
VIRGINIA JOURNAL OF INTERNATIONAL LAW

Volume 52 — Number 3 — Page 483



Article

“Unwilling or Unable”: Toward a Normative Framework for Extraterritorial Self-Defense

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Nonstate actors, including terrorist groups, regularly launch attacks against states, often from within the territory of another state. When a victim state seeks to respond with force to such attacks, it must decide whether to use force on the territory of a state with which it may not be in conflict. International law traditionally requires the victim state to assess whether the territorial state is “unwilling or unable” to suppress the threat itself. Only if the territorial state is unwilling or unable to do so may the victim state lawfully use force. Yet there has been virtually no discussion, either by states or scholars, of what that test requires. The test’s lack of content undercuts its legitimacy and suggests that it is not currently imposing effective limits on the use of force by states at a time when transnational armed violence is pervasive.

This Article provides the first sustained descriptive and normative analysis of the test. Descriptively, it explains how the “unwilling or unable” test arises in international law as part of a state’s inquiry into whether it is necessary to use force in response to an armed attack. It identifies the test’s deep roots in neutrality law while simultaneously illustrating the lack of guidance about what inquiries a victim state must undertake when assessing whether another state is “unwilling or unable” to address a particular threat. Normatively, the Article plumbs two centuries of state practice to propose a core set of substantive and procedural factors that should inform the “unwilling or unable” inquiry. It then applies those factors to a real-world example — Colombia’s use of force in Ecuador in 2008 against the Revolutionary Armed Forces of Colombia — to explore how the use of these factors would affect the involved states’ decision-making and the evaluation by other states of the action’s legality. The Article argues that the use of these factors would improve the quality of state decision-

* Academic Fellow, Columbia Law School. The author thanks Laurie Blank, Erin Delaney, Ariela Dubler, Monica Hakimi, Thomas Heinemann, Rebecca Ingber, Marty Lederman, Henry Monaghan, Trevor Morrison, Anthony O’Rourke, Vijay Padmanabhan, Paul Stephan, Matthew Waxman, and participants in several Columbia Law School workshops for their helpful comments.

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INTRODUCTION

In an August 2007 speech, then-Presidential candidate Barack Obama asserted that his administration would take action against high-value leaders of al-Qaida in Pakistan if the United States had actionable intelligence about them and President Musharraf would not act.¹ He later clarified his position, stating, “What I said was that if we have actionable intelligence against bin Laden or other key al-Qaida officials . . . and Pakistan is unwilling or unable to strike against them, we should.”²

On May 2, 2011, the United States put those words into operation. Without the consent of Pakistan’s government, U.S. forces entered Pakistan to capture or kill Osama bin Laden. In the wake of the successful U.S. military operation, the Government of Pakistan objected to the “unauthorized unilateral action” of the United States.³ U.S. officials, on the other hand, suggested that the United States declined to provide Pakistan with advance knowledge of the raid because it was concerned that doing so might have compromised the mission.⁴ This failure to notify suggests that the United States determined that Pakistan was indeed “unwilling or unable” to suppress the threat posed by bin Laden.⁵ Unfortunately, international law currently gives the United States (or any state in a similar position) little guidance about what factors are relevant when making such

1. Dan Balz, *Obama Says He Would Take Fight to Pakistan*, WASH. POST, Aug. 2, 2007, at A1, available at <http://tinyurl.com/2bxtk8>.

2. Andy Merten, *Presidential Candidates Debate Pakistan*, MSNBC (Feb. 28, 2008, 4:24 PM), <http://tinyurl.com/78paob3>; see also *Obama Vows to ‘Take Out’ Terror Targets in Pakistan*, AFP (Sept. 28, 2008), available at <http://tinyurl.com/6mlznzx> (“If Pakistan is unable or unwilling to act” against al-Qaida leaders, “then we should take them out.”).

3. Jane Perlez & David Rohde, *Pakistan Pushes Back Against U.S. Criticism on Bin Laden*, N.Y. TIMES (May 3, 2011), <http://tinyurl.com/7nzkclj>; *Death of Osama bin Laden — Respect for Pakistan’s Established Policy Parameters on Counter Terrorism*, Press Release, Gov’t of Pakistan, Min. of For. Aff., PR. NO. 152/2011, May 3, 2011, <http://tinyurl.com/3wlpbc>.

4. Alan Cowell, *Pakistan Sees Shared Intelligence Lapse*, N.Y. TIMES (May 4, 2011), <http://tinyurl.com/7f3h3lm>; Siobhan Gorman & Julian Barnes, *Bin Laden Raid in Pakistan Shows New Trust Between CIA, U.S. Special Forces*, WALL ST. J. (May 23, 2011), <http://tinyurl.com/7bgcbkb> (quoting anonymous sources as stating that President Obama decided to “cut Pakistan out of the loop” because the United States mistrusted the Pakistan intelligence forces).

5. Indeed, previous reports suggest that the United States may believe as a general matter that Pakistan is “unwilling or unable” to suppress the threats posed by al-Qaida and other militant groups that attack U.S. forces. See Adam Entous & Sioban Gorman, *U.S. Slams Pakistani Efforts on Militants*, WALL ST. J., Oct. 6, 2010, at A1, available at <http://tinyurl.com/2es9gzq> (citing White House assessment that Pakistan’s government and military were “unwilling to take action against al Qaeda and like-minded terrorists” and describing Pakistan’s under-resourced military); Greg Miller, *Military Drones Aid CIA’s Mission*, WASH. POST, Oct. 3, 2010, at A1, available at <http://tinyurl.com/2863rzy> (noting that the U.S. military’s willingness to lend some of its drones to the CIA “reflects rising frustration within the U.S. military command with Pakistan’s inability or unwillingness to use its own forces to contain Haqqani’s and other insurgent groups”).

a determination. Yet the stakes are high: the U.S.-Pakistan relationship has come under serious strain as a result of the operation. If, in the future, a state in Pakistan's position deems another state's use of force in its territory pursuant to an "unwilling or unable" determination to be unlawful, the territorial state could use force in response. The lack of guidance therefore has the potential to be costly.

President Obama's speech invoked an important but little understood legal standard governing the use of force. More 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.⁶ Yet there has been virtually no discussion, either by states or scholars, of what that standard means. What factors must the United States consider when evaluating Pakistan's willingness or ability to suppress the threats to U.S. (as well as NATO and Afghan) forces? Must the United States ask Pakistan to take measures itself before the United States lawfully may act? How much time must the United States give Pakistan to respond? What if Pakistan proposes to respond to the threat in a way that the United States believes may not be adequate?

Many states agree that the "unwilling or unable" test is the correct standard by which to assess the legality of force in this context. For example, Russia used force in Georgia in 2002 against Chechen rebels who had conducted violent attacks in Russia, based on Russia's conclusion that Georgia was unwilling or unable to suppress the rebels' attacks.⁷ Israel has invoked the "unwilling or unable" standard periodically in justifying its use of force in Lebanon against Hezbollah and the Palestine Liberation Organization, noting, "Members of the [Security] Council need scarcely be reminded that under international law, if a State is unwilling or unable to prevent the use of its territory to attack another State, that latter State is entitled to take all necessary measures in its own defense."⁸ Similarly,

6. See *infra* text accompanying notes 59–69 and Appendix I.

7. See Permanent Rep. of the Russian Federation to the U.N., Letter dated Sept. 11, 2002 from the Permanent Rep. of the Russian Federation to the United Nations addressed to the Secretary-General, Annex, U.N. Doc. S/2002/1012/Annex (Sept. 12, 2002). While the United States has used the "unwilling or unable" test itself, it publicly criticized Russia's bombings in Georgia, presumably because it disagreed with the way in which Russia had applied the test.

8. U.N. SCOR, 36th Sess., 2292d mtg. at 5, U.N. Doc. S/PV.2292 (July 17, 1981); see also 1979 U.N.Y.B. 332 (describing Israel's observation, in the context of attacks launched from Lebanon in 1979, that "[i]f States were unwilling or unable to prevent terrorists from operating out of their countries, they should be prepared for reprisals"); U.N. SCOR, 33d Sess., 2071st mtg. at 7, U.N. Doc. S/PV.2071 (Mar. 17, 1978) ("What Israel did is fully in accordance with the norms of international law and the Charter of the United Nations. International law is quite clear on this subject. . . . [W]here incursion of armed bands is a precursor to an armed attack, or itself constitutes an attack, and the authorities in the territory, from which the armed bands came, are either unable or unwilling to control and restrain them, then armed intervention, having as its sole object the removal or destruction of their bases, would — it is believed — be justifiable under Article 51.") (quoting

Turkey defends its use of force in Iraq against the Kurdish Workers’ Party (PKK) by claiming that Iraq is unable to suppress the PKK.⁹ Several U.S. administrations have stated that the United States will inquire whether another state is unwilling or unable to suppress the threat before using force without consent in that state’s territory.¹⁰

Given that academic discussion of the test has been limited thus far, we may describe what “unwilling or unable” means only at a high level of generality.¹¹ In its most basic form, a state (the “victim state”) suffers an armed attack from a nonstate group operating outside its territory and concludes that it is necessary to use force in self-defense to respond to the continuing threat that the group poses. The question is whether the state in which the group is operating (the “territorial state”) will agree to suppress the threat on the victim state’s behalf. The “unwilling or unable” test requires a victim state to ascertain whether the territorial state is willing and able to address the threat posed by the nonstate group before using force in the territorial state’s territory without consent. If the territorial state is willing and able, the victim state may not use force in the territorial state, and the territorial state is expected to take the appropriate steps against the nonstate group. If the territorial state is unwilling or unable to take those steps, however, it is lawful for the victim state to use

J.E.S. Fawcett, *Intervention in International Law, A Study of Some Recent Cases*, 103 RECUEIL DES COURS 363 (1961)); U.N. SCOR, 61st Sess., 5489th mtg. at 6, U.N. Doc. S/PV.5489 (July 14, 2006) (defending Israel’s use of force in Lebanon on the basis that the Lebanese Government had relinquished control over its country to Hezbollah terrorists rather than exercise its full sovereignty).

9. Minister for Foreign Affairs of Turkey, Letter dated July 2, 1996 from the Minister for Foreign Affairs of Turkey addressed to the Secretary-General and to the President of the Security Council, U.N. Doc. S/1996/479 (July 2, 1996) (invoking Iraq’s duty to prevent the use of its territory for staging terrorist acts against another state and asserting that, in light of this duty, “it becomes inevitable for a country to resort to necessary and appropriate force to protect itself from attacks from a neighboring country, if the neighboring State is unwilling or unable to prevent the use of its territory for such attacks”); see also Minister for Foreign Affairs of Turkey, Letter dated Jan. 3, 1997 from the Minister for Foreign Affairs of Turkey addressed to the Secretary-General and to the President of the Security Council, U.N. Doc. S/1997/7 (Jan. 3, 1997) (referring to Iraq’s “inability to exercise its authority over the northern parts of Turkish borders and territory in the form of terrorist infiltrations”).

10. See Abraham D. Sofaer, *Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 108 (1989) (defending U.S. strikes in Sudan and Afghanistan on the basis that neither the Government of Sudan nor the Taliban were willing to suppress the alleged terrorist activities); John Bellinger, Legal Adviser, U.S. Dep’t of State, Legal Issues in the War on Terrorism, Address at the London School of Economics, (Oct. 31, 2006), available at <http://tinyurl.com/88mmmgm> (reciting “unwilling or unable” standard repeatedly); Harold Koh, Legal Adviser, U.S. Dep’t of State, The Obama Administration and International Law, Remarks Before the Annual Meeting of the American Society of International Law, Mar. 25, 2010, available at <http://tinyurl.com/yj863ke>; Permanent Rep. of the United States to the U.N., Letter dated Aug. 20, 1998 from the Permanent Rep. of the United States to the United Nations addressed to the President of the Security Council, U.N. Doc. S/1998/780 (Aug. 20, 1998).

11. For a general discussion of the scenario in which the “unwilling or unable” test arises, see GREGOR WETTBERG, *THE INTERNATIONAL LEGALITY OF SELF-DEFENSE AGAINST NON-STATE ACTORS* 20–21 (2007).

that level of force that is necessary (and proportional) to suppress the threat that the nonstate group poses.

A test constructed at this level of generality offers insufficient guidance to states. Although many inquiries in the use of force area lack precision, including questions about what constitutes an “armed attack” and when force is proportional, states and commentators have discussed the possible meanings of these terms at length and in great detail.¹² The same is not true for the “unwilling or unable” test; strikingly little attention has been paid to the nature and consequences of—or solutions to—the imprecision surrounding the “unwilling or unable” test.

The test’s lack of content undermines the legitimacy of the test as it currently is framed and suggests that it is not, in its current form, imposing effective constraints on a state’s use of force.¹³ To address this flaw, this Article first identifies the test’s historical parentage in the law of neutrality and then conducts an original analysis of two centuries of state practice in order to develop normative factors that define what it means for a territorial state to be “unwilling or unable” to suppress attacks by a nonstate actor.

Identifying the test’s pedigree demonstrates the legitimacy of the core test and helps to frame the relevant law that should inform the test’s content. As Thomas Franck has noted, “Pedigree . . . pulls toward rule compliance by emphasizing the deep rootedness of the rule.”¹⁴ Embedded in this argument is an assumption that states are reasonable actors, that they develop particular rules for good reasons, and that rules with a long pedigree may be seen as particularly instructive because they draw from the collective wisdom of states over time. While following precedent and tradition does not always result in the ideal normative outcome,¹⁵ this Article will demonstrate why it is useful to consider the historical development and applications of the test in ascertaining what its meaning should be.

It is worth noting that this test is not the only standard around which states could have coalesced. Although it is possible to imagine a range of

12. See, e.g., YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* 169–81 (3d ed. 2001) (discussing the notion of armed attack); Judith Gardam, *Proportionality and Force in International Law*, 87 *AM. J. INT’L L.* 391 (1993) (explaining the concept of proportionality).

13. Thomas Franck has identified several elements that can bolster the legitimacy of an international norm, including the norm’s pedigree and its “determinacy” — that is, the rule’s clarity about where the boundary exists between what is permissible and impermissible. THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 94 (1990). This Article attempts to bolster the legitimacy and efficacy of the “unwilling or unable” test by explaining the test’s pedigree and proposing a way to clarify the norm’s content.

14. *Id.* at 94.

15. See Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 *COLUM. L. REV.* 1482, 1487–88 (2007) (critiquing Edmund Burke’s view that precedent and tradition necessarily embody latent wisdom).

alternative regimes, it is beyond the scope of this Article to explore those other regimes in detail.¹⁶ Instead, this Article takes as a given that states currently view the “unwilling or unable” test as the proper test. The fact that states currently are acclimated to using the “unwilling or unable” test suggests that any other test would have to overcome a high bar to become the preferred test, a hurdle no other option is poised to meet.

In considering the appropriate content of the test, I argue that the “unwilling or unable” test, properly conceived, should advance three goals, derived from Abram Chayes’s articulation of how international law can influence foreign policy decisions.¹⁷ First, the “unwilling or unable” test should constrain victim state action by reducing the number of situations

16. One option would allow State A to respond to an attack by Group B launched from within State C by using force on State C’s territory as it sees fit, as long as the attack by Group B triggers State A’s right to self-defense under the U.N. Charter. This option effectively would impose strict liability on the territorial state for any attacks by nonstate actors launched from its territory and would prioritize in every case one state’s national security interests over another state’s territorial sovereignty. To defend this test, one would have to argue that nothing in Article 51 of the Charter requires a state that has suffered an armed attack to limit its actions in self-defense to particular geographic areas or that a use of force within a state against a nonstate actor, when the victim state evidences no intent to occupy or otherwise affect the territorial state’s borders or political independence, should not be deemed to constitute a use of force against the territorial integrity of that state in violation of Article 2(4). Because it imposes no limits on the right of a state to use force in self-defense, regardless of the geographic source of the armed attack, this option seems doomed to lead to uses of force in situations in which there could be other, equally effective ways to manage the threat. It also seems poised to increase the chances for inadvertent military clashes between victim and territorial states because it requires the victim state to take no steps to consult with the territorial state before acting.

Another option would be to allow State A to use force on State C’s territory only if State C helped Group B attack State A. Supporters of this argument would point out that this is consistent with a post-U.N. Charter preference for avoiding the use of force. This option would reflect the idea that State A does not have a right to self-defense against an attack conducted exclusively by a nonstate actor and would limit significantly the number of circumstances in which State A lawfully could use force in self-defense against an armed attack. However, states in State A’s position seem highly unlikely to suffer those attacks in silence. Because this rule systematically under-protects the national security of the states that are the targets of these armed attacks, states likely would ignore a rule like this and use force in whatever situations they deemed appropriate.

A more reasonable variant of this option would permit State A to act only where State C failed to act with “due diligence” against the nonstate actor, and might also let State A seek damages from State C for the harm State A suffered from the attack (whether or not State C exercised due diligence). This option would place a reasonable burden on State C to try to address the threat posed by Group B, would provide some protection to State A against Group B (though the extent of the protection would depend entirely on the capacity and sophistication of State C’s military and law enforcement), and would compensate State A monetarily for the losses it suffered as a result of Group B’s armed attacks. Even this test has serious flaws, however. First, it would preclude State A from acting to protect itself against armed attacks as long as State C made a good-faith effort to suppress those attacks, even if State C’s capacity was extremely minimal (and totally ineffective). Second, it takes an ex post approach to damages to State A’s citizens and infrastructure and assumes that financial compensation is an acceptable alternative to ex ante action to suppress forthcoming attacks. Third, there likely will be many cases in which State C is not in a position to provide financial compensation that easily might total millions of dollars, leaving State A with neither military nor monetary recourse.

17. ABRAM CHAYES, *THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW* 7 (1974).

in which a victim state resorts to force. Second, the test should be clear and detailed enough to serve to justify or legitimate a victim state's use of force when that force is consistent with the test. Third, the test should establish procedures that will improve the quality of decision-making by the victim and territorial states and by those international bodies that are seized with use of force issues. In considering these goals, I identify the relevance of the "rules versus standards" debate and discuss why, in this context, we should favor a more precise rule over a less determinate standard. A test that promotes the goals I have described within the framework of the UN Charter is likely to be seen as a credible international legal norm. It therefore will legitimize those uses of force that are consistent with the test's requirements and delegitimize (and possibly reduce the frequency of) those that stand in tension with the test.

This Article contains both descriptive and normative discussions. As a descriptive matter, Part I lays out the traditional understandings of international law on self-defense and explains how the "unwilling or unable" test arises as part of the inquiry into whether the use of force in response to an armed attack is "necessary." Part II identifies the "unwilling or unable" test's deep roots in the international law of neutrality and provides an original analysis of how the test became relevant to the use of force against nonstate actors. At the same time, Part II illustrates that there has been almost no discussion of when it is appropriate for one state to deem another state "unwilling or unable."

Having established that the test lacks detailed content, the Article then considers in Part III three ways in which international law can affect foreign policy decisions: as a constraint on action, as a basis for justifying or legitimating action, and as providing organizational structures and procedures. With these goals in mind, Part III examines several centuries of state practice to propose a core set of substantive and procedural factors to assess when it is lawful and legitimate for a victim state to use force against a nonstate actor in another state's territory. From this robust body of state practice, I derive previously unrecognized normative principles that rationalize the practice. These principles include requirements that the victim state: (1) prioritize consent or cooperation with the territorial state over unilateral uses of force, (2) ask the territorial state to address the threat and provide adequate time for the latter to respond, (3) reasonably assess the territorial state's control and capacity in the relevant region, (4) reasonably assess the territorial state's proposed means to suppress the threat, and (5) evaluate its prior interactions with the territorial state.

Having proposed factors to inform the content of the "unwilling or unable" test, Part IV applies those factors to a real-world example—Colombia's use of force in Ecuador in 2008 against the Revolutionary

Armed Forces of Colombia (FARC) — to explore how application of the factors would alter the substance and process of the affected states’ decision-making and the way in which other states evaluate the action’s legality. In that situation, Colombia bombed a FARC camp just inside Ecuador’s border without Ecuador’s consent and killed the FARC’s second-in-command. The diplomatic fallout was immediate and intense, with the Organization of American States (OAS) condemning Colombia and disregarding even standard self-defense arguments that would have supported Colombia’s actions. I conclude that providing greater texture to the “unwilling or unable” test by drawing on the Part III factors will improve the quality of decision-making surrounding the use of force in important substantive and procedural ways.

Appendix I lists thirty-nine cases (spanning nearly two centuries) in which one state used force in another state’s territory where (1) the armed attacks were attributable entirely or primarily to a nonstate armed group or third state, and (2) the territorial state did not consent to the victim state’s presence.

In today’s world, the “unwilling or unable” test is a key piece in the puzzle of how to regulate force on the international plane. Nonstate actors frequently attack states in which they are not located. Under-governed spaces abound, serving as appealing terrain from which these actors may organize and launch armed attacks. States increasingly are turning to a self-defense or armed conflict paradigm to respond to these attacks. Yet the use of force in these situations implicates the integrity of the territorial state’s sovereignty, something international law generally strives to preserve. The “unwilling or unable” test theoretically should serve as an important control on the use of force by a victim state outside of its own territory, but only with greater substantive content will it be able to do so. This Article provides that content.

I. SELF-DEFENSE AND THE “UNWILLING OR UNABLE” TEST

This Part provides a brief overview of the international law governing the use of force by states in self-defense. In so doing, it explains how the “unwilling or unable” inquiry arises as part of the customary international law obligation for a state to consider whether the use of force in response to a particular armed attack is necessary. It concludes by discussing which decision-makers in the international community are responsible for applying the “unwilling or unable” test.

A. The General Right to Use Force in Self-Defense

International law restricts the situations in which a state may use force against another state. Article 2(4) of the UN Charter makes clear that all

states “shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.”¹⁸ There are three situations in which it is lawful for a state to use force in another state’s territory: pursuant to authorization by the Security Council under Chapter VII of the Charter,¹⁹ in self-defense,²⁰ or with the consent of the territorial state (at least in certain circumstances).²¹ The right to use force in self-defense is triggered by an “armed attack,” as recognized by Article 51 of the Charter.²² Most states and scholars recognize that an imminent threat of an armed attack would also trigger a state’s right to self-defense, though there is debate about what constitutes an “imminent” threat.²³

Scholars have disputed whether states alone can commit the kinds of attacks that constitute the “armed attacks” envisioned by Article 51, or whether it also is possible for nonstate actors to commit armed attacks. One group of scholars takes the view that the drafters of the Charter meant “armed attacks” to include only attacks by states, perhaps because the Charter itself was crafted in a highly state-centric world or because the drafters could not envision an attack by a nonstate group that was significant enough that a state might feel the need to respond with force.²⁴ Others believe that nonstate actors may commit armed attacks, but only in cases in which those attacks are attributable to a state.²⁵ A third group

18. U.N. Charter art. 2, para. 4.

19. *Id.* art. 42.

20. *Id.* art. 51.

21. ANTONIO CASSESE, *INTERNATIONAL LAW* 313–16 (2001) (noting that international use of force without Security Council mandate may be justified with the genuine consent of the territorial state).

22. U.N. Charter art. 51.

23. *See, e.g.*, Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT’L L. 1, 4 (1972) (“It was never the intention of the Charter to prohibit anticipatory self-defense and the traditional right certainly existed in relation to an ‘imminent’ attack.”); Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1634 (1984) (noting that Article 51 should not be read to foreclose legitimate self-defense in advance of an actual attack). *But see* IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 278 (1963) (stating that Article 51 prohibits anticipatory self-defense); HANS KELSEN, *THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS* 797–98 (1951) (arguing that Article 51’s recognition that states may use force in self-defense applies only when a state has suffered an actual armed attack). Thomas Franck explains that “[i]n San Francisco, the founders deliberately closed the door to any claim of ‘anticipatory self-defense,’ but that posture was soon challenged by the exigencies of a new age of nuclear warheads and long-range rocketry.” Thomas M. Franck, *When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization?*, 5 WASH. U. J. L. & POL’Y 51, 59 (2001).

24. *See, e.g.*, Antonio Cassese, *The International Community’s ‘Legal’ Response to Terrorism*, 38 INT’L & COMP. L.Q. 589, 597 (1989); Eric Myjer & Nigel White, *The Twin Towers Attack: An Unlimited Right to Self-Defense*, 7 J. CONFLICT & SECURITY L. 5, 7 (2002) (“The categorization of the terrorist attacks on New York and Washington as an ‘armed attack’ within the meaning of article 51 is problematic to say the least Self-defence, traditionally speaking, applies to an armed response to an attack by a state.”).

25. *See, e.g.*, Legal Consequences of the Construction of a Wall in the Occupied Palestinian

accepts that an attack by a nonstate actor may constitute an “armed attack,” regardless of whether a state was involved in any aspect of the attack.²⁶ Given the purpose animating the text of Article 51, which is to allow states to respond to attacks that seriously endanger their security, the lack of textual support in Article 51 for drawing a distinction between an armed attack by a state and an armed attack by a nonstate actor, and the extensive state practice described in Part III, the better view (and a premise of this Article) is that a nonstate actor may instigate an armed attack, regardless of whether a state provided support or assistance to that nonstate actor.²⁷

Much has been written on precisely what level of force constitutes an “armed attack.” To sidestep this thorny debate, as well as the debate about how imminent an attack must be to trigger a state’s right of self-defense, I assume for purposes of this Article that a nonstate actor against whom a state is contemplating the use of force already has committed an armed attack of a magnitude that all agree would trigger a right of self-defense if committed by a state, and is poised to engage in additional attacks.²⁸ I use

Territory, Advisory Opinion, 2004 I.C.J. 136, 194 (July 9) (declining to find that Israel could be acting in self-defense because Israel had not claimed that the terrorist attacks were imputable to a state); *see also* REP. OF THE COMM. ON FOREIGN RELATIONS ON THE N. ATL. TREATY, S. EXEC. REP. NO. 81-8, at 13 (1st Sess. 1949) (“[I]f a revolution were aided and abetted by an outside power, such assistance might possibly be considered an armed attack.”); Allen S. Weiner, *The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?*, 59 STAN. L. REV. 415, 435–36 (2006) (noting that the international community has been critical of uses of force against nonstate terrorists in another state’s territory when state is not supporting them). *But see* Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116 (Dec. 19) (suggesting that the Court has not yet decided the issue in noting that “the Court has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defense against large-scale attacks by irregular forces”).

26. *See, e.g.*, S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001) (recognizing the right to individual or collective self-defense in the wake of attacks by nonstate actors); JUTTA BRUNNEE & STEPHEN TOOPE, LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW 296 (2010) (“[I]nternational practice seems to have evolved both to allow self-defence against armed attacks by non-state forces, and to loosen the required link between such forces and a state in which armed defensive measures are taken.”); DINSTEIN, *supra* note 12, at 214; WETTBERG, *supra* note 11, at 19 (“[S]tate practice strongly indicates that states may respond to any armed attack, irrespective of the aggressor’s nature as a non-state actor.”); Thomas M. Franck, *Terrorism and the Right of Self-Defense*, 95 AM. J. INT’L L. 839, 840 (2001); Christopher Greenwood, *International Law and the Preemptive Use of Force: Afghanistan, al-Qaida, and Iraq*, 4 SAN DIEGO INT’L L. J. 7, 17 (2003); Raphaël Van Steenberghe, *Self-Defence in Response to Attacks by Non-State Actors in the Light of Recent State Practice: A Step Forward?*, 23 LEIDEN J. INT’L L. 183, 184 (2010) (concluding that recent state practice suggests that attacks committed by nonstate actors alone constitute armed attacks under Article 51).

27. *See* Sean Murphy, *Terrorism and the Concept of “Armed Attack” in Article 51 of the UN Charter*, 43 HARV. INT’L L. J. 41, 50 (2002) (“There is nothing in Article 51 of the U.N. Charter that requires the exercise of self-defense to turn on whether an armed attack was committed directly by another state. Indeed, the language used in Article 2(4) (which speaks of a use of force *by* one ‘Member’ *against* ‘any state’) is not repeated in Article 51. Rather, Article 51 is silent on who or what might commit an armed attack justifying self-defense.”).

28. Schachter, *supra* note 23, at 1638 (noting that when a government treats an isolated incident of armed attack as ground for retaliation with force, action can only be justified as self-defense when the state has good reason to expect a series of attacks from the same source).

the phrase “nonstate actor” to include any nonstate entity that has the capacity to undertake armed attacks against the state: terrorist groups, rebel groups, other organized armed groups, and even individuals.

B. Limits on the Use of Force in Self-Defense

Once a state determines that it has a right of self-defense, it then must assess what specific types of actions it can take in response, including whether it can use force. The standard inquiry here has three elements: whether the use of force would be *necessary*, whether the level of force contemplated would be *proportional* to the attack (or imminent threat thereof), and whether the response will be taken at a point sufficiently close to the moment of attack (i.e., *immediate*).²⁹ As discussed below, the necessity inquiry most directly implicates the “unwilling or unable” test, but the proportionality of a state’s response is critical both to its legality and to its perceived legitimacy.

In a state-to-state context, the victim state must face an imminent threat of attack or an expected repetition of the type of attack it just suffered in order to conclude that it is necessary to use force. The usual inquiry requires a state first to assess whether there are means short of force — such as undertaking diplomatic discussions, imposing sanctions, or severing commercial ties — that would resolve the interstate dispute.³⁰ When a state determines that it can counter an armed attack only by resorting to force, the necessity requirement is satisfied.³¹ The proportionality requirement “simply requires that the response in self-defense be no more than necessary to defeat the armed attack and remove the threat of reasonably foreseeable attacks in the future.”³²

Evaluating whether it is necessary to use force against a nonstate actor requires a somewhat different approach. In the interstate context, a victim state considering whether force is necessary generally will be contemplating the use of force on the territory of the state that originally

29. See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 194 (June 27) (“The Parties also agree in holding that whether the response to the attack is lawful depends on observance of the criteria of the necessity and the proportionality of the measures taken in self-defence.”); DINSTEIN, *supra* note 12, at 207–12; CHRISTINE D. GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 148 (3d ed. 2008) (“As part of the basic core of self-defense all states agree that self-defence must be necessary and proportionate.”).

30. See GRAY, *supra* note 29, at 150 (“Necessity is commonly interpreted as the requirement that no alternative response be possible.”); Oscar Schachter, *The Extraterritorial Use of Force Against Terrorist Bases*, 11 HOUS. J. INT’L L. 309, 314 (1989) (“An economic boycott or severance of air and sea links has had the desired effect in some cases.”).

31. See TARCISIO GAZZINI, *THE CHANGING RULES ON THE USE OF FORCE IN INTERNATIONAL LAW* 146 (2005).

32. See Michael Schmitt, *Counter-Terrorism and the Use of Force in International Law*, in *INTERNATIONAL LAW AND THE WAR ON TERROR* 7, 28 (Borch & Wilson eds., 2003) (noting that “it is sometimes wrongly suggested that the size, nature and consequences of the response must be proportional to the size, nature and consequences of the armed attack”).

attacked it. In contrast, an attack by a nonstate actor almost always is launched from the territory of a state with which the victim state is not in conflict. Thus, the victim state will be contemplating the use of force on another state's (non-enemy) territory.

The necessity inquiry thus has two prongs in the nonstate actor context: A victim state must consider not just whether the attack was of a type that would require it to use force in response to that nonstate actor, but it also must evaluate the conditions in the state from which the nonstate actor launched the attacks. This latter evaluation is where, absent consent, states currently employ the “unwilling or unable” test to assess whether the territorial state is prepared to suppress the threat. If the territorial state is neither willing nor able, the victim state may appropriately consider its own use of force in the territorial state to be necessary and, if the force is proportional and timely, lawful. If the territorial state is both willing and able, it will not be necessary for the victim state to use force, and the victim state's force would be unlawful.

C. *Who Decides?*

In any discussion about use of force rules, there inevitably is a question about which entity decides whether the rules have been applied properly. This situation is no different: Who should decide whether the territorial state is “unwilling or unable” to suppress the threat?

According to Article 51, a state exercising its right of self-defense against an armed attack may do so until the Security Council intervenes.³³ “Although the text indicates that U.N. authority can supersede State prerogatives regarding a State's exercise of self-defense, in practice, the Security Council has recognized the right of States to defend themselves individually and through coalitions even once the Council has acted.”³⁴ The Charter thus envisions a period of time in which a state may act in self-defense without Security Council approval.

The following discussion assumes that the victim state urgently needs to respond to an armed attack in the period before the Security Council has had time to address the situation.³⁵ In these cases, the victim state itself must decide whether the territorial state is unwilling or unable to address the threat posed by the nonstate perpetrator. There may well be other cases, however, in which the victim state believes that it needs to use force in self-defense but does not believe that it needs to act “with no moment

33. U.N. Charter art. 51.

34. See David Sadoff, *A Question of Determinacy: The Legal Status of Anticipatory Self-Defense*, 40 GEO. J. INT'L L. 523, 549–50 (2009).

35. See W. Michael Reisman, *Assessing Claims to Revise the Laws of War*, 97 AM. J. INT'L L. 82, 88 (2003) (“By their nature, all acts of self-defense are initiated unilaterally and evaluated for their lawfulness only after the fact.”).

for deliberation.”³⁶ The Security Council has been able to act with great speed when there is consensus on an issue, as there was on Resolution 660, condemning Iraq’s invasion of Kuwait, which the Council adopted on the same day as the invasion.³⁷ Thus, while the victim state often will be the arbiter of the “unwilling or unable” inquiry, in some cases the Security Council itself may have to make that assessment.

Even if the ultimate decision whether to use force usually resides, as a practical matter, with the victim state, several factors discussed in Part III give the territorial state the ability to shape the decision-making process. Many of the factors place the burden on the victim state to determine certain information, particularly information about the territorial state. The territorial state therefore has some measure of control over the victim state’s decision whether to use force, either because it decides to act to suppress the threat or because it produces timely information to address the victim state’s concerns.³⁸ Further, the Security Council may judge after the fact whether the victim state’s use of force was lawful, thus providing an ex post analysis that informs the decisions of future victim states. In sum, although the victim state usually will be the entity forced to decide whether to use force in a particular case, the territorial state and the Security Council (and other international bodies) also may play direct and indirect roles in influencing that decision.

II. HISTORICAL AND CONTEMPORARY USES OF THE TEST

This Part excavates the historical lineage of the “unwilling or unable” test, a story that has not previously been told in the academic literature. It identifies the law of neutrality, which developed in situations of international armed conflict between states, as the original source of the test. It then examines how states began to apply the test to situations

36. See, e.g., Jonathan I. Charney, *The Use of Force Against Terrorism and International Law*, 95 AM. J. INT’L L. 835, 836 (2001) (arguing that “in the weeks that followed the September 11 attacks, the United States had more than sufficient time to seek the Security Council’s approval for an appropriate military response, as it has done with regard to actions other than the use of force”).

37. See S.C. Res. 660, U.N. Doc. S/RES/660 (Aug. 2, 1990).

38. The International Court of Justice has recognized that it may be appropriate to shift the burden to show certain facts onto the state with the greatest access to those facts. In the Corfu Channel case, the Court stated:

[I]t cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein On the other hand, the fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence.

Corfu Channel (U.K. v. Albania), 1949 ICJ 4 (Apr. 9). A territorial state that wants the victim state to draw the correct inferences should be prepared to offer relevant information to the victim state.

involving attacks by nonstate actors, and explores the status of the test in contemporary practice. It concludes by highlighting the test’s indeterminacy throughout its history. Part III takes up what the appropriate understanding of the test should be.

A. *The Law of Neutrality*

Neutrality law offers a useful starting point from which to understand a rule that allows one state to use force on another state’s territory against a third entity in certain circumstances. Although neutrality law does not directly govern uses of force between states and nonstate actors, this section will show that the equities and concerns of the neutral state and an offended belligerent state in the neutrality law context are analogous to those of the territorial state and the state seeking to use force in self-defense against a nonstate actor in that territory. The fact that the “unwilling or unable” test finds its roots in neutrality law anchors the test’s legitimacy — even in the test’s current skeletal form — and, in so doing, may enhance what Franck terms its “compliance pull.”³⁹ Although the law of neutrality offers a clear pedigree in international law for the “unwilling or unable” test, however, it tells us little about what standards should or do attach to that test.

1. *Core Rules of Neutrality*

Neutrality law, as articulated in several 1907 Hague Conventions and in customary law, seeks to guarantee that states not participating in an armed conflict sustain minimal injuries as a result of the conflict.⁴⁰ It also establishes rules to guarantee to belligerent states that neutral states will not permit their territory to be used by another belligerent as a safe harbor or a place from which to launch attacks.⁴¹

39. See FRANCK, *supra* note 13, at 94 (“Pedigree . . . pulls toward rule compliance by emphasizing the deep rootedness of the rule . . . This compliance pull, emphasizing the venerable historic and social origins and continuity of rule standards . . . links rights and duties reciprocally in a notion of venerable, authenticated status deserving special deference.”). This argument assumes (with good reason) that states are reasonable actors, that they develop particular rules for rational reasons, and that states should give deference to these rules unless and until it is clear that those reasons are no longer relevant to the contemporary circumstances in which the rules are used. Rules with a long pedigree may be seen to draw from the collective wisdom of states over time.

40. Some claim that neutrality law is dead in the post-Charter era. See, e.g., Dietrich Schindler, *Neutrality and Morality: Developments in Switzerland and in the International Community*, 14 AM. U. INT’L L. REV. 155, 162 (1998) (“The end of the Cold War ended the privileged position of neutrals . . . It was impossible to remain neutral between the international community as a whole and a single aggressor state.”) (citation omitted). The better view is that neutrality law remains relevant and applicable, at least to international armed conflicts. See STEPHEN NEFF, *THE RIGHTS AND DUTIES OF NEUTRALS: A GENERAL HISTORY* 218 (2000) (concluding that the “UN Charter failed to kill neutrality”). Even if neutrality law were defunct, however, the existence of the “unwilling or unable” test in that law provides historical depth to today’s rule.

41. See DINSTEIN, *supra* note 12, at 24.

Several 1907 treaties impose specific rights and obligations on both neutral states and belligerent states.⁴² First and foremost, neutral territory is deemed to be inviolable.⁴³ As such, belligerent states may not move troops, convoys of munitions, or other war supplies across neutral territory, and may not recruit combatants there.⁴⁴ Neutral states have the right to demand that belligerents respect their territory by not using it for prohibited purposes. At the same time, neutrals must not permit belligerents to violate their territory and, if necessary, must take steps to quash such violations.⁴⁵ Neutrality law thus helps cabin the breadth of armed conflicts while allowing belligerents to conduct operations fundamental to their prosecution of the war.

What, exactly, is a neutral expected to do if a belligerent violates its territory? A neutral state is expected to use “due diligence” in its efforts to prevent violations of its neutrality.⁴⁶ States understand that this obligation might require a neutral state to use force against the offending belligerent if necessary to uphold its neutral duties.⁴⁷ Neutrals are expected to foreclose belligerent violations of their territory, not achieve a particular objective. If a neutral uses the means at its disposal, it cannot be accused of violating its international legal obligations or incur state responsibility if it fails to repel the belligerent.⁴⁸ That does not mean that the offended belligerent is left without recourse, however, as the following section makes clear.

42. See Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, 36 Stat. 2310 [hereinafter Hague V]; Convention (XI) Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War, Oct. 18, 1907, 36 Stat. 2396; Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, 36 Stat. 2415; see also Hague Rules of Air Warfare, 1923 arts. 42, 46 reprinted in THE LAWS OF ARMED CONFLICTS 29 (Dietrich Schindler & Jiri Toman eds., 1988) [hereinafter 1923 Hague Rules], which were never legally adopted but which states regarded at the time as an authoritative attempt to capture the rules of air warfare. Article 42 of the 1923 Hague Rules provides, “A neutral government must use the means at its disposal to prevent the entry within its jurisdiction of belligerent military aircraft and to compel them to alight if they have entered such jurisdiction.” Article 46 provides, “A neutral government is bound to use the means at its disposal . . . to prevent the departure from its jurisdiction of an aircraft in a condition to make a hostile attack against a belligerent Power.”

43. Hague V, art. 1.

44. *Id.* arts. 2, 4.

45. NICOLAS POLITIS, NEUTRALITY AND PEACE 21–22 (1935).

46. See NEFF, *supra* note 40, at 105.

47. See Hague V, art. 10 (“The fact of a neutral Power resisting, even by force, attempts to violate its neutrality cannot be regarded as a hostile act.”); 1923 Hague Rules, art. 48 (“The action of a neutral Power in using force or other means at its disposal in the exercise of its rights or duties under these rules cannot be regarded as a hostile act.”). This is a further effort to avoid having neutrals be pulled into the conflict.

48. DINSTEIN, *supra* note 12, at 179.

2. *The Unwritten “Unwilling or Unable” Test*

It is easy to envision that a neutral state either might ignore its duties or face significant practical difficulties in blocking a committed belligerent from using its neutral territory for various war-related purposes. Nor is it hard to see why that would be an unsatisfactory state of affairs for that belligerent’s opponent. Although not provided for in a treaty, commentators and, later, state military manuals recognized that belligerents would not tolerate being (and should not be) left without remedy if a neutral power did not fulfill its neutral duties effectively.⁴⁹ These sources make clear that neutrality law permits a belligerent to use force on a neutral state’s territory if the neutral state is unable or unwilling to prevent violations of its neutrality by another belligerent.⁵⁰

The “unwilling or unable” test thus serves as a guide for belligerents as to when they may enforce neutrality law in the face of violations by their enemies or by neutral states. As Emer de Vattel remarked in 1758:

[I]f my neighbor offers a retreat to my enemies, when they have been defeated and are too weak to escape me, and allows them time to recover and to watch for an opportunity of making a fresh attack upon my territory, such conduct, so injurious to my safety and to my welfare, would be inconsistent with neutrality. When, therefore, my enemies, after suffering defeat, retreat into his territory, . . . he should . . . not allow them to lie in wait to make a fresh attack on me; otherwise he warrants me in pursuing them into his territory. This is what happens when Nations are not in a position to make their territory respected.⁵¹

Later commentators made clear that either a state’s unwillingness to take steps against a belligerent or its lack of capacity to do so were sufficient grounds for an offended belligerent to act.⁵² Some have gone so

49. See *infra* notes 59–69.

50. See ERIK CASTREN, *THE PRESENT LAW OF WAR AND NEUTRALITY* 441 (1954) (noting that where a neutral state has neither the desire nor the power to interfere with one belligerent’s violation, other belligerents may resort to self-help); MORRIS GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 538 (1959) (stating that where a violation of neutral territory occurs “through the complaisance of the neutral state, or because of its inability, through weakness or otherwise, to resist such a violation,” the belligerent may attack enemy forces on neutral territory); WILLIAM E. HALL, *A TREATISE ON INTERNATIONAL LAW* 284–85 (4th ed. 1895) (“The right of self-preservation in some cases justifies the commission of acts of violence against a . . . neutral state, when from its position and resources it is capable of being made use of to dangerous effect by an enemy, when there is a known intention on his part so to make use of it and when, if he is not forestalled, it is almost certain that he will succeed, either through the helplessness of the country or by means of intrigues with a party within it.”).

51. EMER DE VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW* 277 (Charles G. Fenwick trans., 1916).

52. See CHARLES CHENEY HYDE, *INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* 2337–38 (2d ed. 1947) (“If a neutral possesses neither the power

far as to assert that this rule constitutes customary international law, and thus binds all states, even if they are not party to the various neutrality treaties.⁵³ Whether or not the rule is customary law, state practice affirms that it is a well-entrenched norm. For instance, official manuals of the U.S., U.K., and Canadian militaries refer to the “unwilling or unable” test in the law of neutrality.⁵⁴

Although these manuals do not further caveat the offended belligerent’s right to act, commentators suggest that the offended belligerent’s right is not unlimited. Some scholars argue that the offended belligerent may act only when the other belligerent’s acts cause “material prejudice” to the offended belligerent.⁵⁵ One commentator asserted that the belligerent could respond “only when a demand for adequate redress has proven unavailing,” but was not willing to view this as a rigid requirement.⁵⁶

The San Remo Manual on International Law Applicable to Armed Conflict at Sea, which law of war experts developed in 1995, places the

nor disposition to check warlike activities within its own domain, the belligerent that in consequence is injured or threatened with immediate injury would appear to be free from the normal obligation to refrain from the commission of hostile acts therein.”); LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE 679 (H. Lauterpacht ed., 7th ed. 1952) (“If . . . neutrals acquiesce in or are unable to prevent the violation of this rule by one belligerent to the vital disadvantage of the other belligerent, the latter cannot be expected to suffer this without redress, and must be excused if, in retaliating upon the enemy, he also violates the rule.”); J.M. SPAIGHT, WAR RIGHTS ON LAND 482 (1911) (“[W]here the neutral cannot or will not enforce its rights, then the belligerent is fully entitled to prevent the violation permitted by the neutral redounding to his disadvantage.”); Dietrich Schindler, *Transformations in the Law of Neutrality Since 1945*, in HUMANITARIAN LAW OF ARMED CONFLICT 382 (Astrid J.M. Delissen & Gerard J. Tanja eds., 1991) (describing the “old rule of the law of neutrality” as “[i]f the neutral nation is unable or unwilling to enforce effectively its right of inviolability an aggrieved belligerent may resort to acts of hostility in neutral territory against enemy forces . . . making unlawful use of that territory”).

53. John Norton Moore, *Legal Dimensions of the Decision to Intervene in Cambodia*, 65 AM. J. INT’L L. 38, 51 (1971) (“It is well established in customary international law that a belligerent Power may take action to end serious violations of neutral territory by an opposing belligerent when the neutral Power is unable to prevent belligerent use of its territory . . .”).

54. United States, Department of Army, *Law of Land Warfare*, Field Manual No. 27-10, ¶ 520 (Jul. 18, 1956) (“Should the neutral State be unable, or fail for any reason, to prevent violations of its neutrality by the troops of one belligerent entering or passing through its territory, the other belligerent may be justified in attacking the enemy forces on this territory.”); Office of the Judge Advocate General (Canada), *Law of Armed Conflict at the Operational and Tactical Levels*, Joint Doctrine Manual, ¶ 1304(3) (13 Aug. 2001) (“If enemy forces enter such neutral territory and the neutral state is unwilling or unable to intern or expel them, the opposing party is entitled to attack them there or demand compensation from the neutral for this breach of neutrality.”); U.K. MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT 01/04, ¶ 13.9E (2004). For other examples of state practice, see *infra* Part III.

55. BROWNLIE, *supra* note 23, at 314; GREENSPAN, *supra* note 50, at 538 (requiring the belligerent to be “prejudiced” by the violation).

56. ROBERT W. TUCKER, THE LAW OF WAR AND NEUTRALITY AT SEA 256, 261–62 (1955); *see also* Sean Murphy, *Protean Jus Ad Bellum*, 27 BERKELEY J. INT’L L. 22, 47 (2009) (proposing that states may use or threaten to use armed force against a nonstate actor located in another state that has conducted (or imminently will conduct) an armed attack, but only if the other state has been provided a reasonable opportunity to address the matter directly, and has either refused to do so or is incapable of doing so).

largest number of caveats on the basic rule. That Manual asserts that when a neutral state fails to terminate the violation of its waters by a belligerent, the opposing belligerent must notify the neutral state and give that neutral state a reasonable time to terminate the belligerent’s violation.⁵⁷ If that violation constitutes a serious and immediate threat to the security of the opposing belligerent and the violation is not terminated, the opposing belligerent may, absent any feasible and timely alternative, use such force as is strictly necessary to respond to the threat posed by the violation.⁵⁸

In its most basic form, then, the “unwilling or unable” test is well-established in the context of a belligerent’s right to act on a neutral’s territory, although its parameters are not well-articulated.

B. Extending the Test to Nonstate Actors

Soon after the “unwilling or unable” test took root in the context of international armed conflict, it migrated into the rules governing a state’s use of force extraterritorially against nonstate actors.⁵⁹ At least some aspects of these laws applied not only when those states were at war, but also when they were at peace.⁶⁰ To preserve their status as neutrals during conflict, several states enacted domestic “neutrality” laws prohibiting their citizens from “committing such acts as amount to making the national territory a base for military or naval operations against a friendly state.”⁶¹ It

57. San Remo Manual on International Law Applicable to Armed Conflict at Sea ¶ 22 (Louise Doswald-Beck ed., 1995) [hereinafter San Remo Manual].

58. *Id.* Although the San Remo Manual does not formally reflect state practice because it was drafted by independent experts, the U.K. adopted this version of the rule in its Manual in 2004. *See* THE MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 54, at ¶ 13.9E.

59. Therefore, some of these examples are drawn from the pre-UN Charter era. Nevertheless, they remain salient because most scholars accept that the term “inherent right of individual or collective self-defense” in Article 51 reflects the Charter’s intention to preserve that customary international law related to the use of force that existed at the time of the Charter’s drafting. *See, e.g.,* THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 3 (2002) (arguing that the Charter allows states, subject to certain conditions, to “invoke an older legal principle: the sovereign right of self-defense”); HILAIRE MCCOUBREY & NIGEL WHITE, INTERNATIONAL LAW AND ARMED CONFLICT 89 (1992).

60. Hersch Lauterpacht, *Revolutionary Activities by Private Persons Against Foreign States*, 22 AM. J. INT’L L. 105, 113 (1928) (describing the U.K. Act of 1819 as criminalizing the fitting out or preparing of a military expedition against the dominion of any friendly state, whether during wartime or peacetime, and noting that the U.S. Neutrality Act’s title does not necessarily imply the existence of a state of belligerency).

61. *Id.* at 113–15; *see also id.* at 127 (“The nearest approach to what is believed to be the true juridical construction of the state’s duty to prevent organized hostile expeditions from proceeding in times of peace against a friendly state will be found in the law of neutrality.”); Roy E. Curtis, *The Law of Hostile Military Expeditions as Applied by the United States*, 8 AM. J. INT’L L. 1, 1 (1914) (“By the time of the establishment of the American Government the practice of the nations with regard to their mutual obligations had begun to resolve itself into fairly well-defined principles. Among these was one to the effect that one state must prevent the use of its territory and resources for hostile attacks upon its neighbors with which it is at peace. In the beginning this rule was evolved from the relations of neutrality . . .”).

is precisely that activity — an armed attack by a nonstate actor against a state not in conflict with the actor’s host state — that is at issue here. These domestic laws thus explain how neutrality rules developed to govern acts by states during international armed conflict expanded beyond that context to govern acts by nonstate actors during peacetime (and in non-international armed conflicts).

A famous example supports this explanation. The 1837 case of the *Caroline*,⁶² known best for providing the basic rules for using force in anticipatory self-defense, is itself an “unwilling or unable” case. Canadian rebels were using U.S. territory as a staging ground from which to attack British forces in Canada.⁶³ The rebels used a steamer called the *Caroline* to transport themselves from the U.S. side of the Niagara River to the Canadian side.⁶⁴ British troops set fire to and destroyed the *Caroline*, prompting a strong objection from the United States and a series of diplomatic exchanges setting forth each state’s position.⁶⁵ As Abraham Sofaer notes,

Both [the United States and the United Kingdom], in short, agreed on the existence of a right to pre-empt attacks, when necessary in the circumstances. The principal difference between them was the claim by the British that the [United States] was either unable or unwilling to stop the rebels within its territory from attacking Canada. The [United States], on the other hand, insisted that it was adequately fulfilling its obligation to prevent the rebels from attacking Canada from [U.S.] territory.⁶⁶

In the U.S. view, an important reason why the United Kingdom should have considered the United States willing and able was that the United States had in place and was attempting to enforce a neutrality law outlawing the rebels’ acts.⁶⁷ The U.S. description of that law is instructive:

The rule is founded in the impropriety and danger, of allowing individuals to make war on their own authority, or, by mingling themselves in the belligerent operations of other Nations, to run the hazard of counteracting the policy, or embroiling the relations, of their own Government. And the United States have been the first . . . to enforce the observance of this just rule of neutrality and peace, by special and adequate legal enactments. In the infancy of

62. For a description of the *Caroline* incident, see Matthew Allen Fitzgerald, Note, *Seizing Weapons of Mass Destruction from Foreign-Flagged Ships on the High Seas under Article 51 of the UN Charter*, 49 V.A. J. INT’L L. 473, 477–79 (2009).

63. See Abraham D. Sofaer, *On the Necessity of Pre-emption*, 14 EUR. J. INT’L L. 209, 214–17 (2003).

64. *Id.* at 215.

65. *Id.*

66. *Id.* at 216–17.

67. *Id.* at 218–19.

this Government, on the breaking out of the European wars . . . Congress passed laws with severe penalties, for preventing the citizens of the United States from taking part in those hostilities. By these laws, it prescribed to the citizens of the United States . . . their duty, as neutrals, by the law of Nations . . .⁶⁸

That the test migrated into the world of nonstate actors is not surprising, because the equities of the affected states are similar in each scenario.⁶⁹ Neutral states and territorial states from which nonstate actors are operating both wish to preserve their territorial integrity, to avoid to the maximum extent possible either the conduct of armed conflict or other uses of force on their territory, and to be seen as fulfilling their international legal obligations. Likewise, offended belligerent states and victim states that suffered attacks by a nonstate actor both have an interest in securing an end to harmful attacks, avoiding armed clashes with the neutral state, and avoiding having to undertake military activity that another state could (and has a duty to) perform instead.

C. *The Test's Substantive Indeterminacy*

The “unwilling or unable” test finds itself in a peculiar situation in state practice and in academic commentary. On the one hand, there is little question that the test exists as an internationally-recognized norm governing of the use of force, given how regularly states and commentators invoke it. Indeed, it is possible that the test has become customary international law; states frequently cite the test in ways that suggest that they believe it is a binding rule.⁷⁰ On the other hand, scholars,

68. Letters between U.S. Secretary of State Daniel Webster and U.K. Foreign Secretary Lord Ashburton, encl. 1 (July 27, 1842), *available at* http://avalon.law.yale.edu/19th_century/br-1842d.asp.

69. This is true despite the fact that the sources of the duties of the neutral state and the territorial state are different. A neutral's duty to prevent belligerents from undertaking hostile acts on its territory stems either from its status as a party to a neutrality treaty or from the customary law of neutrality. A territorial state's duty (in peacetime) to prevent nonstate actors on its territory from undertaking attacks against other states stems from an international rule subsequently memorialized in the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations. *See* G.A. Res. 2625 (XXV), at 123, U.N. Doc. A/85 (Oct. 24, 1970) (“Every State has the duty to refrain from organizing . . . terrorist acts in another State or acquiescing in organized activity within its territory directed toward the commission of such acts, when the acts . . . involve a threat or use of force.”); *see also* Tom Ruys & Sten Verhoeven, *Attacks by Private Actors and the Right of Self-Defence*, 10 J. CONFLICT & SECURITY L. 289, 306 (2005) (“[S]tates have a duty to protect other states from attacks conducted by private individuals from their territory by combating the hostile use of force of private individuals against foreign states.”).

70. *See supra* notes 7–10 and accompanying text; *see also* Appendix I, *infra*. I have found no cases 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), nor have I located cases in which states have rejected the test. Even if one concludes that the rule does not rise to the level of custom, however, the rule makes frequent appearances in state practice and therefore is the appropriate starting point from which to determine how the norm should develop.

like states, generally recite the test without discussing its meaning. As far back as 1958, Ian Brownlie wrote, “Military action across a frontier to suppress armed bands, which the territorial sovereign is unable or unwilling to suppress, has been explained in terms of legitimate self-defense on a limited number of occasions in the present century.”⁷¹ More recently, Carsten Stahn stated, “If it becomes evident that the host state is unable or unwilling to act, the injured may, as an *ultima ratio* measure, take military action to stop the persisting threat.”⁷² And in the context of his recent report on extrajudicial killings, Philip Alston noted:

A targeted killing conducted by one State in the territory of a second State does not violate the second State’s sovereignty if either (a) the second State consents, or (b) the first, targeting State has a right under international law to use force in self-defence under Article 51 of the UN Charter, because . . . the second State is unwilling or unable to stop armed attacks against the first State launched from its territory.⁷³

Perhaps there has been little discussion of what the “unwilling or unable” test entails because, at first blush, the inquiry seems straightforward. In some cases, it will be. In the best-case scenario, the territorial state is willing and able to suppress the threat. In that case, the victim state achieves its goal without expending resources, and the territorial state preserves its sovereignty. In contrast, a state that provides

71. See Ian Brownlie, *International Law and the Activities of Armed Bands*, 7 INT’L & COMP. L.Q. 712, 732 (1958).

72. See Carsten Stahn, *Terrorist Acts as “Armed Attack”: The Right to Self-Defense, Article 51 (1/2) of the UN Charter, and International Terrorism*, 27 FLETCHER F. WORLD AFF. 35, 47 (2003); see also DINSTEIN, *supra* note 12, at 217 (“Extra-territorial law enforcement is a form of self-defence, and it can be undertaken by Utopia against armed bands or terrorists inside Arcadian territory, in response to an armed attack unleashed by them from that territory. Utopia is entitled to enforce international law extra-territorially only when Arcadia is unable or unwilling to prevent repetition of that armed attack.”); NOAM LUBELL, *EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS* 42 (2010) (reciting the “unwilling or unable” test as the correct test for determining when a victim state may take measures against nonstate actors in the territorial state); Alberto Coll, *The Legal and Moral Adequacy of Military Responses to Terrorism*, 81 AM. SOC’Y INT’L L. PROC. 297, 305 (1987) (“[O]nce it becomes reasonably evident that the harboring state is unable or unwilling to act, the injured state should be free to use the minimum of force required to stop the terrorist threat.”); Greg Travalio & John Altenburg, *Terrorism, State Responsibility, and the Use of Military Force*, 4 CHI. J. INT’L L. 97, 116 (2003) (“[S]hould a state be unwilling or unable to prevent its territory from being used as a sanctuary or base of operations by a transnational terrorist organization, a state threatened with an imminent attack by such an organization may . . . engage in a self-defense use of force to deal with this threat.”); Tatiana Waisberg, *Columbia’s Use of Force in Ecuador Against a Terrorist Organization*, 12 ASIL Insights (2008), available at <http://www.asil.org/insights080822.cfm> (“State practice and the UN Security Council’s actions after the September 11 attacks may, however, indicate a trend toward recognizing that a State that suffers large-scale violence perpetrated by non-State actors located in another State has a right to use force in self-defense when . . . that other State proves unwilling or unable to reduce or eliminate the source of the violence”).

73. U.N. Human Rights Council, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, ¶ 35, U.N. Doc. A/HRC/14/24/Add. 6 (May 28, 2010).

direct support to a nonstate actor in its territory with the intent that the actor undertake armed attacks against another state quite clearly is “unwilling” to suppress the threat posed by that nonstate actor. A state that has very limited military and police forces and no control over broad swaths of its territory almost certainly is “unable” to suppress a large and sophisticated set of nonstate actors acting in that ungoverned area.⁷⁴

The inquiry frequently will be much more complicated, however. What if the territorial state is not aware (or is not persuaded) that the nonstate actors that launched the attack actually are located on its territory? What if the territorial state requires several days to suppress the threat and the victim state is not sure whether that response will be timely enough? What if the victim state is worried that some officials in the territorial state might tip the nonstate actors off to a planned response? Or if the territorial state will be able to arrest 75% of the nonstate actors, but believes that it has no basis to use force against 25% of them? In any of a number of cases, it will not be clear to a victim state, at least initially, whether the territorial state is unwilling or unable to suppress the threat.

Thus, one is left with certainty that the test exists, but puzzlement about how states do or should apply it. This raises questions about how effectively the test, in its current state, can guide states’ decisions about when to use force. As Matthew Waxman has noted:

Law should guide decisionmaking and help improve the informational conditions that underlie it. Or, put another way, law should improve the accuracy of decisionmaking by permitting force when its use would be beneficial, and by helping to restrain it when it would not.⁷⁵

In its current, incompletely theorized condition, the “unwilling or unable” test is not serving this purpose as well as it could.⁷⁶ Victim states do not always rely on the same types of facts when explaining their extraterritorial uses of force against nonstate actors. A single state may invoke one set of facts when defending one use of force and a different set of facts when defending another case. We thus have a rule without clear legal content. Only by being much more precise about what the test should mean — what assessments a victim state must make before using force and how it should make them — can the “unwilling or unable” test serve

74. Somalia may be the best contemporary example of such a state.

75. See Matthew Waxman, *The Use of Force Against States that Might Have Weapons of Mass Destruction*, 31 MICH. J. INT’L L. 1, 21 (2009).

76. See BRUNNEE & TOOPE, *supra* note 26, at 307 (“[T]he more unpredictable and uncertain a supposed rule becomes, the more difficult it will be to meet the . . . requirement [that state practice is congruent with the norm]. If we do not know what the rule is, or we find that the rule is actually without constraining content . . . , then congruence becomes a meaningless concept.”).

as a meaningful (and more transparent) restraint on state action.⁷⁷ Part III identifies factors that would make the test more precise.

III. DEVELOPING THE TEST'S FACTORS

Part II described the long-standing international law antecedents of the “unwilling or unable” test, but illustrated that states and scholars have not fleshed out the test’s meaning. This Part analyzes normatively what the test should mean. Even though on its face the test seems to offer a useful way to manage the competing interests of the affected states, only by articulating in detail what the test should mean may we assess whether it truly can do so. This Part first explains the three core advantages that a clear, more detailed test should provide: (1) serving as a substantive constraint on action by the victim state, (2) providing a basis on which the victim state can (and must) justify its actions, and (3) as a procedural matter, structuring decision-making by the victim and territorial states and by international bodies in a way that improves the quality of those decisions. In this regard, it seeks to shift the current test, which currently operates as a legal “standard,” to a more detailed, “rule”-like test, and explains why this shift in the test’s legal form will advance those goals.

With these objectives in mind, this Part develops factors that flesh out the “unwilling or unable” test, better positioning it to serve as a reasonable and effective restraint on the use of force in circumstances in which that use of force would not benefit international peace and security. These factors include the requirements that the victim state: (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.

77. See High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, ¶¶ 204–05, U.N. Doc. A/59/565 (Dec. 2, 2004). The Report of the UN High-level Panel on Threats, Challenges and Change recommended that the Security Council adopt guidelines to govern when it would authorize the use of force and thus increase the legitimacy of those authorizations. *Id.* It stated:

[I]n deciding whether or not to authorize the use of force, the Council should adopt and systematically address a set of agreed guidelines, going directly not to whether force can legally be used but whether, as a matter of good conscience and good sense, it *should* be. The guidelines we propose will . . . maximize the possibility of achieving Security Council consensus around when it is appropriate or not to use coercive action, including armed force; to maximize international support for whatever the Security Council decides; and to minimize the possibility of individual Member States bypassing the Security Council.

Id.

A. *Three Functions of a Developed Test*

Abram Chayes famously described three ways international law can affect foreign policy decisions: as a constraint on action, as a basis of justification or legitimation for action, and as a way to provide organizational structures, procedures, and forums.⁷⁸ In the use of force area, the law must work particularly hard to achieve any of these goals, because use of force decisions lie so close to core state equities. In its current bare-bones form, the “unwilling or unable” test offers only a limited constraint on victim state uses of force, is too nebulous to provide a useful basis on which a victim state can justify its action, and, because it fails to structure any aspect of the relationship between the victim state and the territorial state, offers little procedural guidance in an area where process can affect substantive decisions. A clearer and more detailed “unwilling or unable” test would better advance all three goals.

As currently crafted, the “unwilling or unable” test both under- and over-protects the security equities of victim states. States that would be permitted to use force under a fully-theorized “unwilling or unable” test but that doubt the legitimacy of the test or are uncertain about what the test requires may choose not to act out of concern about the political costs that would accompany their use of force. Hence, some states may systematically under-protect their security because of the test’s lack of clarity. By contrast, victim states contemplating the use of force in situations in which the territorial state arguably is both willing and able to address the threat may nevertheless be able to invoke the broad “unwilling or unable” phrase as legal cover without having to defend their actions carefully. Where the test is not clear, a victim state’s claim that a territorial state is unwilling or unable to act is easy to make, relatively hard to disprove, and at least superficially useful in concealing an incursion based on other motivations. These victim states are able to take advantage of the rule’s lack of clarity to over-protect their security. A clearer rule would avoid at least the more obvious cases of over- and under-protection.

Those skeptical of international law’s ability to guide state behavior in circumstances that stray from the state’s inherent self-interest likely will view most “tests” in this area as toothless, whether the test is crafted in very broad strokes or in great detail.⁷⁹ I am not arguing that a clear “unwilling or unable” test will prevent a state that is intent on using force

78. CHAYES, *supra* note 17, at 7.

79. See, e.g., JACK L. GOLDSMITH & ERIC POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005) (arguing that international law emerges from states acting rationally to maximize their interests); Michael Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the UN Charter*, 25 HARV. J.L. & PUB. POL’Y 539, 540 (2002) (arguing that the use of force regime in the UN Charter has collapsed); see also GRAY, *supra* note 29, at 27 (noting the complicated nature of the question of whether a state that breaches the law on the use of force incurs any costs).

from doing so. As long as use of force decisions usually are not made collectively by an international body, and instead remain with the victim state as the final decision-maker, no test could do this. I am arguing, however, that the absence of a better-defined test leads states to engage in suboptimal decision-making, particularly at the margins, and that we might be seeing more uses of force than truly would be necessary if the test were clear.

1. *The Test as Substantive Constraint*

Any test that purports to guide state decision-making in the use of force area must be keenly attuned to the core underlying principles in the UN Charter and the basic problems that have arisen in evaluating particular uses of force by states. Michael Reisman has written, “A critical factor in the acceptance and incorporation of a new claim into the corpus of international law is whether it serves the common interests of the aggregate of actors.”⁸⁰ A sustainable test that constrains the situations in which a victim state may use force in another state’s territory against a nonstate actor will need to take into account the aggregate interests of the state actors directly affected, as well as other states in the international community that can imagine themselves in the shoes of the victim state, the territorial state, or both. The test therefore must strike an appropriate balance between victim state security and territorial state sovereignty.

The Charter’s primary use of force rules — Articles 2(4) and 51 — are in some tension with each other.⁸¹ Jane Stromseth has described the UN Charter as seeking both to limit pretextual and open-ended claims of self-defense that threaten the idea of limits on the use of force and to affirm the “inherent right” of states to defend themselves effectively from attack, given that Security Council action would not always be timely.⁸²

This balance has proven notoriously difficult to achieve since the Charter’s enactment,⁸³ but striking the wrong balance may have seriously destabilizing results. Consider an “unwilling or unable” test that systematically over-protects the victim state’s equities. Such a test might require the victim state to undertake only a superficial inquiry about the territorial state’s willingness or ability to suppress the threat itself, or might set high expectations for the territorial state’s capacity to address the

80. Reisman, *supra* note 35, at 89.

81. U.N. Charter art. 2, para. 4, art. 51.

82. Jane E. Stromseth, *New Paradigms for the Jus Ad Bellum?*, 38 GEO. WASH. INT’L L. REV. 561, 568 (2006); *see also* FRANCK, *supra* note 59, at 17 (describing the tension in the Charter between the institutional pursuit of order (i.e., non-violence) and the moral pull to justice).

83. *See* Michael Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J. L. & PUB. POL’Y 539, 549 (2002) (“Article 51 is grounded upon premises that neither accurately describe nor realistically prescribe state behavior.”).

threat, such that it would be easy for the victim state to conclude that the territorial state was unable to do so and to choose to use force itself.⁸⁴

On the other hand, consider a test that systematically over-protects the territorial state's equities — for instance, by only allowing the victim state to deem the territorial state “unwilling” when the victim state proves to a high level of certainty that the territorial state assisted the nonstate actor that undertook the armed attack. Victim states simply will ignore a test that under-protects their equities when national security is at stake.

Neither of those tests is likely to survive happily in the real world, and each is likely to increase, rather than decrease, the overall uses of force by victim states. A well-balanced test, in contrast, offers two ways substantively to reduce the use of force by victim states. The first way is to give the territorial state incentives to address the threat itself. In a world of unclear rules, territorial states are less likely to be on sufficient notice of the steps they must take to avoid having other states legitimately use force on their territory. Territorial states thus may take fewer prophylactic steps than they should to address violent nonstate activity in their territory. This increases the likelihood that a particular territorial state may actually be unwilling or unable to suppress the threat. A vague rule also might increase the chances of inadvertent conflict between the victim state and territorial state, if the territorial state is not aware of the legal basis on which the victim state is using force on its territory and interprets the victim state's use of force as an armed attack against it.

In contrast, a territorial state that understands its responsibilities to foreclose the use of its territory by violent nonstate actors and that knows what inquiry a victim state will undertake when considering whether to violate the territorial state's sovereignty has better incentives *ex ante* to monitor its territory than would a state where the rule was hazy.⁸⁵ Assuming that most states have inherent incentives to avoid violations of

84. While victim states generally would be happy with a test that over-protects their equities, those states must be conscious that any test they use may be used against them in the future. Thus, even though Turkey might instinctively prefer a test that over-protects victim states (because it envisions itself most often in the situation of a victim state), it must consider how Iran might seek to apply the test if it believed that Kurdish rebels in Turkey were planning an attack against Iran. Thus, those states that expect most often to be in the position of victim states should place themselves behind a Rawlsian veil of ignorance in determining the characteristics of the test that they are willing to accept. Likewise, those states that expect that nonstate actors might try to use their territory as a safe haven nevertheless should envision what test they would desire if they found themselves in the position of a victim state.

85. See *infra* Part III.B (discussing the advantages of a shift to a more detailed rule). One might ask whether a territorial state that faces ambiguity in how to act to avoid having other states violate its sovereignty already has increased incentives to take steps to suppress such threats. However, these additional steps undoubtedly will be costly, and states often are loath to spend money to address problems prophylactically, especially when the outcome is in doubt. Additionally, the territorial state might perceive that an unclear rule would deter a victim state from acting for fear of being condemned.

their sovereignty, this might mean that a territorial state has stronger incentives to improve its ability to suppress nonstate threats by having adequate criminal laws on its books and strong, noncorrupt law enforcement and military forces.⁸⁶ The “unwilling or unable” test should offer the territorial state the opportunity — at least in principle — to take control of the situation, foreclosing the need for the victim state to act.⁸⁷

A second way that the “unwilling or unable” test might serve to reduce the use of force by a victim state is to improve the quality of the information that the victim state uses to make its decision and, concomitantly, to reduce pockets of uncertainty that cause the victim state to err on the side of using force. Both states and commentators consistently call for as much factual certainty as possible about the circumstances of an armed attack (or imminent threat thereof) before using force. As Louis Henkin noted, some scholars prefer to interpret the UN Charter to allow self-defense to be triggered only after an armed attack occurs because an “actual armed attack” is “clear, unambiguous, subject to proof, and not easily open to misinterpretation or fabrication.”⁸⁸ Franck observes that “it is clarity of the facts, the evidence, and the context that count most in determining systemic reaction.”⁸⁹

86. This assumes a “rational state.” One can imagine a dictator wanting to ensure that his state’s military is weak so that he is less likely to face a coup; a clearer “unwilling or unable” test might have little effect on the way the dictator structures his military.

87. Another way to view the test is as establishing a rebuttable presumption that the territorial state is the “cheapest cost avoider.” As an early writer on neutrality law noted, “A neutral state which has the power and the intention to make its neutrality respected may safely be left to deal with any case of violation: it is a waste of energy for a belligerent to take upon himself a duty which Convention throws upon a neutral.” SPAIGHT, *supra* note 52, at 482. The territorial state knows the terrain, has law enforcement and military troops in the country, and likely will understand the facts on the ground in the region from which the threat emanates. In addition, the act of suppressing the threat usually will cost the territorial state less reputationally (in time spent defending its actions before international organizations, for instance) than it would cost the victim state. *See* Schachter, *supra* note 23, at 1646 (“Decisions of international bodies add both to the specificity and density of agreed law and affect the costs that result from illegitimate conduct.”). However, for some territorial states, the costs of suppressing the threat will be extremely high. For instance, where the military is weak and corrupt, training competent, honest special forces might take years and large sums of money. Acting against a group of nonstate actors that some of the territorial state’s populace supports also might cost the government too much in political capital. Thus, the “unwilling or unable” test should default to a burden on the territorial state (consistent with that state’s international law duties), but should recognize instances in which the burden must shift to the victim state.

88. LOUIS HENKIN, *HOW NATIONS BEHAVE* 142 (1979); *see also* STANIMIR A. ALEXANDROV, *SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW* 7 (1996) (“[I]n order that a self-defence may be lawful, it must be necessary; and it is not necessary unless we are certain, not only regarding the power of our neighbour, but also regarding his intention.”) (quoting Grotius); Jules Lobel, *The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan*, 24 *YALE J. INT’L L.* 537, 541–42 (1999) (“The Article 51 requirement of an ongoing armed attack serves as a restraint against use of force based on pretext, misunderstanding, and erroneous factual determinations.”).

89. FRANCK, *supra* note 13, at 66.

Although the uncertainty with which this Article is concerned is uncertainty about another state’s willingness and ability to defeat a threat (rather than a state’s intention and ability to undertake an attack), the advantages of reducing factual uncertainty are comparable. The greater the victim state’s clarity about the intentions of the other relevant actors, the more likely it is that the victim state accurately may determine when force is a necessary and lawful response and avoid force when it is not necessary.⁹⁰ And the more clarity that the international community has about the facts, the more easily it will be able to assess the victim state’s response. Thus, an “unwilling or unable” test that fosters exchanges of information between the victim and territorial states and that requires the victim state to conduct due diligence about the territorial state’s capabilities should result in better-calibrated decisions about when to use force.⁹¹

2. *The Test as Legitimation and Justification*

When a rule is not clear, actions taken pursuant to the rule are of questionable legitimacy. Some states will be skeptical of the existence of the rule; others may not understand its parameters. When the rule is clear and a victim state can demonstrate that it acted consistent with the rule, its action is far more likely to be deemed legitimate by other states. Ironically, in the absence of clear rules, it is more difficult for states that object to a particular victim state’s use of force to make compelling arguments that the victim state acted unlawfully. When the rule is clear and other states believe that a victim state has not complied with the rule, those other states are better situated to employ international law to condemn the victim state’s acts. Put differently, a clearer and more detailed “unwilling or unable” test would provide a common vocabulary for all states to use in discussing and evaluating a victim state’s use of force.⁹² This aspect

90. Several scholars have written about the level of certainty that states must establish before using force. *See, e.g.*, Lobel, *supra* note 88, at 539 (“The changing nature of warfare in the latter half of the twentieth century highlights the international community’s need to develop rules and mechanisms to address the factual assertions upon which a nation employs armed force.”); Waxman, *supra* note 75, at 58. The proper standard of proof that a victim state should be able to meet before taking action in a territorial state is an important and difficult question, because the facts underlying an “unwilling or unable” determination often will be contested. It may be that a standard akin to “clear and convincing evidence” will strike the best balance between the equities of the victim and territorial states. It may also be that the standard should shift depending on the level of threat that the victim state reasonably believes that it faces. Although the issue is worthy of further consideration, this Article does not address in detail the standard of proof that a victim state must meet. However, it makes a baseline assumption that the victim state must act in good faith. *See infra* text accompanying notes 146–147.

91. In general, it may be easier to assess another state’s capabilities than its intent. *See* Jack Levy, *Misperception and the Causes of War: Theoretical Linkages and Analytical Problems*, 36 *WORLD POL.* 76, 96 (1983).

92. *See* BRUNNEE & TOOPE, *supra* note 26, at 304 (“[A]s Chayes rightly stressed, international law provides a framework against which states’ actions should be assessed, and imposes a heavy burden

provides an additional reason that certain powerful states, such as the United States, should be concerned about the test's current vagueness: By accepting reasonable restraints on their own action, they will make it more difficult for other states, whose interests often are different from their own, to take advantage of an open-ended test. As other states grow more powerful relative to the United States, this is not an insignificant consideration.

The legitimacy of a norm can strengthen its "compliance pull" as well. Among the elements that bolster the legitimacy of an international norm is its "determinacy" — that is, the rule's clarity about where the boundary exists between what is permissible and impermissible.⁹³ When that clarity is absent, the norm's legitimacy falters. According to Franck, "[D]eterminacy seems the most important [aspect of legitimacy], being that quality of a norm that generates an ascertainable understanding of what it permits and what it prohibits. When that line becomes unascertainable, states are unlikely to defer opportunities for self-gratification. The rule's compliance pull evaporates."⁹⁴

A clearer and more detailed "unwilling or unable" test also would allow the victim state to predict with greater accuracy reactions by other states to its use of force and to decide to act (or refrain from acting) accordingly.⁹⁵ The victim state will be on notice that it will need to justify its actions against set standards, which provides incentives for it to consider each element of the test before making a decision.⁹⁶ This, in turn, counsels more measured decision-making and may result in fewer decisions to use force.

Finally, a more clearly articulated "unwilling or unable" test could limit the precedential impact of a particular use of force. Even in the face of the current "unwilling or unable" test, states expect to and feel a need to defend their actions, possibly to signal that they view their use of force as cabined by certain elements and thus to guard against excessive uses of

of justification."); ANDREW GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* 97 (2008) ("[T]he more uncertain a performance standard is, the less clear that a state's behavior is violating that standard. Hence, a state's action when assessed in light of ambiguous circumstances will be less likely to affect its reputation as a complier than if the act were a clear violation of an agreement.").

93. FRANCK, *supra* note 13, at 94.

94. Thomas M. Franck, *The Power of Legitimacy and the Legitimacy of Power*, 100 AM. J. INT'L L. 88, 93 (2006); *see also* LON FULLER, *THE MORALITY OF LAW* 39 (1969) (noting that unclear rules can contribute to a failed legal system).

95. *See* Sean Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILL. L. REV. 699, 704 (2005) (describing one of law's functions as allowing a state to predict global reactions to a proposed use of force).

96. *See* CHAYES, *supra* note 17, at 103 ("There is continuous feedback between the knowledge that the government will be called upon to justify its action and the kind of action that can be chosen.").

force by others.⁹⁷ Former U.S. State Department Legal Adviser John Stevenson was explicit about this in his speech on the U.S. decision to use force in Cambodia against the Vietcong. He stated:

It is important for the Government of the United States to explain the legal basis for its actions, not merely to pay proper respect to the law, but also because the precedent created by the use of armed forces in Cambodia by the United States can be affected significantly by our legal rationale. . . . [T]he United States has a strong interest in developing rules of international law that limit claimed rights to use armed force and encourage the peaceful resolution of disputes.⁹⁸

Clearer rules give victim states a greater ability to articulate why their actions should not be interpreted to broadly sanction the use of force.

Before considering the third goal of a functional legal test, it is worth noting possible political limitations on a victim state’s ability to proffer a complete explanation for its conclusion that a territorial state was unwilling or unable to act. As the U.S. raid into Pakistan to kill bin Laden makes clear, a complicated relationship between a victim and territorial state may render it politically unwise for the victim state to announce precisely why it concluded that a territorial state was unwilling or unable to take steps to address a particular threat. The political costs of impugning the territorial state’s capacity or implicating that state’s officials in wrongdoing may preclude a victim state — at least in the short term — from offering a detailed public case about why its action was legitimate and legally justified. That said, states should take steps to make that information available in the longer term, both to cabin precedent after the fact and to signal the state’s efforts to comply at the time with the existing legal framework.

3. *The Test as Procedural Guidance*

In international law, as elsewhere, substantive rules and procedural requirements interact: Better procedure can produce better substantive decisions, even when the procedures have no substantive content.

97. See Oscar Schachter, *Self-Defense and the Rule of Law*, 83 AM. J. INT’L L. 259, 266 (1989) (“[O]nce [decisions to use force are] made they become part of the law-shaping process, influencing expectations as to the acceptability of future actions influencing use of force. Most governments recognize this. Whether or not they are themselves involved in the particular conflict, they are aware of the implications for other conflicts and often of their own interest in avoiding the spread of hostilities. Legality matters to them, not only as rhetoric to win support, but also as a factor to be taken into account as part of the effort to contain violence and reduce the risks of escalation.”); FRANCK, *supra* note 13, at 187 (“[M]ost governments are conscious of the importance of practice as precedent.”).

98. John R. Stevenson, Legal Adviser of the U.S. Dep’t of State, Statement on Legal Aspects of U.S. Military Action in Cambodia to the New York City Bar Assoc. 2 (May 28, 1970), available at <http://tinyurl.com/7gtt34x> [hereinafter Stevenson Speech].

Whether procedural elements manifest themselves as a “check list” that a state moves through in working toward a final decision, or as an external “adjudicator” such as the Security Council that will evaluate a state’s decisions *ex ante* or *ex post*, that procedure can affect the substantive conclusions that a state reaches. A requirement that a victim state undertake certain inquiries and engage in certain exchanges with the territorial state is likely to affect the victim state’s ultimate decision about whether to use force.

Perhaps more importantly, a clear set of factors will promote more coherent analysis by third states (particularly Security Council members) about the legality of the victim state’s use of force. Even the most successful legal test in the use of force area cannot excise considerations of politics and diplomacy from statements made by members of the Security Council. However, a more detailed framework for the “unwilling or unable” inquiry gives the players a common script against which to measure the facts. If the victim and territorial states use a particular test to frame their arguments, it forces Security Council member states to articulate their arguments for or against the particular use of force in that same frame. The reverse also is true: The fact that the Security Council will have a basic yardstick against which to analyze the victim state’s acts will influence how the victim state makes its decisions. Finally, it will help the Security Council or other international bodies focus on the core factual disputes, which is particularly useful if the Council appoints a fact-finding body to determine which state had the better argument on the facts.⁹⁹

B. *The Shift from Standard to Rule*

Part III.A, which argues for importing much greater detail into the governing law, implicates the long-running debate about the relative advantages of decisional tools that take the form either of rules or of standards.¹⁰⁰ Although much of that debate has taken place in the context of domestic laws and institutions, it is relevant to efforts to structure law on the international plane as well.¹⁰¹ Section A calls for a shift from a

99. Robert Keohane and Allen Buchanan have proposed that the Security Council appoint impartial bodies to determine whether the *ex ante* justification of a state that used force anticipatorily is borne out *ex post*. See Allen Buchanan & Robert Keohane, *The Preventive Use of Force: A Cosmopolitan Institutional Proposal*, 18 ETHICS & INT’L AFF. 1, 1–2 (2004).

100. See, e.g., Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992) (providing an economic analysis of the extent to which legal commands should be promulgated as rules or standards); Kathleen Sullivan, *Foreword: Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57–69 (1992) (identifying the respective merits of “rules” and “standards”).

101. For example, Professor Helfer has identified how the level of specification in a treaty may affect a state’s willingness to adhere to that treaty. See Laurence Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights*, 102 COLUM. L. REV. 1832, 1852 (2002) (“States may tolerate rather high levels of precision, but only if levels of obligation and delegation are more attenuated.”); see also Pierre Schlag, *Rules and Standards*, 33

general, largely unspecified standard (is a state “unwilling or unable”?) to a more detailed “rule-like” norm that, among other things, aims to constrain the discretion of various international decision-makers and to provide more information *ex ante* to the victim and territorial states about what behavior is lawful. While the multifactor test I propose would retain some “standard-like” elements, such as a requirement that the victim state “reasonably” assess the territorial state’s control and capacity, the test would have more “rule-like” features than it does in its current form.

Is it clear that a shift toward a detailed “unwilling or unable” rule will produce more desirable behavior by the relevant states? The broader debate has illustrated that rules do not always produce better results than standards.¹⁰² For example, while rules generally offer greater guidance to actors *ex ante* and lead to better compliance and lower enforcement costs *ex post*, it is more costly to promulgate rules than to promulgate standards.¹⁰³ In addition, a rule is more likely to be both under- and over-inclusive in regulating behavior, while a standard makes it easier for an adjudicator to take into account the totality of the circumstances in determining whether to condemn the behavior of the actor before him.¹⁰⁴ Further, rules allow individuals to take advantage of loopholes by engaging in behavior that technically would not violate the rule’s prescription, even if the rule’s creator would have wanted to capture that behavior.¹⁰⁵ One might wonder, then, whether a shift to a rule-like directive inadvertently will allow “bad states” to legitimize undesirable uses of force by complying with the form of the rule without respecting its spirit.

I am not claiming that, as a general matter, the use of rules in international law will always be preferable to the use of standards. Indeed, there is good reason to believe that standards often will prove as effective, if not more effective, than rules in regulating states’ behavior.¹⁰⁶ I am claiming, however, that in this particular case, there are good reasons to

U.C.L.A. L. REV. 379, 380 (1985) (noting that the arguments we make for and against rules or standards are the same regardless of the specific issue involved).

102. As Judge Posner put it, “No sensible person supposes that rules are always superior to standards, or vice versa, though some judges are drawn to the definiteness of rules and others to the flexibility of standards.” *Mindgames, Inc. v. W. Publ’g Co.*, 218 F.3d 652, 657 (7th Cir. 2000).

103. See Kaplow, *supra* note 100, at 563, 570.

104. See Sullivan, *supra* note 100, at 62–63, 66.

105. See *Mindgames*, 218 F.3d at 657 (“Rules have the advantage of being definite and of limiting factual inquiry but the disadvantage of being inflexible, even arbitrary, and thus overinclusive, or of being underinclusive and thus opening up loopholes (or of being both over- and underinclusive!). Standards are flexible, but vague and open-ended”); Sullivan, *supra* note 100, at 62–63 (noting that bright-line rules allow the proverbial “bad man” to engage in socially undesirable behavior right up to the line). In fact, the current form of the test — an open-ended standard — currently allows significant loopholing. See *supra* Part III.A.

106. See, e.g., GEORGE W. DOWNS & DAVID M. ROCKE, *OPTIMAL IMPERFECTION? DOMESTIC UNCERTAINTY AND INSTITUTIONS IN INTERNATIONAL RELATIONS* 76–77 (1995) (arguing that there is an optimal level of non-specificity in international trade treaties that gives states leeway to address uncertainties in the international marketplace).

believe that a shift to a more “rule-like” legal directive will offer tangible benefits at a reasonable cost.

First, one common criticism of rules is that they are more costly to promulgate than standards because it is harder to generate a political consensus for them.¹⁰⁷ The factors set forth in Section D illustrate, however, that it is possible to generate a legal directive at a level of detail that would cover most cases that states would want to capture. Because it relies on existing state practice to do so, the directive might garner consensus among many affected states. Indeed, this Article hopefully has lowered the costs of developing the outlines of a rule-like directive by assembling those factors.

Second, rules express a greater distrust of the decision-maker than do standards.¹⁰⁸ This seems particularly salutary where the *ex post* “adjudicator” that will review the victim state’s decision (that is, the Security Council) has little enforcement authority. A shift toward a legal directive that limits the discretion of the state deciding whether to use force and that provides additional structure to the adjudicator’s evaluation of the act after the fact will help channel the victim state’s decision and the international community’s discussion of that decision.

Third, even if one generally prefers standards over rules, current practice suggests that the total absence of detail in the standard prevents it from serving as an effective legal directive. As Part IV illustrates, the use of a standard this vague has rendered *ex post* adjudication disjointed. Even a more complex standard would improve the quality of the fact-finding, legal assessments, and political judgments made in the wake of a use of force of the type this Article addresses. For all of these reasons, a shift to a more rule-like directive offers clear advantages.

C. *Methodology*

For many decades, states have defended their uses of force in other states’ territories to suppress attacks from entities other than the territorial states. I derive most of the factors that follow from identifiable trends in the information that states have offered in their own defense. These victim states presumably proffered those aspects of their situation that they perceived as most compelling to other states. From these recitations of facts, I extrapolate general categories of information that victim states are most inclined to proffer: information about the conditions of the territorial

107. See Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 352.

108. See Kaplow, *supra* note 100, at 609 (“Rules may be preferred to standards in order to limit discretion, thereby minimizing abuses of power.”); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180 (1989) (“Only by announcing rules do we hem ourselves in.”); Sullivan, *supra* note 100, at 64 (“Rules embody a distrust for the decisionmaker they seek to constrain.”).

state’s armed forces, information that suggests a relationship between the territorial state’s leadership and the nonstate actors, the territorial state’s real and claimed levels of control over particular parts of its territory, and the types of requests that the victim state has submitted to the territorial state. The idea is that “incidents may serve as a type of ‘meta-law,’ providing normative guidelines for decision-makers in the international system in those vast deserts in which case law is sparse.”¹⁰⁹

I located as many examples as possible in which one state used force in another state’s territory against a third entity, whether a state or a nonstate actor. Although there is no database that houses the full set of instances in which one state used force in another state’s territory against a third actor, the incidents I reviewed represent the bulk of the highest-profile cases, particularly in the post-Charter era.¹¹⁰ In a few cases, the victim state discussed extensively its legal rationale for using force.¹¹¹ More often, it did not.

Another way to develop factors would have been to examine uninvolved states’ reactions to these interventions. However, there are several problems with using these reactions as an accurate indicator of views about the “unwilling or unable” test, either as a legal norm or as applied. First, many of these reactions are not recorded, particularly in the pre-Charter era. Even in the post-Charter era, where there are far better records of states’ reactions to these events, Security Council debates usually involve political arguments, not legal ones. Where states make legal arguments, those arguments often are superficial, in part because the Security Council setting is not conducive to time-consuming, complicated, and carefully-structured legal argumentation.¹¹² Additionally, statements in the Security Council often are strongly colored by the politics surrounding the uses of force — apartheid, colonialism, or the Israeli-Palestinian conflict, for example — and may not reveal the actual legal views of states.¹¹³

109. See W. Michael Reisman, *The Incident as a Decisional Unit in International Law*, 10 YALE J. INT’L L. 1, 19 (1984).

110. *Id.* at 13 (noting the current lack of a systematic method for studying and reporting incidents of overt conflict between two or more actors in the international system).

111. The exchange between the United States and United Kingdom regarding the *Caroline* and the U.S. use of force in Cambodia are two notable examples in which the states involved engaged in an extensive legal discussion about the use of force. See John B. Moore & Francis Wharton, *Destruction of the Caroline*, 2 DIG. OF INT’L L. 362 (1906).

112. William W. O’Brien, *Reprisals, Deterrence and Self-Defense in Counterterrorism Operations*, 30 VA. J. INT’L L. 421, 471 (1990) (concluding that the “Council makes legal arguments that are generally unpersuasive” and that “the Council’s record” from 1953–1988 “is conspicuous for the scarcity of serious legal arguments”).

113. See Bowett, *supra* note 23, at 12 (noting that Security Council reactions against the Portuguese bombing of villages in Senegal “probably invoked a good deal of the anti-colonialist sentiment which operated against . . . the Portuguese position in Africa and therefore brought a condemnation for actions which were probably not strikingly disproportionate”); Ruys & Verhoeven,

Second, there were few examples in which third states identified particular aspects of a victim state's defense of its use of force as more persuasive or less persuasive. Thus, to the extent that one believes that third-state reactions are a useful way to establish factors,¹¹⁴ it is difficult to determine whether any particular factor discussed below should be given more weight than another factor. As a result of these problems in using states' reactions to uses of force, this Article focuses on what victim states have said, taking into account criticism or support by territorial and other states where those reactions elucidate the relevance of certain types of facts.

Deriving factors largely from the statements and explanations of victim states means that those factors will be shaped by states that have the political power and military capacity to use force in another state's territory. This means the factors inevitably will contain some bias toward victim state equities, and will be shaped by states willing to use force.¹¹⁵ However, if one believes that an "unwilling or unable" test that has greater legal content and that is consistent with the objectives in Part III.A will serve as a more effective restraint on the use of force, then the test will impose constraints on the very actors that helped shape the test. In response to skepticism that those actors will abide by such constraints, the fact that many of these factors have their roots in state practice drawn from a range of states across different time periods suggests that states generally will find these factors workable. This matters because state decision-makers, acting in good faith, "are more likely to respect standards rationally related to concerns they recognize as appropriate."¹¹⁶

supra note 69, at 293–94 (“[T]he condemnations were mainly based on political, rather than on legal grounds: all three states [Israel, Portugal, and South Africa] were considered to be illegally occupying territory, denying peoples the fulfillment of their right of self-determination”); W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT’L L. 3, 53 (1999) (“South African pursuit of African National Congress (ANC) personnel in Angola was condemned, though again, the international legal condemnation seemed to arise more from revulsion at South Africa and the fact that the international community had virtually unanimously condemned its apartheid system than a considered legal judgment of the lawfulness of pursuing terrorists into the territory of the state in which they have found haven.”); *id.* (noting that the U.S. use of force in Cambodia in 1970 also faced extensive criticism, though “in retrospect, much of the criticism seems to have been part of a larger objection to U.S. pursuit of the [Vietnam] war as a whole”).

114. Michael Reisman’s “incident”-based analysis relies almost exclusively on the reaction by a subset of states to a particular incident. *See supra* note 109.

115. Francis A. Boyle, Book Review, *International Incidents: The Law That Counts in World Politics*, 83 AM. J. INT’L L. 403, 405 (1989) (“[A]nalyzing the behavior of the world’s most powerful military states (here, the United States, the Soviet Union, Great Britain and Israel) as touchstones for determining ‘effective’ rules of international law contains a built-in tendency to conclude almost ineluctably that international law must mean what Thucydides said it did . . . : the strong do what they will and the weak suffer what they must.”).

116. Sofaer, *supra* note 63, at 225.

D. *The Test's Factors*

The following factors should guide both the victim and territorial states in the wake of an armed attack by a nonstate actor launched from within the territorial state's borders. These factors collectively give the victim state a framework in which to acquire and assess the information it has about the territorial state (thus reducing the victim state's uncertainty about the territorial state's capacity), improve the victim state's decisional processes (including by allowing it to assess the respective burdens on itself and on the territorial state of taking action against the threat), and allow the victim state to defend its actions against clear standards. The factors attempt to avoid over- or under-protecting either state's equities by carefully circumscribing the circumstances in which the victim state may act without the territorial state's consent or cooperation.

I identify the factors as substantive, procedural, or both. The expectation is that the victim state will undertake each of the procedural inquiries embedded in the factors when it contemplates using force extraterritorially against a nonstate actor. The victim state also should undertake each of the substantive evaluations in the factors; because inquiries in this area are highly fact-specific, however, a victim state must make the ultimate decision about what weight to give to particular substantive factors.

1. *Prioritization of Consent or Cooperation*

As noted in Part I, where a victim state obtains a territorial state's consent to use force within the latter's borders, the victim state need not conduct an “unwilling or unable” inquiry. It is important not to understate as a descriptive matter how often counter-terrorism-related activities, including uses of force by one state in another state, occur with the territorial state's consent, or take place as a cooperative endeavor between the victim and territorial states.¹¹⁷ Of course, consent-based cases are less likely to make headlines, both because there is no disgruntled territorial state to complain about violations of its sovereignty, and because the territorial state may have independent reasons to keep its cooperation with the victim state quiet.¹¹⁸ If the territorial state gives the victim state consent, the latter need not perform an “unwilling or unable” analysis, but if the territorial state denies the victim state's request for consent, the denial may prove relevant in the subsequent “unwilling or unable” analysis.

117. For instance, the United States appears to have received consent from the transitional government of Somalia before conducting air strikes on al-Qaida in southern Somalia in 2007. *US Somali Air Strikes “Kill Many,”* BBC NEWS (Jan. 9, 2007), <http://tinyurl.com/78m5kec>.

118. See GRAY, *supra* note 29, at 85 (“Interventions limited to action to help governments to repress local protests of army mutinies have generally attracted relatively little international attention.”).

Given the international significance of a use of force within another state's borders, the victim state's preference in each case should be to obtain the consent of the territorial state.¹¹⁹ For example, at one point, Turkey obtained the consent of the Government of Iraq to conduct "anti-guerrilla" operations against the PKK on Iraqi soil.¹²⁰ Even if the territorial state declines to give the victim state consent to use force unilaterally, the victim state should, as a rule, explore whether there is an opportunity to work cooperatively with the territorial state to suppress the threat. The U.S. Secretary of War took this approach in 1877 in instructing General William Sherman to suppress Mexican and Indian raids into Texas from Mexico. He wrote, "It is very desirable that efforts [to suppress these raids] be made with the cooperation of the Mexican authorities; and you will instruct General Ord, commanding in Texas, to invite such cooperation on the part of the local Mexican authorities."¹²¹

The reasons to prefer this approach — which has both substantive and procedural aspects — are plain. First, bilateral cooperation preserves the integrity of the territorial state's sovereignty, because the victim state is present at the behest of — and its activities done with the knowledge of — the territorial state. Second, the states acting collectively are likely to have better information about the target, including its location and its network, than would either state acting alone. Third, there is a minimal chance of inadvertent state-to-state use of force when the states' forces are acting in concert. Fourth, the fact that a state other than the victim state has assessed the threat and the proposed response means that the use of force is not entirely unilateral.¹²² While this falls short of the multilateral

119. What constitutes consent has been the subject of a fair amount of debate. *See, e.g.*, Ademola Abass, *Consent Precluding State Responsibility: A Critical Analysis*, 53 INT'L & COMP. L.Q. 211 (2004); Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 BRIT. Y.B. INT'L L. 190, 222–34 (1986). It seems preferable to obtain express consent from a head of state or similarly senior governmental decision-maker. Whether consent may ever be implicit and whether it may serve as an independent basis for the use of force are beyond the scope of this Article.

120. *Turkish Jets Hammer at Kurdish Bases in Northern Iraq*, N.Y. TIMES, Sept. 6, 1999, at A17, available at <http://tinyurl.com/7dmxhaj> ("During the Persian Gulf War, Turkey had an agreement with Iraq that allowed it to cross the border in pursuit of Kurdish rebels. Since then Baghdad has objected to the raids, but has done nothing to prevent them."); *Turkey Says Its Planes Raided Kurdish Guerrilla Bases in Iraq*, N.Y. TIMES, Mar. 5, 1987, available at <http://tinyurl.com/8x3jutv> (referring to a 1984 agreement that allowed Turkey to carry out anti-guerrilla operations in Iraq).

121. Amos S. Hershey, *Incursions into Mexico and the Doctrine of Hot Pursuit*, 13 AM. J. INT'L L. 558, 560 (1919); *see also* Moore, *supra* note 53, at 55 (suggesting that the U.S. government had the "tacit consent" of Cambodia to use force in Cambodian territory); George A. Finch, *Mexico and the United States*, 11 AM. J. INT'L L. 399, 399–400 (1917) (noting that President Wilson had ordered an expedition into Mexico "under an agreement with the de facto government of Mexico for the single purpose of taking the bandit Villa . . . It is the purpose of our commanders to cooperate in every way possible with the forces of General Carranza in removing this cause of irritation to both governments"). Carranza later disputed the existence of this agreement and denounced the U.S. incursion as happening without Mexico's consent. *Id.* at 401.

122. *See, e.g.*, Weiner, *supra* note 25, at 428 (discussing the advantages of having multiple states contribute data to threat assessments).

decision-making that many would prefer, it offers an additional set of inputs into the decision to use force. Finally, the victim state is less likely to face international questioning about or condemnation for its activities, while presumably having wider room to maneuver (more time, for example) than it would if it were operating in the territorial state without consent.

2. *Nature of the Threat Posed by the Nonstate Actor*

The factors that follow relate predominately to the relationship between the victim state and the territorial state. However, a victim state's understanding of the nature and seriousness of the threat from the nonstate actor that attacked it will permeate its consideration of the territorial state's willingness and ability to suppress that threat (as well as the territorial state's view of its own ability to suppress the threat). Relevant factors that the victim state should consider are the geographic scope and intensity of the nonstate actor's activities, the sophistication of the attacks the nonstate actors have undertaken and are expected to undertake in the future, the number of actors in a particular area, the seniority (or juniority) of those actors within the organization, and the imminence of the threat of further armed attacks. If the nonstate actor undertook an armed attack against the victim state that killed hundreds of people, runs multiple training camps in the territorial state, and, according to the victim state's intelligence, is planning several additional attacks in the next week, the victim state understandably will be demanding in its assessment of the territorial state's capacity. The higher the density of actors, the more senior the actors present on the territory, and the more sophisticated the group's organization, the harder it will be for the territorial state — indeed, for any state — truly to counter the threat to the extent and with the speed required.

3. *Request to Address the Threat and Time to Respond*

Assuming that the territorial state has not consented to the victim state's use of force in its territory, the most obvious way to determine whether a territorial state is willing or able to address the threat is for the victim state to request that it do so and evaluate its response. Virtually every state that publicly has defended its use of force in another state's territory in this context has indicated that it first asked the territorial state to take the requisite steps to suppress the nonstate actors' activities, whether by arresting them, ejecting the actors from the country, transferring them to the victim state,¹²³ or using military force against

123. *See, e.g.*, President George W. Bush, Speech to Joint Session of Congress (Sept. 21, 2001) (“[T]onight, the United States of America makes the following demands on the Taliban: Deliver to

them. For example, in 1921, when Soviet troops entered Chinese Outer Mongolia, “the action was justified as having been taken after failure, in spite of repeated requests, of the Chinese Government to liquidate White Guard bands . . . preparing to invade the Soviet Republics from Mongolia.”¹²⁴ Before the United Kingdom raided the *Altmark*, a German auxiliary ship in neutral Norwegian waters in World War II, to rescue British prisoners of war, it “invited Norway to bring the *Altmark* into Bergen and there investigate” the United Kingdom’s claim that the ship had U.K. prisoners on board.¹²⁵ More recently, media reports indicate that the United States informed Pakistan that it would cease using force against certain nonstate actors in Pakistan if Pakistan addressed the targets itself.¹²⁶ Commentators have also cited this as an important factor in assessing the rights of the victim state. Robert Tucker, for example, argues that resort to the use of force by a belligerent “is normally justified only when a demand for adequate redress has proven unavailing.”¹²⁷

This procedural requirement ensures that the territorial state is aware of the problem, reducing the chance that the territorial state’s inaction is not due to its ignorance of the situation. It also provides an opportunity for the victim state to share relevant information with the territorial state about the nature and location of the threat. A test that lacked this requirement would systematically over-protect the national security of the

United States authorities all the leaders of al Qaeda who hide in your land.”).

124. Brownlie, *supra* note 71, at 732–33.

125. C.H.M. Waldock, *The Release of the Altmark’s Prisoners*, 24 BRIT. Y.B. INT’L L. 216, 236 (1947); *see also* Permanent Rep. of the United States to the U.N., Letter from the Permanent Rep. of the United States to the United Nations addressed to the President of the Security Council, U.N. Doc. S/1998/780 (Aug. 20, 1998) (notifying Security Council that the United States used force in Sudan and Afghanistan against Osama bin Laden’s organization and stating, “These attacks were carried out only after repeated efforts to convince the Government of the Sudan and the Taliban regime in Afghanistan to shut these terrorist activities down and to cease their cooperation with the Bin Ladin organization”); CHARLES CHENEY HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 111 n.1 (1922) (quoting a U.S. Government communication referencing the “repeated requests” that the United States made before pursuing Pancho Villa into Mexico); Hershey, *supra* note 121, at 560 (quoting U.S. Secretary of War’s instructions to General Sherman regarding 1877 raids into Texas as stating, “At the same time [General Ord] will inform those [Mexican authorities along the Texas border] that if the Government of Mexico shall continue to neglect the duty of suppressing these outrages, that duty will devolve upon this Government, and will be performed, even if its performance should render necessary the occasional crossing of the border by our troops”); R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT’L L. 82, 83 (1938) (noting that the British Lieutenant Governor informed New York’s governor of the non-peaceful activities of the *Caroline*, but received no reply); Note, *International Law and Military Operations Against Insurgents in Neutral Territory*, 68 COLUM. L. REV. 1127, 1141 (1968) (noting that Soviet government demanded that Rumania end its support for and expel White Guard forces).

126. Declan Walsh, *Osama Bin Laden Mission Agreed in Secret 10 Years Ago by US and Pakistan*, GUARDIAN (U.K.), May 10, 2011, at 16, available at <http://tinyurl.com/6x7bk95> (“We told them, over and over again: ‘We’ll stop the Predators if you take these targets out yourselves.’”).

127. TUCKER, *supra* note 56, at 261; *see also* Stahn, *supra* note 72, at 47 (“The defending state is under a duty to resort initially to diplomatic means in requesting the government in whose territory the terrorist acts have been planned to take suppressive measures.”).

victim state by effectively creating a regime of strict liability for the territorial state. That is, without a requirement to solicit action by the territorial state (or, as discussed below, determine that such a request would be ineffective or security-harming), the test would give the victim state too much leeway to violate the territorial state’s sovereignty. The notice requirement also constitutes an important first step in reducing the victim state’s uncertainty about the territorial state’s will and capacity; how the territorial state responds will provide the victim state with important information about how it will need to proceed. Finally, this factor allows each state to begin to calculate the costs it will incur in suppressing the threat by the nonstate actor. If the territorial state is both willing and able to take effective action, doing so spares the territorial state a violation of its sovereignty while saving the victim state from expending military and reputational resources to defend itself.

In some cases, the territorial state may demand to learn the basis on which the victim state believes that the attack it suffered was launched from the territorial state (or that the nonstate actors are otherwise present in that territory). The victim state often will have an incentive to provide the territorial state with at least some information in support of its arguments, so as to encourage the territorial state to take action. Given the different intelligence relationships that a victim state may have with various territorial states, however, the identity of the territorial state will dictate how much information a victim state will share. In some cases, sharing information about a past armed attack or anticipated future attacks may reveal to the territorial state intelligence sources and methods that the victim state may not want to reveal. A victim state that declines to share information with the territorial state (which, by definition, means it will decline to make that information available publicly) is likely to face strong challenges by the international community unless the victim state shows after the fact, using other, less sensitive intelligence, that the nonstate actors were in fact located in the territorial state.

While critical, the requirement to give the territorial state the opportunity to suppress the threat should not be absolute. There may be certain limited situations in which the victim state has a high level of confidence that making such a request either will be futile or will cause tangible harm to the victim state’s national security. In particular, if the victim state has very strong reasons to believe that the territorial state is colluding with the nonstate actor, asking the territorial state to take steps to suppress the threat might lead the territorial state to tip off the nonstate actor before the victim state can act.¹²⁸ For instance, France’s recent use of

128. This appears to have been the driving force behind the U.S. decision not to seek assistance from the Government of Pakistan to capture or kill bin Laden. *See* Gorman & Barnes, *supra* note 4 (reporting that President Obama chose to “cut Pakistan out of the loop” because the United States

force in Mali against al-Qaida in Mali (AQIM) without the Malian Government's consent may have been driven by a concern about possible links between the leadership of Mali and AQIM.¹²⁹

In weighing whether a request will be ineffective or damaging, the victim state may consider, among other issues, whether the territorial state has a publicly-stated (or otherwise clear) affinity for the nonstate actor or is providing support to the nonstate actor.¹³⁰ The victim state also may consider whether the territorial state is under political pressure not to assist the victim state. For example, in 1878, the U.S. Secretary of State wrote the U.S. Minister to Mexico to remind him of Mexico's duty to take action against marauding bands plundering U.S. territory, even though the United States was aware that the Mexican Government "encounter[s], or apprehend[s] that they may encounter, a hostile public feeling adverse to the United States, . . . thwarting their best intentions and efforts."¹³¹

Even in these cases, however, there are ample precedents for (and reasons for) urging the territorial state to act — such as the U.S. request to the Taliban to expel al-Qaida from Afghanistan,¹³² or Portugal's efforts (as the colonial power in Guinea-Bissau) to seek cooperation from neighboring states even where "those countries were avowedly hostile to Portugal and were aiding and encouraging violence against Portuguese territories in Africa."¹³³ Even where a victim state believes that the territorial state may be assisting the nonstate actor in some way, a request to the territorial state to suppress the threat may cause the territorial state to rethink its political calculus. If the territorial state anticipates that the victim state may use force in its territory in self-defense, it may conclude

mistrusted Pakistan's intelligence forces).

129. See Olivier Guitta, *Mali: A New Haven for Al Qaeda*, REALCLEARWORLD (Feb. 21, 2010) <http://tinyurl.com/7jxz48w> ("Another possible actor playing a troubled game is the Malian regime itself. For example, Algerian official media explains that AQIM kidnaps foreign citizens in other countries, and brings them right away to Mali where negotiations begin with the Amani Amadou Toure's government. The same media affirms that AQIM terrorists are protected by Malian authorities . . . There are examples of Malian authorities treating arrested AQIM members with leniency."); Paul Taylor, *PM Says France "At War" with al Qaeda Over Hostage*, REUTERS (July 27, 2010), <http://tinyurl.com/73t6ovk> (stating that Mali "was angered by Paris' apparent failure to consult it on the raid" and that Mali was "seen as a weak link in fighting AQIM" because there were "reported links between some authorities and Islamists").

130. Between 1870 and 1877, when the United States frequently pursued Mexican bandits into Mexico, "[n]ot only was it apparent that the Mexican central government had taken no action to prevent such incidents, but it also was clear that friends of the bandits were in military and political control of the Mexican states adjacent to the Texas border." Note, *supra* note 125, at 1132.

131. Hershey, *supra* note 121, at 561. The *Caroline* case offers another example: A U.S. official wrote to a British official to note, "There is a general feeling here in favor of the radical cause, and it may become difficult to prevent violations of the laws of neutrality." See Jennings, *supra* note 125, at 88 n.17; see also Bowett, *supra* note 23, at 20 (noting, in 1972, that "[n]o Arab Government, given the enormous popular support for the guerrilla activities amongst its own population, appeared able to risk an intensive campaign to stamp out" attacks on Israel).

132. See *supra* note 123.

133. 1969 U.N.Y.B. 138.

that it is no longer worth providing assistance to the nonstate actor. Only when the request itself could undercut the victim state’s ability to defend itself should such a request be seen as unnecessary.

Unless the territorial state unequivocally rejects a victim state’s request to suppress the threat, the victim state should allow the territorial state a reasonable amount of time in which to respond to that threat.¹³⁴ It is in the victim state’s interest to give the territorial state time to respond if, as discussed below, the proposed type of response has a reasonable chance of success, for it allows the victim state to conserve resources. What constitutes a “reasonable” amount of time must be judged in relation to the imminence of the threat. If the victim state truly faces “no moment for deliberation,”¹³⁵ as where the nonstate actor already has initiated another armed attack, the victim state may need to respond immediately, possibly without soliciting the territorial state’s assistance.

4. *Reasonable Assessment of Territorial State Control and Capacity*

What if a territorial state asserts that it is willing to take steps against the nonstate actor, but the victim state has real doubts about the territorial state’s level of control over the area in which the nonstate actor is operating, or serious concerns about the capacity of the territorial state’s armed forces or police? Ungoverned and under-governed spaces are a frequent problem in practice. Thus, it is imperative that the victim state fairly assess the level of control that the territorial state has over the area from which the threat emanates to make an accurate assessment of a territorial state’s “ability” to suppress the threat. Fortunately, there is likely to be a fair amount of information publicly available, as many scholars and policymakers research and publish information about ungoverned spaces in various states.¹³⁶ A state that is well-known to lack control over a relevant part of its territory is quite unlikely to be “able” to suppress threats emanating from that area.

A 1970 explanation of the legal basis for the U.S. decision to use force in Cambodia highlights the emphasis that states historically place on the lack of territorial control in deciding whether a territorial state is unable to

134. U.N. SCOR, 51st Sess., 3653d mtg. at 6, S/PV.3653 (Apr. 15, 1996) (relating Israel’s statement that it told Lebanon and Syria to exercise control over Hezbollah and “waited for the Governments to respond and allowed ample time for diplomatic efforts, but to no avail”); San Remo Manual, *supra* note 57, at ¶ 22 (“[T]he opposing belligerent must . . . give that neutral State a reasonable time to terminate the violation by the belligerent . . .”).

135. Letter from Daniel Webster to Henry Fox, British Minister in Washington (Apr. 24, 1841), in 1 BRITISH DOCUMENTS ON FOREIGN AFFAIRS: REPORTS AND PAPERS FROM THE FOREIGN OFFICE CONFIDENTIAL PRINT (PART I, SERIES C) 153, 159 (Kenneth Bourne & D. Cameron Watt eds., 1986).

136. See, e.g., *Failed State Index 2011*, FUND FOR PEACE, June 20, 2011, <http://tinyurl.com/839ercf>; Angelea Rabasa et al., *Ungoverned Territories: Understanding and Reducing Terrorism Risks*, RAND CORPORATION (2007), <http://tinyurl.com/2utbq59>.

respond to a threat. After describing the North Vietnamese use of Cambodian territory to infiltrate thousands of troops and large quantities of supplies into South Vietnam, the Legal Adviser stated:

Both the previous Cambodian Government under Prince Sihanouk and the present Government headed by Lon Nol have made efforts to limit . . . these violations of Cambodia's rights as a neutral. . . . In any event, however, the control and restraint exercised by the previous Cambodian Government was progressively eroded by constant North Vietnamese pressure. . . . Cambodian police and other officials were driven out of many localities in the border area. . . . We have limited our area of operations to that part of Cambodia from which Cambodian authority had been eliminated and which was occupied by the North Vietnamese.¹³⁷

Likewise, Turkey repeatedly has invoked Iraq's lack of control over northern Iraq in defense of its use of force there against the PKK, a Kurdish terrorist group that has conducted extensive attacks in Turkey. Effectively claiming that Iraq lacked sovereignty over that area, Turkey stated in 1996:

Iraq cannot exercise its authority either on the territory or the airspace of a part of its country. Turkey, therefore, can at present neither ask the Government of Iraq to fulfil its obligation nor find any legitimate authority in the north of Iraq to hold responsible under international law for terrorists acts committed or originated there. . . . [U]ntil Iraq is in a position to resume its responsibilities and perform its consequent duties under international law, Turkey has to take necessary and appropriate measures to eliminate the existing terrorist threat from the area¹³⁸

137. Stevenson Speech, *supra* note 98, at 3–7; *see also* Richard Nixon, Address to the American People (April 30, 1970) (“The areas in which these attacks will be launched are completely occupied and controlled by North Vietnamese forces.”).

138. Minister for Foreign Affairs of Turkey, Letter from the Minister for Foreign Affairs of Turkey addressed to the Secretary-General and to the President of the Security Council, U.N. Doc. S/1996/479 (July 2, 1996); *see also* Minister for Foreign Affairs of Turkey, Letter from the Minister for Foreign Affairs of Turkey addressed to the Secretary-General and to the President of the Security Council, U.N. Doc. S/1997/7 (Jan. 3, 1997) (“Iraq's inability to exercise its authority over the northern parts of its territory continues to provide room for frequent violations of Turkish borders and territory in the form of terrorist infiltrations.”); U.N. SCOR, 61st Sess., 5489th mtg. at 6, U.N. Doc. S/PV.5489 (July 14, 2006) (presenting Israel's argument that the Lebanese government chose to “let its southern region be occupied by terrorism” and to “relinquish control over its country rather than exercise its full sovereignty”); HYDE, *supra* note 125, at 109 n.2 (noting that in 1818 Andrew Jackson took possession of certain cities in South Florida, “giving notice that they should be restored whenever Spain should place commanders and a force there able and willing to fulfill the engagements of Spain toward the United States, or of restraining by force the Florida Indians from hostilities . . .” and that the United States seized control of Amelia Island where Spain was “not exercising over it any control”); Hershey, *supra* note 121, at 559–60 (describing why the United States found it unacceptable to be prevented from acting after suffering “irreparable injuries from Mexico,

The territorial states accepted the asserted facts in the two examples above. Thus, where a victim state concludes, in the face of well-established public information, that a territorial state is unable to act in a particular area, it is less likely to face international condemnation if it takes action.¹³⁹

This assessment will not always be straightforward or noncontroversial. In defending its use of force in Georgia’s Pankisi Gorge, Russia noted that the “Georgian authorities . . . have repeatedly assured the world community of their readiness to restore by themselves order in the Pankisi Gorge,” though Russia questioned Georgia’s ability to do so.¹⁴⁰ Georgia responded that “the Russian side had been informed in detail . . . regarding all the arrangements planned and conducted by the Georgian military and law-enforcement agencies to improve the criminal situation in the Pankisi Gorge and on the Chechen segment of the Georgian-Russian State border.”¹⁴¹ Russia’s assessment of Georgia’s territorial control over the Gorge area differed sharply from Georgia’s, leading some to question whether Russia’s use of force was pretextual.¹⁴²

Closely related to the question of a state’s control over a part of its territory is the question of the state’s military or law-enforcement capacity.¹⁴³ While the two factors are not perfectly correlated, it often is the case that a state cannot control all parts of its territory because it lacks a robust set of forces to keep order.¹⁴⁴ This factor tends to focus on whether a state is “able,” rather than whether it is “willing,” though there could be circumstances in which a territorial state’s military force or law

who did not inflict them, but who was, from circumstances, without the power to prevent . . .”).

139. GRAY, *supra* note 29, at 142 (“[I]n spite of the absence of a clear legal justification for its use of force, Turkey avoided condemnation by the Security Council.”); Murphy, *supra* note 56, at 38–40 (noting that Turkey has faced no notable condemnation from the international community for its action).

140. Charge d’Affaires of the Permanent Mission of the Russian Federation to the United Nations, Letter dated July 31, 2002 from the Charge d’Affaires of the Permanent Mission of the Russian Federation to the UN, addressed to the Secretary-General, U.N. Doc. S/2002/854 (Annex) (July 31, 2002).

141. Permanent Rep. of Georgia to the United Nations, Letter dated Sept. 13, 2002 from the Permanent Rep. of Georgia to the UN addressed to the Secretary-General, U.N. Doc. S/2002/1035 (Annex) (Sept. 13, 2002).

142. GRAY, *supra* note 29, at 230–31 (“The USA in response stressed the rights of Georgia. It seemed not to accept the Russian claims; it deplored the violations of Georgian sovereignty and spoke of bombings by Russian aircraft ‘under the guise of antiterrorist operations’”); *Patterns of Global Terrorism*, U.S. DEPT OF STATE (May 21, 2002), <http://tinyurl.com/7lryehy> (noting, somewhat inconsistently, that the “Georgian Government has not been able to establish effective control over the eastern part of the country”); see also Sofaer, *supra* note 63, at 218–19 (discussing the *Caroline* case, in which the United Kingdom and United States disputed U.S. capacity to enforce U.S. neutrality laws along a long border).

143. The victim state may need to assess first which entity would be likely to address the threat, based on statements by the territorial state or a general understanding of how the territorial state’s laws are structured, and then assess the relevant entity’s capacity.

144. W. Michael Reisman, *Private Armies in a Global War System: Prologue for Decision*, 14 VA. J. INT’L L. 1, 5 (1973) (“A significant number of the nominal states of the world do not exercise anything approaching plenary power within their borders . . .”).

enforcement officials are capable but are sympathetic to the nonstate actors and thus are unwilling to act.

The U.S. use of force in Cambodia provides an example of the victim state's efforts to assess the territorial state's capacity. The State Department Legal Adviser stated, "It was impossible for the Cambodian Government to take action itself to prevent these violations of its neutral rights. Its efforts to do so had led to the expulsion of its forces."¹⁴⁵ The territorial state itself acknowledged its capacity failures. Prince Sihanouk "admitted the North Vietnamese and Vietcong effectively controlled several of Cambodia's northern provinces, and that he could not remove them."¹⁴⁶ Commentators agreed that "the Cambodian military was no match for North Vietnam's army. While some touted the North Vietnamese army as the best infantry in history, in 1970 the Cambodian army numbered only about 30,000 and were at best an ill-equipped security force."¹⁴⁷ Indeed, Cambodian forces "were sorely pressed to defend Phnom Penh and the provincial capitals, much less to take effective action against the sanctuaries."¹⁴⁸ In such a case, the victim state readily may conclude that the territorial state is unable to suppress the threat.

Mexico's lack of control over its northern areas in the early nineteenth century led the United States to reach similar conclusions about Mexico's capacity. President Buchanan went so far as to recommend that the United States assume the role of temporary protectorate over the northern portions of Chihuahua and Sonora because the Mexican frontier was in a "state of anarchy and violence," but he also indicated that the United States would withdraw itself "as soon as local governments shall be established in these Mexican States capable of performing their duties to the United States, restraining the lawless, and preserving peace along the border."¹⁴⁹

What if the territorial state's forces are not fully adequate to achieve the task, but are improving? One reason that states may have condemned Russia's use of force in Georgia in 2002 is that Georgia was in the process of improving its military forces' capacity. In April 2002, the United States announced that it had initiated the "Georgia Train and Equip Program" (GTEP). According to the Department of Defense, "This program implements President Bush's decision to respond to the Government of

145. Stevenson Speech, *supra* note 98, at 4.

146. Timothy Guiden, *Defending America's Cambodian Incursion*, 11 ARIZ. J. INT'L & COMP. L. 215, 230 (1994).

147. *Id.* at 231; KEITH NOLAN, INTO CAMBODIA 74 (1990); C.L. Sulzberger, *Foreign Affairs: How the War Must End*, N.Y. TIMES, Apr. 9, 1969, at 46.

148. Moore, *supra* note 53, at 54.

149. 2 JOHN BASSETT MOORE, *Plea of Necessary Self-Defense: Pursuit of predatory Indians and other marauders*, in A DIGEST OF INTERNATIONAL LAW 418, 421 (1906) (citing communication from U.S. Secretary of State Marcy to Mexican Minister Almonte regarding President Buchanan's statements concerning the use of force in Mexico).

Georgia’s request for assistance to enhance its counter-terrorism capabilities and address the situation in the Pankisi Gorge.”¹⁵⁰ Given these efforts, other states may have viewed Russia as deliberately ignoring evidence of Georgia’s willingness and improving ability to respond to the very threat on which Russia was focused.

5. *Proposed Means to Suppress the Threat*

Although there are few examples of a victim state’s efforts to review a territorial state’s proposed means to respond to the threat, it is imperative that, if faced with such a proposal, the victim state must reasonably assess the actions that the territorial state has proposed.¹⁵¹ This assessment, which has both procedural and substantive elements, would serve several functions. Most obviously, it would advance the victim state’s efforts to determine the territorial state’s ability and willingness to address the threat by bearing down on the details of how the territorial state proposes to apply its capabilities to the situation at hand. It also would force the victim state to focus on the second part of that inquiry: What steps *are* required to suppress the threat effectively? The victim state will be forced at this point to make its ultimate assessment about the proper allocation of burdens: Is the territorial state actually able to bear the burden of using force effectively in a lower cost way than the victim state, or is the victim state persuaded that it must employ force itself within the territorial state’s borders?

An example puts this factor in context. Assume Macedonia has suffered repeated armed attacks from a 1000-person-strong rebel group in Bulgaria, and Bulgaria informs Macedonia that it plans to send federal police into the area from which the group is operating to arrest them. Macedonia believes that only the use of Bulgaria’s military forces will bring an end to the attacks, given the group’s size, organization, and stockpiles of military-grade weapons. May Macedonia consider Bulgaria to be “unwilling” to address the threat?

Here, the approach must be what a “reasonable state” believes would accomplish the core goal of the victim state: avoiding further armed attacks by the nonstate actors operating from within the territorial state. In the context of analyzing the use of force in anticipatory self-defense,

150. Press Release, U.S. Dep’t of Def., Georgia ‘Train and Equip’ Program Begins, (Apr. 29, 2002), available at <http://tinyurl.com/6rmeml8>; see also JENNIFER D. P. MORONEY ET AL., BUILDING PARTNER CAPABILITIES FOR COALITION OPERATIONS 67 (2007) (“The main purpose of GTEP was to train and equip the Georgian battalions using company infantry tactics with the intended goal of managing the volatile Pankisi Gorge region.”).

151. One reason for the lack of examples may be due to the indeterminacy of the current “unwilling or unable” test, such that victim states generally have not asked territorial states to propose how they would address the threat. Another reason may be that the victim and territorial states have conducted their exchanges privately.

Michael Schmitt has described what constitutes a reasonable state: “Reasonable States do not act precipitously, nor do they remain idle as indications that an attack is forthcoming become deafening.”¹⁵² Waxman is doubtful that there is a single “reasonable state” in international self-defense law

akin to the hypothesized ‘reasonable person’ of many domestic law contexts. Vast disparities in power, wealth, prestige, interests, and political systems make it impossible to discern a single, universal standard. Instead the question becomes: How would a reasonable state in the position of the one claiming a right to use force act? That is hard to answer without delving into the complex strategic calculus of individual state decisionmaking.¹⁵³

Even if it is difficult to envision a comprehensive objective test for how a “reasonable victim state” should behave, a reasonable state in this context at least would evaluate in good faith and with an objective eye the territorial state’s proposal, keeping in mind both those actions that it has determined are necessary to suppress the threat and the practical limitations that any state likely would face in addressing that particular threat. In cases of doubt, the victim state should err on the side of acquiescing to the territorial state’s plan. If subsequent events make clear that the territorial state’s plan is insufficient, the victim state would have leeway to reconsider that state’s ability to suppress the threat.

A reasonable victim state should take into account that even a state with a robust military capacity is unlikely to be able to suppress the threat fully.¹⁵⁴ A plan by a territorial state that does not anticipate complete success in rooting out every last member of the nonstate group does not necessarily indicate that the territorial state is unwilling or unable. The United States made this point to the United Kingdom in the *Caroline* case when it described the U.S.-Canadian border as “a frontier the extent of which renders it impossible for either [the United Kingdom or the United States] to have an efficient force on every mile of it, and which outbreak, therefore, neither may be able to suppress in a day.”¹⁵⁵

Although the victim state ultimately must decide whether the territorial state’s plan (or actions, if the territorial state acts without consulting the victim state) is sufficient to meet the threat, an expectation *ex ante* that the

152. Michael Schmitt, *Responding to Transnational Terrorism Under the Jus ad Bellum: A Normative Framework*, in *INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES* 194 (Schmitt & Pejic eds., 2007).

153. Waxman, *supra* note 75, at 50.

154. Sofaer, *supra* note 63, at 210 (“[N]o amount of preparation and technological sophistication will enable the US and other target states to prevent all serious terrorist attacks, or even to limit such attacks to a tolerable level.”).

155. Letters between U.S. Secretary of State Daniel Webster and U.K. Foreign Secretary Lord Ashburton, encl. 2 (July 27, 1842), available at http://avalon.law.yale.edu/19th_century/br-1842d.asp.

victim state must act reasonably imposes some de facto constraints on that state.¹⁵⁶ For instance, if it became known publicly that the territorial state had proposed a particular approach that seems reasonable to most states in the international community but that the victim state rejected, the victim state’s subsequent use of force in the territorial state is unlikely to be viewed as legitimate. A requirement that the victim state reasonably assess the territorial state’s proposed means to assess the threat also helps properly allocate the burden of using force and give due deference to the territorial state’s equities, for a proposal by a territorial state that promises to be reasonably effective is an indication that the territorial state views itself as better positioned to bear the burden of using force.

6. *Prior Interactions With the Territorial State*

As a substantive way to further assess the territorial state’s willingness and ability to respond to the threat, the victim state should evaluate its prior interactions with the territorial state on issues related to the attacking nonstate actor. For instance, it should assess what the territorial state has done in response to any previous requests to take steps against the nonstate actors or other groups conducting armed attacks against the victim state. It generally will be appropriate for a victim state to draw inferences about a territorial state’s likely future behavior from its past actions in similar circumstances, particularly where the prior requests related to the same nonstate actor. One situation in which it may not be appropriate to do so is when the territorial state’s circumstances have changed significantly since the time of the prior request — a regime change, for example, or an improvement in the capacity of the territorial state’s armed forces.

The United Kingdom’s frustration with the U.S. reaction to prior U.K. requests to suppress rebel attacks is apparent in one of its letters to the United States regarding the *Caroline* incident. The United Kingdom noted, “Remonstrances, wholly ineffectual were made; so ineffectual indeed that a Militia regiment, stationed on the neighbouring American island, looked on without any attempt at interference, while shots were fired from the American island itself.”¹⁵⁷ Indeed, President Van Buren previously had released from U.S. custody a Canadian rebel in an attempt to win support in his reelection campaign.¹⁵⁸ Clearly, evidence that the territorial state’s forces knowingly stood by while a group engaged in armed attacks against the victim state gives that state a strong reason to infer that the territorial state will be unable or unwilling to act in response to the latest attack.

156. See discussion *supra* Part I.C, assuming that the Security Council is not seized with the issue.

157. Letters between Daniel Webster and Lord Ashburton, *supra* note 155.

158. Sofaer, *supra* note 63, at 217.

Even requests made well before the contemporary incident provide relevant data points for the victim state. President Clinton, defending U.S. missile strikes on suspected al-Qaida targets in Sudan and Afghanistan, noted that “Afghanistan and Sudan have been warned for years to stop harboring and supporting these terrorist groups.”¹⁵⁹ Even if a territorial state has not responded favorably to prior requests, however, the victim state nevertheless should make a new request. If the territorial state declines to act or fails to reply, this provides further evidence of a territorial state’s unwillingness and increases the legitimacy of the victim state’s decision.

As a related matter, it is appropriate for the victim state to view prior attacks that it has suffered from actors within the territorial state as substantive indications of the territorial state’s inability or unwillingness to act. A victim state may even draw inferences from prior attacks by those actors against third states. Conversely, if a state’s territory never before has served as a launching pad for an attack by a nonstate actor, the victim state should be more cautious in concluding that the territorial state is unwilling or unable to address the threat.¹⁶⁰

States naturally will draw these inferences. Indeed, victim states frequently consider previous armed attacks from within a territorial state when assessing that state’s willingness and ability. For instance, in defense of its decision to use force against bases in Senegal that hosted anti-Portuguese organizations, Portugal referred to “many border violations involving firing of mortars and heavy artillery from Senegal” as well as “armed attacks in which Senegalese troops had sometimes participated.”¹⁶¹ Israel defended its bombing of the PLO’s headquarters in Tunisia by arguing that, for the year preceding the bombing, those headquarters “had organized and launched hundreds of terrorist attacks against Israel, Israeli targets, and Jews everywhere.”¹⁶² In the case of the *Caroline*, the United Kingdom “specifically warned the [United States] that it could not tolerate ‘ruffians and brigands . . . again and again, to issue forth from within the jurisdiction of the United States, for the ruin of Her Majesty’s subjects.’”¹⁶³

159. Sean Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT’L L. 161, 162 (1999).

160. Where a state is contemplating a use of force to counter an imminent threat of attack by a nonstate actor, that “victim” state must be particularly cautious, as there may therefore be no prior attacks at all from which it can draw inferences about the territorial state’s willingness or capacity.

161. 1969 U.N.Y.B. 138, 141 (stating also that Portugal defended its bombings of several Guinean villages by referring to “one incident in August and ten in November 1969, when six frontier villages [in Portuguese-held Guinea-Bissau] had been attacked by rocket, mortar, and long-range artillery coming directly from inside Guinea”).

162. 1985 U.N.Y.B. 288.

163. Sofaer, *supra* note 63, at 217; *see also id.* at 219 (“[U.K. Foreign Secretary] Palmerston recounted the many hostile acts that had taken place on Canadian territory that originated in New York and included Americans.”).

Each of these factors serves one or more of the three goals articulated in Section A. Some, such as the requirement to prioritize consent or cooperation, seek to reduce the overall number of cases in which the victim state uses force unilaterally in the territorial state. Others, such as the requirement to reasonably assess the territorial state’s level of control over its territory, serve to legitimize the victim state’s acts where that control objectively is lacking (and to delegitimize those acts where the territorial state manifests a strong level of control). Still others establish procedural steps that, if taken, ensure that the victim state’s decision is as informed as possible and give the international community an accessible framework in which to structure their inquiries into the victim state’s use of force.

As with any factor-based test, these factors face the criticism that they allow the victim state too much discretion in determining the answer to the inquiry. As with most situations in international relations, though, there often will be no one fact that clearly establishes that a territorial state is unwilling or unable to suppress the threat that the victim state faces. The factors are there to guide the victim state through this ambiguity and improve its decision-making without dictating a one-size-fits-all answer. Collectively, these factors will contribute to a more coherent consideration by the affected states and the international community of particular uses of force, both *ex post* and *ex ante*.¹⁶⁴

IV. APPLYING THE ENHANCED TEST

This Part applies the factors elucidated in Part III to a real world situation in which Colombia used force in neighboring Ecuador in 2008 against a nonstate armed group. I chose this situation for several reasons:

164. There are several difficult issues that a robust “unwilling or unable” test cannot fully resolve. For instance, the victim and territorial states may disagree about the source of the attack, and thus disagree about whether the entity that the victim state sought to hit was lawfully targetable. A robust application of the “unwilling or unable” test could limit the number of these cases by fleshing out (and offering an opportunity to resolve) disagreements between the victim and territorial states before the victim state uses force. As an historical matter, I did not locate any examples of this type of disagreement. Another difficult situation occurs where the victim state hits something other than the entity it planned to hit in the territorial state, because (for example) a missile went off course, or because the victim state had bad intelligence about the location of the target. Flawed targeting is an inevitable problem associated with the use of force. It is a particularly thorny problem when the victim state is using force within the boundaries of a state with which it is not in conflict, because these types of errors may broaden the violence beyond the narrower victim state/nonstate actor tensions. The “unwilling or unable” test offers little relief for this type of problem. Fortunately, as an 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.

Its facts offer a paradigmatic example of a situation in which the “unwilling or unable” test is relevant, many facts about the incident are public, it led to a serious bilateral crisis, it occurred recently, and there was no significant political baggage between the states involved.

This Part concludes that the existence at the time of a clearer, more detailed “unwilling or unable” test would have improved in significant ways the affected states’ decision-making and the subsequent debate within the international community about the propriety of Colombia’s actions. Specifically, this Part concludes that use of the Part III factors would have led Colombia to assess the facts more systematically before acting (though it might still have proceeded to use force) and to have articulated a more coherent and consistent rationale for its actions, fostered a more structured and legally accurate discussion after the fact in the Organization of American States (OAS), and helped Colombia avoid having to make certain unrealistic future commitments. It might also have prompted Ecuador to act with greater vigilance against FARC personnel on a regular basis and thus have obviated the need for Colombia to use force. Finally, use of the factors would have allowed states to identify more readily and accurately the primary areas of disagreement between Colombia and Ecuador and to isolate the key questions that need to be answered to determine whether Colombia’s use of force was consistent with international law.

A. Nature of the FARC

In 2008, Colombia bombed a FARC camp just inside Ecuador’s border, killing the FARC’s second-in-command, Raul Reyes.¹⁶⁵ Colombia viewed the attack as a significant victory in its fight against the FARC, but Ecuador was irate.¹⁶⁶ A serious diplomatic clash ensued.¹⁶⁷ Colombia claimed that it had acted in self-defense, but Ecuador asserted that Colombia should have sought its consent and objected to the bombing as a patent violation of its sovereignty.¹⁶⁸ Could Colombia correctly have concluded that Ecuador was unwilling or unable to suppress the threat posed by Reyes and other FARC members, such that it was lawful for it to use force in Ecuador’s territory without consent?

Before examining how the use of the factors would have improved Colombia’s decision-making and other states’ evaluations of the act’s lawfulness, I discuss the nature of the FARC and Colombia’s assertion that the March bombing was based on its right of self-defense against that group. It is important to understand the nature of the FARC because

165. *See* Waisberg, *supra* note 72.

166. *Id.*

167. *Id.*

168. *Id.*

Colombia’s assessment of the group presumably infused its assessment of Ecuador’s willingness and ability to suppress the threat.¹⁶⁹

The FARC is an experienced, well-funded, and well-armed rebel group that conducts terror attacks primarily in and against the Colombian state.¹⁷⁰ Its tactics include “bombings, murder, mortar attacks, kidnapping, extortion, and hijacking, as well as guerrilla and conventional military action against Colombian political, military, and economic targets.”¹⁷¹ Founded in the mid-1960s, the FARC is very wealthy; by one estimate, it receives between \$500 million and \$600 million annually from the illegal drug trade.¹⁷² Colombia’s efforts to defeat the FARC have ebbed and flowed. By 2007, although Colombia had made substantial gains against the group, the FARC still had about 10,000 members and was responsible for 349 attacks that year.¹⁷³

According to the U.S. State Department, in the year before Colombia undertook the attack at issue, the FARC had engaged in the following terrorist acts:

- (1) In March 2007, a bomb attack killed six people and injured more than ten people in Buenaventura.
- (2) Also in March, a car bomb attack attempted but failed to assassinate Neiva Mayor Cielo Gonzalez.
- (3) In April, a bomb detonated in front of the Cali police headquarters killed one person, injured more than thirty, and destroyed the building.
- (4) In June, eleven department legislators from Valle del Cauca held hostage since 2003 were murdered while in FARC custody.
- (5) In October, a grenade attack at a campaign headquarters in Puerto Asís killed two people and injured six others.
- (6) In December, the FARC again attempted but failed to assassinate Neiva Mayor Cielo Gonzalez in a rocket attack.¹⁷⁴

169. *See supra* Part III.D.2 (discussing the nature of the threat posed by the nonstate actor as a factor the victim state must consider).

170. For a general description of the FARC as of 2009, see INT’L CRISIS GROUP, ENDING COLOMBIA’S FARC CONFLICT: DEALING THE RIGHT CARD 4 (Mar. 26, 2009), available at <http://tinyurl.com/7y8stv4>.

171. National Counter-Terrorism Center, *Revolutionary Armed Forces of Colombia* (2011), <http://tinyurl.com/ydxsf8ws>.

172. Stephanie Hanson, *FARC, ELN: Colombia’s Left-Wing Guerillas*, COUNCIL ON FOREIGN REL. (Aug. 19, 2009), <http://tinyurl.com/8xg549e>.

173. Gabriel Marcella, *War Without Borders: The Colombia-Ecuador Crisis of 2008*, 2008 STRATEGIC STUD. INSTIT. 16 (2008).

174. *Country Reports on Terrorism 2007 (Western Hemisphere Overview)*, U.S. DEP’T OF STATE (April 30, 2008), <http://tinyurl.com/6mrwbpt> [hereinafter *Country Reports on Terrorism 2007*].

According to Ploughshares, Colombia's guerilla war has caused more than 40,000 deaths since 1990, most of them civilians.¹⁷⁵ Raul Reyes, the target of Colombia's March 2008 attack, was believed to serve as the FARC's second-in-command.¹⁷⁶ He faced 121 criminal charges in Colombia, including for his involvement in massacring 119 women, children, and elderly in Bojaya in 2002 and for assassinating Colombia's Minister of Culture in 2001.¹⁷⁷ Colombian officials believed that Reyes's death might deliver a "critical blow" to the FARC.¹⁷⁸

The FARC appears to have operated from within Ecuador for years.¹⁷⁹ At the time of the raid, the FARC maintained multiple camps in Ecuador; one scholar reports that, in the days before the attack, "Reyes had been moving around various camps in Ecuadorean territory."¹⁸⁰ Indeed, Ecuador asserted that it destroyed forty-seven FARC camps in Ecuador in 2007.¹⁸¹ The camp that Colombia raided on March 1 appeared to be several months old and boasted several amenities.¹⁸² These camps served as a basis for launching attacks against Colombia: President Uribe stated that the FARC had conducted some forty incursions from Ecuadorean territory in the five years preceding the air strike.¹⁸³ In sum, the FARC had a relatively robust presence in Ecuador, took advantage of that presence to plan and launch attacks in Colombia, and employed significant levels of violence against the Colombian state in the period leading up to the March 2008 airstrike.

175. PLOUGHSHARES, *Armed Conflicts Report: Colombia* (Jan. 2010), <http://tinyurl.com/6pbsqow>. This number may include deaths from the conflict with the ELN as well.

176. See Waisberg, *supra* note 72.

177. STAFF OF S. COMM. ON FOREIGN RELATIONS, 110TH CONG., 2D SESS., PLAYING WITH FIRE: COLOMBIA, ECUADOR, AND VENEZUELA 1 (April 28, 2008) [hereinafter SFRC Report]; Hanson, *supra* note 172; Marcella, *supra* note 173, at 9.

178. SFRC Report, *supra* note 177, at 5.

179. Sibylla Brodzinsky, *On Ecuador's Border, FARC Rebels Visit Often*, CHRISTIAN SCI. MON., Mar. 10, 2008, at 7, available at <http://tinyurl.com/75mexau> ("Locals [in Ecuador] say that Colombian rebels constantly slip over the border and set up camp in the thick jungle that covers the area."); *id.* (describing Ecuador's complaints about past Colombian Army incursions into Ecuador); *On the Warpath*, ECONOMIST, Mar. 6, 2008, at 43 (noting that Ecuador and Colombia "have long swapped complaints" about their mutual inability to prevent the FARC from crossing the border).

180. Marcella, *supra* note 173, at 5.

181. Brodzinsky, *supra* note 179.

182. See SFRC Report, *supra* note 177, at 24 (noting that Ecuador's Minister of Defense stated that the camp was two to three months old); Marcella, *supra* note 173, at 6 ("The FARC camp had been in existence for at least 3 months, disposing of such amenities as beds, two gasoline powered generators, a satellite dish, TV, training area, chicken coop and pig pen, and stored food, in addition to an arsenal of weapons.").

183. See Marcella, *supra* note 173, at 21.

B. *Colombia's Use of Force*

Putting aside questions related to *where* Colombia used force on March 1, 2008, was Colombia's use of force a legitimate act of self-defense against the FARC?

Colombian President Alvaro Uribe defended Colombia's incursion into Ecuador as an act of self-defense, though he (and other Colombian officials) failed to articulate the specific nature of that claim. Colombia initially stated that on March 1, Colombian forces were in the process of bombing a site within Colombia when their helicopter units came under attack from individuals located within the Ecuadorean border.¹⁸⁴ It thus portrayed the subsequent use of force in Ecuador as a direct response to incoming fire from Ecuador. In its discussions with an OAS delegation, Colombia stated that the clash began in Colombia, with the rebels fleeing into Ecuador, such that Colombia's use of force there was a matter of “hot pursuit.”¹⁸⁵ Ecuador challenged these accounts, arguing that the raid on the FARC camp in Ecuador was preplanned.¹⁸⁶ These accounts portray two different scenarios: one in which Reyes and his associates were engaged in active hostilities with the Colombian military when Colombia targeted them, and one in which Reyes and his associates were not actively engaged in a military exchange with the Colombian military when Colombia targeted them.

By most accounts, Colombia is in a non-international armed conflict with the FARC — that is, the FARC is an organized nonstate armed group and the level of hostilities between the FARC and the government rises above that of sporadic acts of violence.¹⁸⁷ Based on the FARC's history of staging armed attacks against Colombia from within Ecuador and the likelihood that it would continue to do so, the Colombian Government therefore reasonably could conclude that it was entitled as a matter of self-defense to use force against the FARC to prevent future attacks.¹⁸⁸ This does not answer the second inquiry related to the lawfulness of Colombia's

184. Reply of the Ministry of External Affairs to the Government of Ecuador regarding Ecuador's Note Verbale 10230, Mar. 2, 2008, *available at* <http://tinyurl.com/85uebrd>.

185. SFRC Report, *supra* note 177, at 27.

186. *Id.* at 26.

187. The ICRC characterizes the fighting between the FARC and the Government of Colombia as an armed conflict. See Int'l Committee of the Red Cross, *Colombia: The Armed Conflict in the South Continues to Affect the Lives of Thousands*, (Sept. 8, 2010), <http://tinyurl.com/88p9ert> (referring repeatedly to the “armed conflict” between Colombia and the FARC).

188. See text accompanying note 27. I do not discuss the *jus in bello* question of whether Reyes himself was a lawful target. Given his leadership role in the FARC, however, there are strong arguments that Colombia lawfully could target Reyes either because he clearly was a member of the FARC or because he performed a “continuous combatant function” for the FARC. See Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, INT'L COMMITTEE OF THE RED CROSS 27 (2009) (noting that the decisive criterion for individual membership in an organized armed group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities).

act, however: whether Colombia lawfully could use force against Reyes in another state's territory. That is the work of the "unwilling or unable" inquiry.

C. *Applying the Factors*

1. *Basic Facts*

In applying the factors, the facts must play a foremost role. The basic facts of the 2008 incident are not disputed, although some details of the event are. On March 1, 2008, eight Colombian Air Force planes in Colombian airspace launched precision-guided bombs at a target less than two kilometers inside Ecuador's border with Colombia, in an attempt to kill Reyes.¹⁸⁹ The bombs killed Reyes and about twenty other people at the camp.¹⁹⁰ Colombian ground forces then entered Ecuador to retrieve the bodies, as well as documents and computer hardware.¹⁹¹ Nine hours later, President Uribe called Ecuadorean President Correa to inform him of the operation.¹⁹² Ecuador, angry that it had not received advance notification or a request from Colombia for assistance, broke off diplomatic relations.¹⁹³ A heated diplomatic exchange ensued, leading to what Senator Richard Lugar called "the region's worst diplomatic crisis in years,"¹⁹⁴ and Ecuador sent thousands of troops to its border with Colombia.¹⁹⁵

On March 5, the OAS condemned Colombia's actions as a violation of international law.¹⁹⁶ In its resolution, the OAS invoked the principle that "the territory of a state is inviolable and may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatsoever."¹⁹⁷ A Declaration by the Heads of State of OAS Members several days later was more moderate, denouncing the Colombian incursion and reasserting that "no state or group of states has the right to intervene, either directly or indirectly, for any reason whatever, in the internal or external affairs of any other State," but also reiterating its members' commitment to fight

189. Marcella, *supra* note 173, at 1–2.

190. *Id.* at 2.

191. *On the Warpath*, *supra* note 179.

192. Luz E. Nagle, *Colombia's Incursion into Ecuadorean Territory: Justified Hot Pursuit or Pugnacious Error?*, 17 J. TRANSNAT'L L. & POL'Y 359, 360 (2008).

193. *Id.*

194. SFRC Report, *supra* note 177, at v. Although Colombia did not use force in Venezuelan territory, President Chavez criticized Colombia vociferously and cut off diplomatic relations. *Id.*

195. Brodzinsky, *supra* note 179.

196. Org. of Am. States, Convocation of the Meeting of Consultation of Ministers of Foreign Affairs and Appointment of a Commission, OAS/CP/RES/930 (1632/08) (Mar. 5, 2008).

197. *Id.*

irregular groups.¹⁹⁸ President Uribe subsequently pledged that Colombia would not conduct this type of bombing in the future.¹⁹⁹

Colombia’s defense of its actions and the discussion of those actions by other states in the OAS were rudimentary at best and incoherent at worst. The use of Part III’s factors as the framework for decision-making and analysis would have forced Colombia to analyze more methodically whether to act in Ecuadorean territory (unless Colombia really was engaged in a hot pursuit mission), and therefore rendered it able to articulate more clearly the underlying legal basis for its action. Similarly, the debate in the OAS would at least have considered whether Colombia had a colorable claim to self-defense and would have fostered a more methodical conversation about what Ecuador had and had not done — previously and in the current case — to address the FARC’s presence in its territory.

Instead, Colombia failed to articulate clearly the legal basis for its actions, including by failing to invoke the “unwilling or unable” test and describe why it might credibly have believed that Ecuador was unwilling or unable to address the threat that Raul Reyes posed. The OAS adopted a resolution that appeared to reject entirely the concept of national self-defense, failed to discuss or give credence to the history of the FARC’s presence in Ecuador, and failed to analyze the steps Ecuador previously had taken to address that presence. Although the OAS and others ultimately were able to mediate a diplomatic solution to the crisis, it would have been preferable as a matter of international law (including for precedent-setting reasons) for all participants to have understood and wrestled coherently with the legal propositions at issue.

2. *Preference for Consent or Coordination*

The Government of Colombia chose not to seek the consent of the Government of Ecuador before it used force in Ecuadorean territory. Assuming that the raid on the Reyes camp was preplanned, Colombia likely would have had time to do so. Had Colombia obtained Ecuador’s consent to conduct the raid, the diplomatic fallout that ensued would have been significantly diminished. Indeed, the use of force might have passed unnoticed on the international stage.

There was precedent for the two countries working together: They previously had conducted three joint military missions against the FARC.²⁰⁰ However, those joint missions appear to have been the exception rather than the rule. Colombia and Ecuador periodically engaged

198. Org. of Am. States, Declaration of the Heads of State and Government of the Rio Group on the Recent Events Between Ecuador and Colombia, OEA/Ser. G, CP/INF. 5653/08 (Mar. 7, 2008).

199. SFRC Report, *supra* note 177, at 30.

200. *Id.* at 2.

in mutual finger-pointing, with Ecuador complaining that Colombia failed to take adequate steps to contain its internal conflict, and Colombia arguing that Ecuador took insufficient action to fight the FARC presence in Ecuador.²⁰¹ Nevertheless, the two states had cooperated at times, and Ecuador easily could have pointed to this cooperation as a reason Colombia should have sought its consent.²⁰² Colombia's decision not to prioritize consent or coordination put it on its back foot in defending its actions.

3. *Request to Address the Threat*

As a related matter, having become aware of Reyes's presence at a particular camp, Colombia chose not to ask Ecuador to address the threat.²⁰³ Thus, Colombia could not argue that its demand for assistance had proven unavailing — at least in this case. However, as noted in Part III, there may be certain limited situations in which a state should not be required to urge the territorial state to act, such as when the victim state is confident that doing so will adversely affect its national security. Colombia appears to have had a reason to be concerned about revealing its plans to Ecuador in advance by asking it to engage with Reyes. When asked why Colombia had not sought Ecuador's support for the raid, Colombia's Defense Minister responded, "Because we didn't trust Ecuador."²⁰⁴ This is hardly an articulate argument about a point that is central to a determination about whether it was reasonable to classify Ecuador as "unwilling" to take steps against Reyes: whether Ecuador was providing assistance or support to the FARC.

After the fact, it is clear why Colombia might have been concerned about taking an action that would have made Ecuador aware that Colombia knew Reyes's location. The computer files that Colombia seized from the FARC camp indicated that Ecuador's security minister had met with Reyes the month before.²⁰⁵ Colombia stated that "one document revealed an offer by the Ecuadorean government to transfer police and army commanders in the area who proved hostile to the FARC."²⁰⁶

201. See Brodzinsky, *supra* note 179; see also Marcella, *supra* note 173, at 19 (noting that in 2005 the Ecuadorean armed forces identified some twenty-five illegal border crossing points and argued that Colombia should have been aware of those crossings as well).

202. Ecuador's criticism of the raid focused in large part on its lack of consent. See SFRC Report, *supra* note 177, at 7 ("According to GOE officials, the GOC had an obligation on March 1, 2008, to notify Ecuador of its intent to raid the camp.")

203. Again, this assumes that the raid was preplanned. If Colombia's story is true, there would have been no time for Colombia to ask Ecuador to suppress the threat that Reyes posed, as he was in the process of firing at Colombian forces from a remote part of the Ecuadorean jungle.

204. Marcella, *supra* note 173, at 10.

205. *On the Warpath*, *supra* note 179.

206. Patrick Markey, *Colombia Says FARC Documents Show Correa Ties*, REUTERS (Mar. 2, 2008), <http://tinyurl.com/6scjyk2>.

Additional information in those files showed that the FARC had contributed \$100,000 to Correa’s 2006 campaign.²⁰⁷ Although Ecuador and Venezuela accused Colombia of tampering with the files, INTERPOL later confirmed that no user files had been created, modified, or deleted in the wake of their seizure on March 1 and that Colombia had followed internationally recognized principles in handling the electronic evidence.²⁰⁸ If Ecuador’s leadership had a close relationship with the FARC, it would be reasonable for Colombia to assume that Ecuadorean officials, told that Colombia knew that Reyes was present in a particular location, might have tipped Reyes off to the raid, seriously compromising Colombia’s national security.

These pieces of evidence came to light only after the attack, however. Colombia’s case would have been much stronger if at the time of the raid it possessed (and later shared publicly) some quantum of intelligence suggesting that such a link existed. The documents discovered in the raid would have bolstered that intelligence after the fact. Thus, the use of this factor would have helped isolate a particular question that, if Colombia could explain satisfactorily, would have rendered persuasive Colombia’s implicit argument that Ecuador was unwilling to assist.²⁰⁹

4. *Reasonable Assessment of Territorial Control and State Capacity*

If Colombia had been uncertain about Ecuador’s willingness to address the threat posed by Reyes, but open to the possibility that Ecuador might be willing, could Colombia nevertheless reasonably have concluded that Ecuador would be unable to do so? After all, Reyes was a senior FARC operative who presumably was well-protected and operationally savvy, and who was located in a remote corner of Ecuador’s territory.

In analyzing Ecuador’s control over its territory, Colombia would have had to consider the following types of information. Ecuador reportedly deployed thirteen military units consisting of 8000 personnel to patrol the Ecuadorian-Colombian border.²¹⁰ The border area is dense jungle, and some argue that Ecuador’s forces are not equipped to manage the threat.²¹¹ It took the Ecuadorean Army six hours to reach the site of the March 2008 attack, which occurred in an area so remote that the last

207. Simon Romero, *Files Suggest Venezuela Bid to Aid Colombia Rebels*, N.Y. TIMES (Mar. 30, 2008), <http://tinyurl.com/7olrajc>.

208. Frank Walsh, *Rethinking the Legality of Colombia’s Attack on the FARC in Ecuador: A New Paradigm for Balancing Territorial Integrity, Self-Defense and the Duties of Sovereignty*, 21 PACE INT’L L. REV. 137, 146 (2009).

209. Because Colombia did not ask Ecuador to defeat the threat, the requirement that Colombia give Ecuador reasonable time to respond to its request is not relevant here.

210. Nagle, *supra* note 192, at 379–80.

211. Marcella, *supra* note 173, at v–vi (“Though [Ecuador’s] military was extensively deployed on the border, it lacked the logistics to deal with the threat.”).

Ecuadorean patrol there had taken place a year earlier.²¹² Correa himself acknowledged the ungoverned nature of the area in an interview in April 2008, when he stated, “A great part of the population, especially in the Amazon, supports the FARC because the Colombian and the Ecuadorean state is (sic) not there”²¹³ Supporting that assertion is the fact that Colombian officials had identified some thirty-two FARC camps in Ecuador before the March attack.²¹⁴ Several weeks after the March attack, President Correa announced that Ecuador would purchase twenty-four aircraft and a radar system for border defense.²¹⁵ Thus, Ecuador itself subsequently recognized that it would benefit from additional capacity to deal with the FARC. In the view of the U.S. State Department, Ecuador in 2007 “publicly expressed its desire to eliminate FARC presence within Ecuadorian territory. Despite some notable successes in this effort, insufficient resources and the challenging border region terrain have made it difficult to thwart cross-border incursions.”²¹⁶

The Ecuadorean military faced more systemic problems as well. By April 2008, Correa, who then had been in power just over a year, had appointed four different defense ministers, none of whom was knowledgeable about defense strategy.²¹⁷ And certain facts discussed below suggest that the military forces themselves may accept bribes from the FARC to ignore their presence.²¹⁸

On the other hand, Ecuador appears to have manned the border more extensively than Colombia has and, as discussed below, has conducted dozens of raids on FARC camps.²¹⁹ Ecuador’s Foreign Minister has stated that Ecuador places 11% of its military and police on the border with Colombia, while Colombia places a mere 2% there.²²⁰ In sum, based on what Colombia knew at the time of the March raid, there was contradictory information about whether Ecuador exercised sufficient control of the territory where Reyes was located and had forces that were sufficiently capable (and incorruptible) to be “able” to act against Reyes.

5. *Proposed Means to Address the Threat*

If Colombia had sought assistance from Ecuador, what type of response might it have received? There is history from which to draw, and

212. *Id.* at 3.

213. *Id.* at 30.

214. SFRC Report, *supra* note 177, at 5.

215. Marcella, *supra* note 173, at 4, 33.

216. *Country Reports on Terrorism 2007*, *supra* note 174.

217. Marcella, *supra* note 173, at 12.

218. *See infra* text accompanying note 227.

219. *See* SFRC Report, *supra* note 177, at 8; Marcella, *supra* note 173, at 25; Nagle, *supra* note 192, at 379–80.

220. Marcella, *supra* note 173, at 27–28.

Ecuador was in a reasonable position to argue — as it did — that “they would not have had a problem capturing and extraditing Reyes to Colombia if GOC officials had requested it. According to GOE Military officials the Ecuadorean military was only minutes from capturing him last November.”²²¹ This statement cuts both ways, however. On one hand, Ecuador likely would have been willing to transfer Reyes to Colombia if it had captured him. On the other hand, Ecuador previously had been unable to capture Reyes when it had him in its sights.

In arguing that its proposed means to address the threat would have worked, Ecuador presumably would have pointed to one important past success in detaining a FARC leader in Ecuador. In 2004, Ecuador detained Simon Trinidad, one of seven members of the FARC’s secretariat, during a routine document check in Quito, and transferred him to Colombia.²²² Then-Ecuadorean President Gutierrez called President Uribe to tell him the news, and was quoted as saying, “I think this really helps maintain excellent relations between our two countries and improves regional security.”²²³ Thus, Ecuador previously evidenced a willingness to detain FARC leaders and transfer them to Colombia, albeit under a different government from President Correa’s.

The facts were different in this case, of course. Reyes was not in Quito facing a document check by local police. He was deep in the jungle, where Ecuador appears to have far more limited success detaining FARC members. In weighing which state could act effectively at the lowest cost, Colombia presumably also took into account the strength and capabilities of its own air force and the advantages of acting against Reyes with the speed that its aircraft provided.

6. *Prior Interactions Between Colombia and Ecuador*

By a number of accounts, Ecuador has taken repeated steps to address the FARC’s presence in its territory, whether at the request of Colombia or for other reasons. Colombia thus had a significant amount of evidence to evaluate in assessing how Ecuador might have responded to a request for assistance with Reyes.

For instance, according to one scholar, Ecuador has dismantled 170 FARC camps and destroyed cocaine labs and coca plantings over the years.²²⁴ According to Bogotá’s *El Tiempo*, Colombia’s intelligence service told Ecuador sixteen times about the presence of FARC camps inside Ecuadorean territory and provided Ecuador with the exact location of

221. SFRC Report, *supra* note 177, at 7.

222. *Senior Colombian Rebel Leader Arrested*, AP (Jan. 3, 2004), <http://tinyurl.com/7wvfv8>.

223. *Id.*

224. Marcella, *supra* note 173, at 27.

twenty-five such camps.²²⁵ In 2007 alone, Ecuador claimed that it destroyed forty-seven FARC camps, though it is unclear whether Ecuador took steps against each of the twenty-five bases that Colombia identified.²²⁶

While Ecuador seems to have destroyed FARC camps, it did not appear to have engaged or detained any FARC personnel in the period leading up to March 2008. An Ecuadorean officer in a special forces battalion who personally participated in destroying eighteen camps noted, “By the time we get there the rebels are gone They have always tried to avoid contact with us because they know it would complicate things.”²²⁷ Colombia might have found it suspicious that Ecuadorean forces never had encountered FARC members in the camp when they arrived to destroy them, as this suggests pre-coordination with the FARC. In addition, Ecuador has stated that it prefers to deal with the FARC problem by investing in the region, thus providing a disincentive for local Ecuadorians to work with and support the FARC.²²⁸ Colombia may have read this approach as evidencing Ecuador’s lack of enthusiasm for the use of coercive measures against the group.

The U.S. State Department summarized Ecuador’s efforts in the year preceding the 2008 raid as follows:

Despite constraints on their resources and limited capabilities, Ecuador’s security forces conducted effective operations against FARC training and logistical resupply camps along the Northern Border. The Ecuadorian military significantly increased the number of operations along Ecuador’s Northern border, especially at the end of the year. The Ecuadorian military destroyed FARC training, rest, and resupply camps; and confiscated weapons, communications equipment, explosives, explosives manufacturing equipment, and other support equipment. These operations also netted valuable information on FARC activities and infrastructure in and outside of Ecuador.²²⁹

Ecuador’s past efforts against the FARC thus paint a mixed story: While the Ecuadorean military appears consistently to have acted against FARC camps, it did not appear to have captured or killed any FARC personnel as of the time of the raid.²³⁰ (Whether it had done so is an important

225. *Id.* at 10.

226. Brodzinsky, *supra* note 179.

227. *Id.*

228. SFRC Report, *supra* note 177, at 8. Although under the proposed factors, a victim state should defer, whenever possible, to the territorial state’s proposed means to address the threat, it is hard to argue that a long-term plan about how to diminish the FARC’s presence using socio-economic tools constitutes a specific proposal to address the threat posed by Reyes.

229. *Country Reports on Terrorism 2007*, *supra* note 174.

230. This changed in the wake of the 2008 raid. According to the U.S. State Department’s 2008

unknown fact that, if known, would feature prominently in Colombia’s analysis of Ecuador’s ability to suppress the type of threat Reyes posed.) If Colombia’s goal was to either capture or kill Reyes at the jungle camp, it reasonably could have concluded, in the absence of additional information, that Ecuador had evidenced no capacity to do so. If Colombia had been willing to pursue a more modest goal of destroying that camp and retrieving any equipment (including computers) left behind, Ecuador had evidenced the capacity to achieve that goal.²³¹

As noted above, President Uribe stated that the FARC had conducted some forty incursions from Ecuadorean territory in the five years preceding the air strike, despite Ecuador’s efforts against the FARC.²³² The existence of these attacks would support a Colombian argument that Ecuador was unwilling or unable to act against the threat posed by the FARC to the extent that was required. It is not clear whether the number of incursions was on the rise or waning, information that either would strengthen or weaken the inferences Colombia could draw from those past attacks.

D. *Altering the Debate*

Virtually none of the information discussed in Section C came to light in Colombia’s explanation of its use of force, in the subsequent bilateral exchanges between Ecuador and Colombia, or in the discussions at the OAS. Instead, the debate was sterile and highly politicized. The March 5 OAS resolution condemning Colombia’s action and declaring that it violated international law rejected the right of a state to use force in self-defense against a terrorist group located in another state without that state’s consent. Indeed, the OAS resolution and a subsequent declaration

Country Reports on Terrorism:

The military’s operational tempo, already higher in early 2008 than in previous years, increased further after the March 1 attack. A total of over 100 battalion-level operations along the northern border led to the discovery and destruction of 11 cocaine producing laboratories, over 130 FARC facilities (bases, houses, and resupply camps), the eradication of nine hectares of coca, and the confiscation of weapons, communications equipment, and other support equipment. These operations also netted valuable information on FARC activities and infrastructure both inside and outside of Ecuador, and resulted in the detention of 20 FARC members and the killing of one FARC member during the year. Despite increasing successes in this effort, insufficient resources, the challenging border region terrain, and a terse bilateral relationship with Colombia since the March 1, 2008 raid made it difficult to thwart cross-border incursions.

Country Reports on Terrorism 2008 (Western Hemisphere Overview), U.S. DEP’T OF STATE (April 30, 2009), <http://tinyurl.com/7v2ehls>.

231. However, if Ecuadorean forces had reviewed the documents and electronic data that they recovered from a hypothetical raid on the Reyes camp and learned that that information suggested a relationship between Ecuador and the FARC, the Ecuadorean government likely would have been reluctant to turn that information over to Colombia.

232. Marcella, *supra* note 173, at 21.

by the heads of state of OAS members never mention the right of self-defense.²³³ Thus, the OAS documents are in tension with the state practice discussed in this Article, as well as with the UN Security Council's current willingness to consider that terrorist attacks can trigger the right to use force in self-defense. Colombia ultimately promised not to conduct similar raids in the future, thus foreclosing its ability to undertake certain acts that would be consistent with international law and potentially undercutting its own national security.²³⁴

Had all states involved understood in advance that the “unwilling or unable” test was the correct frame through which to view the episode, and that the relevant factors to consider in working through that test were those factors set forth in Part III, there is good reason to believe that Colombia would have been able to articulate its arguments more persuasively, both in internal government discussions and on the public stage. (It hardly could have done so less persuasively, even though it had a good case for its actions.) Ecuador, too, likely would have marshaled its best arguments in support of its willingness and ability to suppress the Reyes threat. As a result, states that were willing to listen to reason rather than political rhetoric would have seen that the case was a close call. In that exchange, it would have become clear what facts the action's legality hinged on, and the OAS (and its subsequent fact-finding mission) could have focused on those concrete issues.²³⁵ Further, Colombia might not have found itself pressed to make what appears to be a problematic promise that ultimately may undercut its own national security. Finally, the incident might have provided a useful set of guideposts through a difficult international legal issue for victim and territorial states in the future. Instead, it emerged as a muddle of international politics and a diplomatic crisis.

CONCLUSION

This Article argued that the “unwilling or unable” test, often recited in the modern history of the use of force, currently lacks sufficient content to serve as a restrictive international norm. To address this shortfall, it identified a set of substantive and procedural factors that victim states should apply in evaluating whether it is lawful to use force in another

233. Declaration of the Heads of State and Government of the Rio Group, *supra* note 198.

234. There is a possibility that the United States made a similar commitment to Pakistan in the wake of its raid into Pakistan to capture or kill Osama bin Laden. Julian Borger, *Pakistani PM: US Promises Not to Repeat Bin Laden Raid*, *GUARDIAN* (U.K.), July 21, 2011, at 29, available at <http://tinyurl.com/4yw9hag>.

235. See Schachter, *supra* note 97, at 272 (“The uncertainty surrounding the factual claims and the not insignificant political motivations are reasons that condemnation by governments in the UN bodies cannot always be accepted as persuasive on the issue of lawfulness.”).

state’s territory in self-defense against a nonstate armed group. A clearer test will improve the victim state’s decision-making, will offer positive ex ante incentives to territorial states to address threats within their boundaries, and will lead to fewer uses of force than have occurred in the face of the current, vague incarnation of the test.

A more fully explicated “unwilling or unable” test would have relevance well beyond the situations in which one state is considering whether to use force in another state’s territory against a nonstate actor.²³⁶ Such a test would guide when a victim state lawfully may use force in a territorial state against a third state’s forces that had attacked it (or that were poised to do so imminently). The enhanced “unwilling or unable” test would inform when one state may use force in another state to defend its own nationals.²³⁷ In the context of cyber warfare, too, where some scholars have suggested that states should apply the law of neutrality to uses of force on the territory of states not involved in a cyber-conflict, states could employ the “unwilling or unable” test to determine when they may undertake offensive cyber operations on the territory of those non-involved states.²³⁸ Although the test’s factors might need to vary somewhat in these diverse contexts, the core inquiry and equities will be the same in each case.

There may well be other factors worth adding to the normative factors contained in Part III. This Article constitutes an initial effort to provide more robust scaffolding for the “unwilling or unable” test, but it is not the end of that process. Instead, these factors give states a place from which to start to clarify the basis for their decisions, and to describe that decisional process more clearly and transparently. In short, the “unwilling or unable”

236. This situation also would include a case in which a conflict between a state and a nonstate actor migrates to another state. There has been extensive controversy about whether a state may be in an armed conflict with a nonstate actor in multiple states, as the United States asserts is the case with its conflict with al-Qaida. If one assumes that such a situation could constitute an armed conflict, the victim state would need to undertake an “unwilling or unable” analysis to evaluate whether it could use force in that armed conflict in a new territorial state. This would mean that, absent the consent of the territorial states, the United States should have engaged in an “unwilling or unable” inquiry when determining whether it could use force against al-Qaida in Somalia, Yemen, and Pakistan. There is no public evidence available reflecting whether it did so.

237. General Scranton, the U.S. representative to the UN in 1976, stated, in the context of a debate about Israel’s use of force in Uganda to rescue its nationals, “Israel’s action in rescuing the hostages necessarily involved a temporary breach of the territorial integrity of Uganda. Normally, such a breach would be impermissible under the Charter of the United Nations. However, there is a well established right to use limited force for the protection of one’s own nationals either from an imminent threat of injury or death in a situation where the state in whose territory they are located is either unwilling or unable to protect them.” Oscar Schachter, *International Law in Theory and Practice: General Course in Public International Law*, 178 RECUEIL DES COURS 145 (1982).

238. See, e.g., Davis Brown, *A Proposal for an International Convention to Regulate the Use of Information Systems in Armed Conflict*, 47 HARV. INT’L L.J. 179, 211 (2006) (arguing that the principles underlying the law of neutrality should apply to warfare in the information age); Jeffrey Kelsey, *Hacking into International Humanitarian Law: The Principles of Distinction and Neutrality in the Age of Cyber Warfare*, 106 MICH. L. REV. 1427, 1441 (2008) (arguing that the principle of neutrality applies to cyber warfare).

test is a critical element that narrows the situations in which it is lawful to use force in another state's territory. In a world in which nonstate actors continue actively to threaten states' national security, and in which those nonstate actors know how to take advantage of failed or failing states and ungoverned spaces, it is critical that states responding to those threats proceed carefully in the face of clear, balanced rules.

APPENDIX I

This Appendix identifies cases in which one state used force in another state’s territory (1) where the armed attacks were attributable entirely or primarily to a nonstate armed group or third state, and (2) the territorial state did not consent to the victim state’s presence. A * denotes that victim state specifically invoked the “unwilling or unable” test or a closely related concept.

Victim State	Territorial State	Nonstate Actor or Third State	Date
United States	Spanish Florida	Seminole Indians	1817–18
United States	Mexico	Mexican Indian tribes	1836
United Kingdom*	United States (the <i>Caroline</i>)	Canadian rebels	1837
United States	Mexico	Indian tribes; Mexican bandits	1856–78
United Kingdom	Honduras	Mexican bandits	1877
United States	Mexico	Francisco “Pancho” Villa	1916–19
United Kingdom	Chile	Germany (<i>Dresden</i>)	1915
Russia	Chinese Mongolia	White Guard forces	1921–29
Russia	Romania	White Guard forces	1921
Colombia	Peru	Peruvian armed band	1933
United Kingdom	Uruguay	Germany (<i>Graf Spee</i>)	1939
United Kingdom	Norway	Germany (<i>Altmark</i>)	1940
France	Tunisia	Algerian rebels	1957–60
Portugal	Guinea-Bissau	Anti-Portuguese rebels	1969
Portugal	Senegal	Anti-Portuguese rebels	1969–71
Portugal	Zambia	Anti-Portuguese rebels	1969
United States	Cambodia	Viet Cong	1970
South Africa	Angola	African National Congress	1979–82
Israel*	Lebanon	Palestinian Liberation Organization (PLO)	1978–84
Turkey	Iraq	Kurdistan Workers’ Party (PKK)	1984
Israel	Tunisia	PLO	1985
Israel*	Lebanon and Syria	Hezbollah	1996
Turkey*	Iraq	PKK	1995–97
United States*	Afghanistan	Al-Qaida	1998
United States*	Sudan	Al-Qaida	1998
United States*	Afghanistan	Al-Qaida	2001
Uganda	Democratic Republic of the Congo	Ugandan rebels	2003
Russia*	Georgia	Chechen rebels	2002
Israel	Syria	Islamic Jihad	2003
Rwanda	Democratic Republic of the Congo	Hutu rebels	2004

Turkey	Iraq	PKK	2006–08
Israel*	Lebanon	Hezbollah	2006
Iran	Iraq	PKK	2007
Colombia	Ecuador	Revolutionary Armed Forces of Colombia (FARC)	2008
France	Mali	Al-Qaida	2010
Turkey	Iraq	PKK	2010
United States*	Pakistan	Al-Qaida	2011
Turkey	Iraq	PKK	2011
Iran	Iraq	PKK	2011