

Derek Jinks

Do states ever have the right to act in self defense against non-state actors on the sovereign territory of another, non-consenting state? The response of some important actors in the international community—including the UN Security Council, the OAS, ANZUS, and several states—strongly suggests that they do. On this view, there are some circumstances in which attacks authored by non-state actors, including terrorist groups, amount to an "armed attack" within the meaning of the UN Charter triggering the inherent sovereign right of the victim state to act in self defense. Of course, the availability of self defense in such cases is important only where the defending state seeks to justify military action otherwise prohibited by the Charter's use of force regime. In other words, self defense claims under the Charter necessarily assert the right to act on the sovereign territory of another state—without that state's consent and irrespective of whether the attack triggering the defensive action is attributable to that state.

The ultimate question, then, is when defending states have the right to take such action. Many scholars and states argue that self defense is available in such circumstances if the territorial state is "unwilling or unable" to suppress the threat itself. Although debates about the formal doctrinal basis of this rule have been contentious, there has been virtually no sustained reflection on the nature and function of the rule. In this paper, I argue that there are several alternative conceptions of the "unwilling or unable" rule and that the various conceptions imply importantly different approaches to several retail-level puzzles that arise in the interpretation, application, and administration of the rule. These competing conceptions of the rule vary crucially on the way in which they understand the relationship between sovereignty and the use of force regime in international law.

Consider a few possibilities. First, the rule might rest on the notion that otherwise sovereign states forfeit their status as sovereign—at least with respect to use of force rules—where they are "unwilling or unable" to suppress armed attacks against other sovereigns emanating from their territory. In other words, the territorial state might not be entitled to protection against the defending state's intrusion against its political independence or territorial integrity because it is "unwilling or unable." On this view, the legitimate claim to sovereignty turns, at least in part, on compliance with certain fundamental rules of international law. Second, the rule might rest on the claim that it reflects a proper balancing of the sovereignty claims of the defending state and the sovereignty claims of the territorial state. On this view, the best way to protect the sovereignty of both states is to provide the territorial state with the opportunity to meet the threat itself before recognizing any right to otherwise unlawful defensive action by the defending state. This view raises important questions about how fundamental factual or legal disagreements between the two states should be resolved. Third,

the rule might instead reflect prioritization of the sovereign right to self defense over the sovereign right to be free from forcible intrusions against territorial integrity and political independence. This view is, of course, difficult to square with the structural relationship between Article 2(4) and Article 51 of the UN Charter--given that the prohibition on threats and uses of force in Article 2(4) is conventionally understood as broader than the "armed attack" trigger for the right to self defense in Article 51. And, in a fundamentally different respect, the rule might describe a set of circumstances in which states are deemed responsible for the attack. In other words, the rule might purport to expand the scope of the sovereign's international legal responsibility for acts committed on its territory.

The paper will identify various plausible approaches to the "unwilling or unable" rule, assess the strengths and weaknesses of each, and analyze the implications of each approach for the scope, content, and administration of the test.