SYMPOSIUM ON TWAIL PERSPECTIVES ON ICL, IHL, AND INTERVENTION

TWAIL AND THE "UNWILLING OR UNABLE" DOCTRINE: CONTINUITIES AND RUPTURES

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Given the long history of violent encounters between the Global North and the Global South, legal arguments concerning the use of force are a fertile ground for testing the virtues and limits of Third World Approaches to International Law (TWAIL) as a theory aspiring to "address the material and ethical concerns of Third World peoples."[1] This essay examines the usefulness and limits of TWAIL in the context of the "unwilling or unable" doctrine currently promoted by a series of Western scholars and states in order to expand the scope of application of the right to self-defence under Article 51 of the United Nations Charter. Adopting TWAIL's impulse to historicize, this essay argues that the structure of this doctrine closely replicates the "standard of civilization" that informed international legal theory and practice throughout the nineteenth century. At the same time, widespread resistance to the "unwilling or unable" doctrine indicates that the profound transformation of international law on the use of force after 1945 and the diffusion of sovereignty outside the West put into question certain methodological and political commitments of TWAIL.

The "unwilling or unable" doctrine has been summarised by Ashley Deeks as follows: "[I]t 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."[2] The assassination of Osama bin Laden by U.S. forces in the territory of Pakistan[3] and, more recently, the bombing campaign of the United States against ISIS in Syrian territory[4] and the drone strike of the United Kingdom against three individuals in Syria,[5] are examples of the relatively clear and direct invocation of the principle to justify the use of force. Despite the fact that Deek's account is conceptually unclear at times, the argument appears to be that a customary norm has arisen, according to which the "inherent" right to self-defence can be exercised against a state even when the acts of individuals are not attributable to it under the test set by the International Court of Justice in the *Nicaragua* case,[6] if the said state is "unwilling or unable" to put an end to the use of its

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[1] Bhupinder S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 INT'L COMMUNITY L. REV. 3, 4 (2006).

[2] Ashley S. Deeks, *"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT'L L. 483, 486 (2012).

[3] Stephen M. Pezzi, *The Legality of Killing Osama bin Laden*, HARV. L. SCHOOL NAT'L SECURITY J. (May 16, 2011, 2:52 PM).

[4] Ashley S. Deeks, *The UK's Article 51 Letter on Use of Force in Syria*, LAWFARE (Dec. 12, 2014, 9:53 AM).

[5] Harriet Moynihan, *UK Drone Strike on ISIS Raises Legal Questions*, CHATHAM HOUSE (Sep. 15, 2015).

[6] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14, 105-115 (June 27).

territory for the launch of these attacks.[7] Hence,the "unwilling or unable" doctrine is qualitatively different from other expansive interpretations of Article 51 because it attempts to (re)introduce a classification of states that differentiates the degree of their sovereignty based on the way that they are internally organized and on the antiterrorist policies that they have chosen to implement. It singles out states that are weak or pursue policies that are considered by the attacking state to be friendly or tolerant toward terrorism for different treatment under Articles 2(4) and 51 of the Charter.

TWAIL's suggestion that history is essential for us to understand the untold truths and social functions of international law is of immediate relevance here. The "unwilling or unable" doctrine reintroduces a hierarchy of states in the operation of *jus ad bellum*. This hierarchy and the corresponding tailoring of states' rights and duties is reminiscent of the infamous nineteenth-century distinction between civilized, semi-civilized and uncivilized states.[8] For nineteenth-century scholars such as James Lorimer, the distinction bore significant international legal consequences, since only civilized states enjoyed full international legal personality, while uncivilized states were just objects (and not subjects) of international law, with semi-civilized states enjoying some limited legal personality.[9] In my view, the "unwilling or unable" doctrine replicates this hierarchy, directly adopting certain "civilization" criteria, such as the existence of a strong, effective, centralized state with a certain level and certain mode of control over its territory. This distinction in turn introduces an unapologetic and (aspiring to be) legalized hierarchy between states, challenging sovereign equality as conceptualized under and after the Charter. Thus, it is no coincidence that the doctrine has attracted the attention of scholars challenging the hegemonic, Eurocentric aspects of the discipline.[10]

The operation of the doctrine to justify use of force confirm this TWAIL-inspired observation and insight. For example, Dawood Ahmed has shown how, in the vast majority of cases, there is a manifest power disparity between the state initiating and the state being subjected to the use of force.[11] At the same time, in virtually all cases the state deemed "unwilling or unable" is a state of the Global South, confirming the argument that the doctrine is not even nominally neutral but targets certain forms of statehood and specific counter-terrorism policies. Admittedly, there are certain cases in which the state invoking the argument belongs to the Global South as well, but even in these cases a weaker peripheral state is targeted. The case of the invasion of Somalia by Kenya is a typical example of these asymmetries of power.[12] In any case, the central role of the United States in developing and diffusing the doctrine cannot be neglected. The central role of the United States in advancing the doctrine is manifest in the letter sent by the United States to the UN Secretary General justifying airstrikes against ISIS in Syria, arguing that

> States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defense, as reflected in Article 51 of the UN Charter, when, as is the case here, the

[7] Anders Henriksen, *Jus ad bellum and American Targeted Use of Force to Fight Terrorism around the World,* 19 J. CONFLICT SECURITY L. 211 (2014).

[8] JAMES LORIMER, THE INSTITUTES OF THE LAW OF NATIONS (1883).

[9] But see the argument of Gerry Simpson that the assignment of specifically legal consequences to the standard of civilization was not shared by all 19th century international lawyers: GERRY SIMPSON, GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER 116 (2004).

[10] Justin Desautels-Stein has been working on the parallels between Lorimer's views and the "unwilling or unable" doctrine and Arnulf Becker Lorca emphasizes directly the conceptual and historical links between the doctrine and the standard of civilization: Arnulf Becker Lorca, *Rules for the Global "War on Terror": Implying Consent and Presuming Conditions for Intervention*, 45 N.Y.U. J. INT'L L. & POL. 45 (2012).

[11] Dawood I. Ahmed, *Defending Weak States against the "Unwilling or Unable" Doctrine of Self-Defense*, 9 J. INT'L L. & INT'L REL. 1, 18 (2013).

[12] Vidan Hadzi-Vidanovic, *Kenya Invades Somalia Invoking the Right of Self-Defense*, EJIL: *TALK!* (Oct. 18, 2011).

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> government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks. The Syrian regime has shown that it cannot and will not confront these safe-havens effectively itself.

Similarly, it is impossible to overlook the crucial role of Western legal scholars in developing, defending, and popularizing the doctrine.[13]

The similarities between this practice and the prominent role of nineteenth-century international legal scholars in the construction of the "civilizing" discourse of the time are striking, even if "[s]ubsequent generations of international lawyers have strenuously attempted to distance the discipline from that period."[14] Imperial aspirations tied to such arguments also form a "red thread" that connect "the standard of civilization" with the "unwilling or unable" doctrine. The unequal international legal structure promoted by these arguments is intimately linked to an unequal political structure, characterized by the dominance of the Global North over the Global South. More specifically, states of the Global North are enabled to use force against the sovereignty and—importantly—the life and security of the citizens of states of the Global South in pursuing the former's "war on terror" and the political and economic agendas accompanying it.[15] Moreover, pressure is exerted upon states of the Global South to transform themselves and adopt policies appealing to powerful states, if they want to avoid being branded "unwilling or unable." A strong parallel can be detected between this transformative process and the pressure exerted upon peripheral states during the nineteenth century to introduce reforms that would render them "civilized" and, hence, equal to Western states.[16]

The specific arguments articulated in defence of the doctrine further support this critique. In the absence of widespread state practice and *opinio juris*, its supporters resort to general references to other legal scholars and advisers of the Global North, along with nonbinding UN reports. As Kevin Jon Heller points out,[17] this eclecticism and deformalization of custom-creation is directly inimical to the practice of states in the Global South that have not only not endorsed it, but tend to condemn its invocation directly. It is indicative that Deeks only invokes the military manuals of three Western states (the United States, United Kingdom, and Canada) to substantiate her claim that the existence of the "unwilling or unable" test is uncontroversial.[18] Even though Deeks recently referred to the "growing pile" of state practice, she did not offer any further evidence,[19] and she admitted that it is not easy to detect accompanying *opinio juris*. She thus elevates the naked practice of a handful of Western states to definite manifestations of international law.[20] Occasional arguments in favor of the "unwilling or unable" doctrine have involved the practice of non-Western states such as Turkey and its strikes against PKK fighters in Iraq,[21] or Kenya invading Somalia,[22] and their invocation of the right to self-defence to justify these acts. However, the absence of any explicit reference to the doctrine renders these invocations highly speculative. Further, these arguments tend to ignore explicit condemnations

[13] Kevin J. Heller, *The Seemingly Inexorable March of "Unwilling or Unable" through the Academy*, OPINIO JURIS (Mar. 6, 2015, 6:44 AM).

[14] ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 109 (2007).

[15] Anthony Anghie, *The War on Terror and Iraq in Historical Perspective*, 43 OSGOODE HALL L.J. 45 (2005).

[16] GERRIT G. GONG, THE STANDARD OF CIVILISATION IN INTERNATIONAL SOCIETY 14-15 (1984).

[17] Heller, *supra* note 13 ("'Instant custom'? How passé. Who needs state practice at all? And please don't bore us by pointing out contrary practice by a bunch of benighted states in the Global South. All we really need are enough scholars, special rapporteurs, and former legal advisors in the Global North willing and able to endorse a particular doctrine and poof—customary international law.").

[18] Deeks, *supra* note 2, at 500.

[19] Ashley Deeks, *UK Air Strike in Syria (with France and Australia Not Far Behind)* LAWFARE (Sep. 9, 2015, 10:41 AM).

[20] Deeks, *supra* note 2, at FN. 70 ("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.")

[21] Kevin J. Heller, *Do Attacks on ISIS in Syria Justify the "Unwilling or Unable" Test?*, OPINIO JURIS (Dec. 13, 2014, 11:58 AM).

[22] Hadzi-Vidanovic, *supra* note 11.

of such acts, as happened in the case of Turkey, both by the Arab League and by the Non-Aligned Movement. More broadly, the fact that the states of the Global South face significant financial restraints is reflected in the legal departments of their governments, and as a consequence their state practice and *opinio juris* is more difficult to document and to detect.[23] Therefore, the "common sense" of the discipline is formed by the states that have both the prestige and the material resources to do so.

These methodological choices about the threshold for customary international law are by no means either new or politically neutral. For instance, today, "humanitarian intervention" features in most textbooks of international law as a potential exception to the prohibition of the use of force.[24] The mere fact that it is debated at length, even though it is advanced only by two (Western) states (Belgium and the United Kingdom), reveals the disproportional weight granted to arguments by Western lawyers to date. It is difficult to imagine that a legal argument advanced solely by Thailand (which has a population comparable to the United Kingdom) and Tunisia (whose population is comparable to that of Belgium) would make it to major international law textbooks. Correspondingly, such methodological choices reveal a perception of international law that clearly prioritizes certain actors (be it certain lawyers, organs, or states) to the detriment of others. Hence, even though the states on the periphery retain their nominal status as subjects of international law, their actual ability to influence its content is curtailed. And hence, the conviction of TWAIL scholars that international law and its practitioners were never fully decolonized is accurate, not only with regard to the substance of international law arguments, but also their methodology and construction.

Nonetheless, there are limits to these continuities. In its effort to pay due attention to the history of international law, TWAIL occasionally overemphasizes continuity over rupture, as well as the ability of hegemonic states to determine unilaterally the content of international law. At the end of the day, the "unwilling or unable" doctrine remains only an attempt to revise and delimit the scope of the prohibition of the use of force, a norm of profound importance for positive international law. If this assertion is correct, then there is perhaps less reason for scholars sensitive to TWAIL arguments to experience discomfort[25] when defending certain aspects of international law.[26]

To take this argument a step further, TWAIL has not always been open to the possibility of international law being other than simply a tool at the hands of powerful states. For example, in his ground-breaking work, Anthony Anghie argues that the concept of sovereignty is intrinsically linked to the process of colonization and the exclusion of the periphery.[27] What is relatively absent from this account is how this concept was once again reformulated through the UN Charter (especially Articles 2(4) and 2(7)), the subsequent process of decolonization and the efforts of the Global South to enhance its standing in the international legal and political order. This contradictory function of international law as both a locus of oppression and a constant promise for liberation has been central in the work of Sundhuya Pahuja.[28] The consistent efforts of hegemonic Western powers to delimit the scope of Article 2(4), so as to promote their imperial plans, hint at this reality. Even though it is impossible to argue that post-1945 international law was radically post/anticolonial, it is equally impossible to ignore its profound reconfiguration. After all, as Eric Posner has caustically pointed

[23] Vaughan Lowe, *The Marginalization of Africa*, 94 ASIL PROC. 231 (2000).

[24] For example, see Christine Gray, *The Use of Force and the International Legal Order*, *in* INTERNATIONAL LAW 618 (Malcolm D. Evans ed., 2014).

[25] Matthew Craven et al., *We are Teachers of International Law*, 17 LEIDEN J. INT'L L. 363 (2004); Henry Richardson, *U.S. Hegemony, Race, and Oil in Deciding Security Council Resolution 1441 on Iraq*, 17 TEMP. INT'L & COMP. L.J.,.27 (2003).

[26] *War Would be Illegal*, THE GUARDIAN, Mar. 7, 2003.

[27] ANGHIE, *supra* note 14.

[28] SUNDHYA PAHUJA, DECOLONIZING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERSALITY (2011).

out, the "unwilling or unable" doctrine is part and parcel of a wider revisionist wave that attempts to do away with those aspects of international law that interfere with U.S. foreign policy aspirations:

> The "coerced consent" doctrine, the "unwilling or unable" doctrine, and the exception for humanitarian intervention all whittle away at whatever part of the law on United Nations' use of force blocks U.S. goals. If the United States ever decides to invade Iran in order to prevent it from acquiring nuclear weapons, expect a new doctrine to take shape, perhaps one that emphasizes the unique dangers of nuclear weapons and Iran's declared hostility toward a nearby country.[29]

On an epistemological level, one should also keep in mind that there are limits to the explanatory potential of historical, genealogical accounts. Pointing to the colonial origins of the concept of sovereignty is valuable both for acquiring a more complete image of the discipline and for comprehending certain current developments, but it is unable to explain in a linear manner the centrality of the concept in the struggle of post-colonial states for a New International Economic Order between the 1960s and 1980s or the ongoing commitment of non-Western states to the concept.[30] To bring the argument home, it is notable that in her defence of the "unwilling or unable" doctrine, Deeks chose to anchor her analysis to the laws on neutrality that predate the UN Charter.[31] This hints at how arguments for extensive rights to use of force are in tension with the Charter, and hence earlier sources are preferred. In turn, this methodological preference supports the claim put forward here that there are limits to the cognitive and political significance of historical arguments about international law.

As I have demonstrated above, the "unwilling or unable" doctrine replicates both the substance and the methodological preferences of nineteenth-century international law. The discourse of "civilisation" keeps returning in the discipline in a manner that questions its self-portrayal as a force of progress, freedom and peaceful co-existence. At the same time, the use of force is perhaps one of the starkest examples of rupture in international law, and indeed of rupture generally, favorable to the interests and concerns of the states of the Global South. Hence, we need to keep in mind that contemporary international law is more than an "undercover" continuation of older international legal structure. Striking the right balance between history and the present situation, continuity and rupture, constitutes the greatest challenge for TWAIL as a project that aspires to approach international law through emancipatory lenses.

[29] Eric Posner, *Obama's Drone Dilemma: The Killings Probably Aren't Legal—Not That They'll Stop*, SLATE (Oct. 8, 2012, 3:32 AM).

[30] For example, see Phil C. W. Chan, *China's Approaches to International Law since the Opium War*, 27 LEIDEN J. INT'L L. 859 (2014).

[31] Deeks, *supra* note 2, at 488.

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