The unwilling or unable doctrine and its development in international law

Abstract

The unwilling or unable doctrine represents a response of the international community to the increasing presence of non-state actors in international relations. According to this doctrine, a state who suffers an attack by a non-state actor is entitled to intervene in the territory of the state where this non-state actor finds its harbour, given that this state is unwilling or unable to tackle the threat alone. This, in turn, means that the harbouring state must endure an intervention by the attacked state on its territory, even though the harbouring state has not resorted to the use of force itself - the action of the non-state actor is not attributable to it.

This thesis first pays attention to the concept of self-defence, in terms of its two equivalent content sources - customary and contractual international law. Both of these sources set certain (pre)conditions for the exercise of the right to self-defence. In the case of customary law, these are conditions of necessity, proportionality and immediacy. The UN Charter then determines one further precondition for exercising the right to self-defence – the existence of a previous armed attack.

Given that the unwilling or unable doctrine is a specific example of how states justify their armed actions against terrorists and other non-state actors in the territory of a foreign state, this thesis also pays adequate attention to the admissibility of the right to self-defence against non-state actors in general. In particular, it examines whether or not the term “armed attack” within the meaning of Article 51 of the UN Charter is reserved only for military action undertaken by States. Based on the findings, it concludes that the exercise of the right to self-defence against non-state actors is generally permissible.

The examination of the unwilling or unable doctrine itself leads to an answer to the research question, i.e. whether this doctrine is an appropriate way of interpreting the right to self-defence for the purpose of justifying the use of force in a foreign state against a non-state actor. The negative answer to this question is based mainly on examination of historical development of the doctrine. This development, based on the provided case studies, is described as inconsistent. This inconsistency is the cause of the problematic aspects that the unwilling or unable doctrine exhibits today – a vague definition of its content, its unclear conceptual foundation and its inconsistent, poorly justified application in state practice.

Finally, this thesis attempts to outline alternative arguments that may be used instead of the unwilling or unable doctrine for the same purpose. In this context, it points out that the doctrine does not reflect the approach of the harbouring state to the given non-state actor and proposes

solutions that reflect this aspect. These are (i) the imputability of the action of the non-state actor to the harbouring state in the event the state is unwilling to intervene against that non-state actor, and (ii) the application of a state of necessity as a circumstance precluding wrongfullness in the event of inability of the harbouring state to deal with the non-state actor.