The Legal Framework of the 'Unwilling or Unable' Theory and the Right of Self-Defence against Non-State Actors

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Abstract

This article provides the theoretical background of so-called the 'Unwilling or Unable' theory which enables a State to conduct military operations when the territorial State is unwilling or unable to suppress the threat of non-State actors based on the right of self-defence. Then, on the basis of the conclusion that the theory is legally acceptable under the inherent right of self-defence, the role of the theory in the military operations against ISIS is considered. Finally, this article examines the legal framework to avoid the abusive use of the theory through the mechanism to decide the situation of unwilling or unable.

I. Introduction

The legal challenges that various international threats pose against a common understanding of the United Nations (UN) Charter constitutes controversial legal issues in contemporary international law.[1)] In this context, one of the most recent and serious ones is the emergence of armed non-State actors such as the Islamic State of Iraq and Syria (ISIS), which has been designated as an international terrorist organisation by the UN Security Council.[2)] However, the text of the UN Charter does not explicitly provide an answer as to the type of legal measures that can be taken to

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1) Yuki Motoyoshi, 'The Legal Status of the 'Unwilling or Unable' Theory: Its Origin and Historical Development (in Japanese)' (2017) 26(1) Yokohama Law Journal 153-55.

2) United Nations (UN) Security Council Resolution (SC Res) 2178 (24 September 2014) UN Doc S/RES/2178. The Security Council expressed 'particular concern that foreign terrorist fighters are being recruited by and are joining entities such as' ISIS in the resolution.

suppress the threat of armed non-State actors when the territorial State is unwilling or unable to suppress the threat of non-State actors (a situation of unwilling or unable).[3)]

The main aim of this article is to provide the theoretical background of the 'Unwilling or Unable' theory, which enables a State to conduct military operations in a situation of unwilling or unable based on the right of self-defence.[4)] Therefore, the debate about the theory is closely related to the legality of military operations against non-State actors in the right of self-defence. Firstly, having examined the key terms such as a situation of unwilling or unable, the definition of a non-State actor and a State (Section II), to address the controversies about the legality of the 'Unwilling or Unable' theory, it is considered whether the theory is justified based on the right of self-defence under the UN Charter (Section III). Then, the legal analysis of the military operations against ISIS is analysed as the one of the most recent and important State practice (Section IV). Finally, this article provides brief guidelines to avoid the abusive use of the theory (Section V).

II. Preliminary Issues

1. A Situation of Unwilling or Unable

As a preliminary issue, firstly, a situation of unwilling or unable needs to be defined. This article employed the definition provided by Cassese as a starting point because his definition clearly and simply expresses a situation of the unwilling or unable as a legal term.[5)] The situation of the unwilling or unable has two aspects, the *unwillingness* of a territorial State and the *inability* of a territorial State. The former is defined as the situation where a State simply acquiesces in terrorist groups seeking refuge on its territory and 'does not take coercive action to prevent or punish terrorism'.[6)] And the latter is the situation where armed non-State actors 'operate on the territory of a State which is unable to exercise control over them'.[7)]

3) See Yuki Motoyoshi, 'The Scope of the Right of Self-Defence against Non-State Actors under the UN Charter Through the Analysis of Its Travaux Préparatoires and the Nicaragua Case (in Japanese)' (2021) 87(3) Nihon Hougaku: See also Motoyoshi (n 1) 165-66.
4) Ashley Deeks, 'Unwilling or Unable: Toward a Normative Framework for Extra-Territorial Self-Defense' (2012) 52(3) Virginia Journal of International Law (VJIL) 486.
5) See also Yuki Motoyoshi, 'The Exercise of the Right of Self-Defence and the Rules of Attribution Particularly When the Territorial State is Unwilling or Unable to Suppress the Threat of Non-State Actors (in Japanese)' (2022) 63 Hougaku Kiyou 3-4.
6) Antonio Cassese, *International Law* (2nd edn, Oxford University Press (OUP) 2005) 470.
7) ibid.

2. The Definition of a Non-State Actor and a State

Secondary, it should be examined what the definition of a *non-State actor* and a *State* is in this article because both of them are also key legal terms. In the context of military operations against non-State actors, the examination of the boundary between a non-State actor and a State is of particular importance because some non-State actors such as ISIS have controlled a certain territory within existing States. The term of a non-State actor in this article is defined as an armed actor which conducts transnational attacks.[8] Peaceful actors, such as non-governmental organisations (NGOs), are excluded from the definition of a non-State actor here. In the international legal system, a State remains the primary subject of international law although non-State actors hold more influence than before.[9]

The Montevideo Convention on the Rights and Duties of States (Montevideo Convention) is often referred to in this context. Even though the convention only reflects the reality of States, and it is not legally binding outside the Latin American region, it is regarded as the 'best known' basic criteria for the law of Statehood and employed as the standard definition of a State under international law.[10] Therefore, with respect to the applicable law in this context, the Montevideo Convention needs to be examined.

In article 1 of the Montevideo Convention, four qualifications are listed for a State to exist as a person of international law: A permanent population; a defined territory; government; and capacity to enter into relations with other States.[11] For the criterion of 'a defined territory', it is enough to keep 'a certain coherent territory' even if it is small,[12] and the land frontiers of a State are not 'fully delimited and defined'.[13]

However, it is argued that the four criteria provided in the convention cannot always effectively work as criteria to determine whether an entity is a State.[14] Particularly, the convention has been criticised because this criterion looks too formalistic and easy to satisfy. Of course, these four criteria

8) See Massimiliano Sassoli de Bianchi, 'Transnational Armed Groups and International Humanitarian Law' (HPCR Occasional Paper Series, 2006) 1-2: Noam Lubell, *Extraterritorial Use of Force against Non-State Actors* (OUP 2010) 20.
9) James Crawford, *The Creation of States in International Law* (OUP 2007) 72.
10) ibid 45.
11) Convention on Rights and Duties of States adopted by the Seventh International Conference of American States (Montevideo Convention on Rights and Duties of States) (Montevideo, 26 December 1933, 165 United Nations Treaty Series (UNTS) 3802): See Motoyoshi (n 1) 177.
12) Crawford (n 9) 46-52.
13) *North Sea Continental Shelf, Germany v Denmark*, (Merits) (1969) the International Court of Justice (ICJ) Rep 3 (*North Sea Continental Shelf* case) para 46.
14) See Crawford (n 9) 436-37.

provided by the convention can still be considered to reflect a minimum standard but are not enough to determine Statehood in contemporary situations. In addition, other criteria which are not referred to in the Montevideo Convention have been proposed in the scholarship, such as recognition, and with it, 'a degree of permanence', 'a certain degree of civilization' and 'willingness and ability to observe international law'.[15)]

Moreover, it is suggested that some States 'have begun also to require respect for human rights and the rights of minorities as well as respect for existing international frontiers, as further conditions for granting recognition'.[16)] With regard to these new aspects, Crawford argues that '[a]n entity created in violation of rules to the use of force in such circumstances will not be regarded as a State'.[17)] Thus, these criteria 'a degree of permanence', 'a certain degree of civilization', 'willingness and ability to observe international law' and 'respect for human rights and existing international frontiers' should be added to the criteria to determine Statehood in addition to the criteria provided in the Montevideo Convention. Therefore, in this article, to determine Statehood, these criteria should be satisfied, and it means that ISIS does not satisfy these criteria because at least, they did not respect existing international frontiers and international law.[18)]

3. The Relationship between a State and a Non-State Actor

Finally, it needs to be examined how the relationship between a State and a non-State actor affects the status of non-State actors.[19)] Thus, this section considers the difference between State and armed non-State actors. The acts of the non-State actor can be attributed to the State if the actors are State organs or *de facto* organs even though the non-State actor is a separate entity and by definition not a State. This is because their acts are attributable to the State under the law of State responsibility.[20)] If the actors are State organs or *de facto* organs of States, such actors are excluded from the scope of the research. Then, if the relationship between a State and a non-State actor satisfies the *effective control* test,[21)] the acts of a non-State actors are attributable to a State.[22)] The *effective control* test codified in Article 8

15) ibid 90-92.
16) Cassese (n 6) 75.
17) Crawford (n 9) 148.
18) See also Motoyoshi (n 1) 177.
19) The detailed analysis of the rules of attribution in the context of the right of self-defence is in Motoyoshi (n 5).
20) International Law Commission (ILC), Draft articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) art 4.
21) ibid art 8.
22) *Nicaragua* case, para 115.

of Draft articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) was born in the debates by Special Rapporteur Reporter Ago in International Law Commission (ILC).[23] Article 8 of ARSIWA reads, '[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct'.

Although the detailed legal issues whether and how international law can engage with the situation where military actions by armed non-State actors can be attributed to States is out of scope in this article,[24] this research particularly focuses on the non-State actors whose military actions cannot be attributed to States by the strict application of the international rules of State responsibility.

III. The 'Unwilling or Unable' Theory as a Part of the Inherent Right of Self-Defence

There is a dispute about whether the 'Unwilling or Unable' theory constitutes customary international law. With respect to the debates about the 'Unwilling or Unable' theory, Deeks provides a theoretical framework for its theory and argues that the theory fits in the right of self-defence.[25] Yet, within international legal scholarship, there is a disagreement about the legal status and the scope of the 'Unwilling or Unable' theory. Critiques of the theory span its disputed acceptance as a norm of international law, the scope of the theory, and the potential for the theory to be abused by States who can make unilateral decisions to exercise the right of self-defence.[26] For example, Corten argues that a situation of unwilling or unable cannot be regarded as an armed attack under Article 51, and therefore, accepting the 'Unwilling or Unable' theory would lead to 'a radical change' in the interpretation of the UN Charter.[27]

Thus, it can be said that the main criticism of the theory is the lack of legal basis, State practice and *opinio juris*. This article firstly examines whether the inherent right of self-defence clearly expressed in Article 51 of the UN Charter provides the solid legal basis of the 'Unwilling or Un-

23) Roberto Ago, UN Doc A/CN.4/264 and Add.1 (1972) Fourth Report on State responsibility, 124-25.
24) See Motoyoshi (n 5).
25) Deeks (n 4) 486.
26) See Motoyoshi (n 1) 159-61.
27) Olivier Corten, 'The "Unwilling or Unable" Test: Has it Been, and Could it be, Accepted?' (2016) 29(3) Leiden Journal of International Law (LJIL) 794-97.

able' theory. The right of self-defence in Article 51 plays a key role for the legal regulation of the military operations, as it constitutes one of the valid exceptions to the general prohibition of a use of force under Article 2(4) of the UN Charter.[28] Article 51 reads that:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[29]

One of the main difficulties in settling the debate on whether the right of self-defence can be exercised against non-State actors particularly in a situation of unwilling or unable, lies in the lack of consensus on the content of the inherent right of self-defence at the time of adoption of the UN Charter.[30] Assessing this requires a review of the extent to which international law restricted the right of self-defence generally in the pre-UN Charter period. Given that Article 51 of the UN Charter is generally believed to codify the already existing right of self-defence,[31] identifying the exact contours of the scope of this right prior to its codification in the UN Charter is essential.

In this regard, the Caroline incident has been generally accepted as the paradigmatic case on the right of self-defence against non-State actors in the pre-UN Charter period.[32] In the incident, the UK exercised the right of self-defence against non-State actors (rebels) within the US territory.[33] The US Secretary of State, Webster, stated that the right of self-defence against non-State actors in the territory of other States can be exercised when 'a necessity of self-defence, instant, overwhelming, leaving no choice of means,

28) See Cassese (n 6) 354: Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Bloomsbury Publishing 2010) 51-52.
29) UN Charter, art 51.
30) The detailed analysis of travaux préparatoires of the UN Charter is in Motoyoshi (n 3) 137-44.
31) ibid 143; See also Military and Paramilitary Activities in and against Nicaragua (Nicaragua *v.* United States of America) (Merits) (1986) ICJ Rep 14-150 (*Nicaragua* case) para 176.
32) See Derek Bowett, *Self-Defence in International Law* (Praeger 1958) 58.
33) Robert Jennings, 'The Caroline and McLeod Incidents' (1938) 32(1) American Journal of International Law 82.

and no moment for deliberation'.[34] The standard proposed here is the so-called *Webster formula*, and it allowed a State to intervene in the territorial State to suppress the threat of non-State actors. The legal doctrine arising from this incident constitutes the standard for the assessment of the lawfulness of interventions against non-State actors in the situation of unwilling or unable.[35]

Thus, the right of self-defence against non-State actors in a situation of unwilling or unable, has been accepted as a part of inherent right of self-defence.[36] Although detailed analysis of State practice, *opinio juris* and case law before the emergence of ISIS is out of scope in this article, this article takes the stance that the ratification of the UN Charter did not fundamentally restrict the customary right of self-defence, and it means that the right of self-defence can be exercised against non-State actors in a situation of unwilling or unable.[37] Next section will examine the legal status of the military operations against ISIS as one of the most recent and important State practice of the theory.

IV. Emergence of ISIS and the 'Unwilling or Unable' theory

1. The Military Operations against ISIS by the US and Its Allied States

This section considers the legality of the military operations against ISIS in Syria and Iraq.[38] In this context, it is crucial to identify whether there exists consent of the territorial States, Syria and Iraq. The Iraqi government requested international support to suppress the growing threat of ISIS in the letter sent to the Security Council in September 2014.[39] In this letter, Iraq indicated that it requested the US intervention with Iraq's 'express consent'.[40] Based on this request, not only the US but other States started military operations to help Iraq from the expansion of ISIS.

In contrast, the legal issue about consent by Syria is more complex. Firstly, with respect to the question about which subject in Syria could give consent of military operations by foreign States in the situation where a civil war occurred, the Assad regime was the only possible subject in Syria

34) 29 British and Foreign State Papers 1129 (Webster to Fox) (1840-41).
35) See Derek Bowett, *Self-Defence in International Law* (Praeger 1958) 58.
36) Motoyoshi (n 1) 190: See also Motoyoshi (n 3) 155.
37) Motoyoshi (n 1) 165-66: Motoyoshi (n 3) 143-44.
38) The brief description regarding the legal debates about the military operations against ISIS is in Motoyoshi (n 1) 177-84: In addition, the analysis of the military operations from the viewpoint of rules of attribution is in Motoyoshi (n 5) 16-19.
39) UN Doc S/2014/691 (22 September 2014).
40) ibid.

which could give consent.[41] However, this matter about the legitimacy of a State in international law is out of the scope of this research. Secondly, then, it should be considered whether the Assad regime gave consent to the military operations within its territory. Although the Assad regime received military support from other countries such as Russia,[42] the Assad regime did not give any requests or consent to the US and its allied States. Moreover, the Assad regime condemned the military operations in Syria by the US because they violated the 'the respect for the unity, sovereignty and territorial integrity of Syria'.[43] Syria required States to stop 'distorting the meaning of Article 51' of the UN Charter.[44] This statement highlighted that Syria, a territorial State in this case, did not give any explicit request to the military operations by the US and other coalitions.

The US representative Samantha Power said that the US led airstrikes against ISIS in Syria and pointed out that the threat came from the safe havens in Syria.[45] In addition, the US stated that:

> ISIL (ISIS) and other terrorist groups in Syria are a threat not only to Iraq, but also to many other countries, including the United States and our partners in the region and beyond. States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defence, as reflected in Article 51 of the Charter of the United Nations, when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks.[46]

In this statement, the US stressed that the US and the international community faced the threat from ISIS.[47] With respect to the legal justification for the operations in Syria (but not Iraq because there exits clear consent by Iraq), the US's justification connects the inherent right of (individual and collective) self-defence with the situation where the Syrian government is

41) For example, Flasch also focused on whether the Assad regime consented to the military operations by the US and its allied States. Olivia Flasch, 'The Legality of the Air Strikes against ISIL in Syria: New Insights on the Extraterritorial Use of Force against Non-State Actors' (2016) 3(1) Journal on the Use of Force and International Law 43-46.
42) Angela Stent, 'Putin's Power Play in Syria: How to Respond to Russia's Intervention' (2016) 95 Foreign Affairs 106.
43) UN Doc S/2015/719 (Syria) (21 September 2015).
44) ibid.
45) UN Doc S/2014/695 (the US) (23 September 2014).
46) ibid (blanket added).
47) ibid.

unwilling or unable to prevent the threat of non-State actors.[48] Thus, this statement is an example of the 'Unwilling or Unable' theory being used in the context of the military operations against ISIS and other States follow this stance.[49]

Moreover, the US, Canada, Turkey and Australia employed the terms of unwilling or unable, *before* the adoption of Security Council Resolution (SC Res) 2249 in the context of the military operations against ISIS in Syria. This section has shown that there existed suggestions about the loss of effective control over territory, which is closely related to the inability of a territorial State to suppress the threat of non-State actors (the situation, which shared the core idea of the 'Unwilling or Unable' theory). This section shows that the 'Unwilling or Unable' theory was endorsed by some States in the context of the military operations against ISIS.[50]

Regarding international reactions, the military operations conducted by the US and other States since 2014 received widespread support.[51] Some countries joined the military operations while others offered military bases or sent weapons and aid. The following sub-sections will look at the legal justifications provided by each State that conducted military operations against ISIS to ascertain the role of the 'Unwilling or Unable' theory.

2. The Paris Attacks and Security Council Resolution 2249

On 31st October 2015, a Russian airliner crashed in Egypt and killed all 224 people on board,[52] and after the incident, the ISIS branch group 'Islamic State in Sinai' claimed responsibility for the attack in Egypt.[53] Then, attacks took place at the centre of Paris on the night of 13th November 2015 by gunmen and suicide bombers, which killed 129 people (the Paris Attacks).[54] ISIS claimed responsibility for the Paris attacks and French President François Hollande regarded the attacks as 'an act of war'.[55] In response to these terrorist attacks, the international community including the US, Russia, the

48) ibid.
49) Motoyoshi (n 1) 178-79.
50) ibid 183-84.
51) 'Who's doing what in the coalition battle against ISIS' *BBC* (28 February 2015) at <https://edition.cnn.com/2014/10/06/world/meast/isis-coalition-nations/index.html> accessed 1 May 2018.
52) 'Sinai plane crash: Russian airliner 'broke up in mid-air'' *BBC* (1 November 2015) at <http://www.bbc.co.uk/news/world-middle-east-34694057> accessed 1 May 2018.
53) ibid.
54) The brief description of the Paris Attacks and the adoption of SC Res 2249 is in Motoyoshi (n 1) 180-82.
55) François Hollande, 'Attacks in Paris – Statement by M. François Hollande, President of the Republic, following the Defence Council meeting' at <http://www.ambafrance-uk.org/Paris-attacks-Official-statements> accessed 1 May 2018.

EU and the Gulf States condemned these attacks by the non-State actors.[56] To suppress the threat of ISIS and its affiliates, France started its military operation against ISIS in Syria and the EU activated collective self-defence under Article 42(7) of the Treaty of the EU.[57]

Based on the article, EU member States joined the military operations against ISIS. Up until this point, there were disputes between the West (such as the US, and the UK) and Russia regarding the response to the civil war in Syria. Russia strongly supported the Assad-regime, but the West did not accept the Assad-regime as the legitimate government. This difference caused difficulties of cooperation against ISIS.[58] However, the Paris Attacks fostered momentum for creating a global coalition to suppress the threat of ISIS.[59] In fact, the Security Council adopted SC Res 2249 which notes that ISIS is 'a global and unprecedented threat to international peace and security' just after the Paris Attacks.[60]

SC Res 2249 reaffirmed the previous resolutions regarding the threat of non-State actors such as SC Res 1368 (2001), SC Res 2178 (2014) and SC Res 2214 (2015),[61] and on the basis of these resolutions, SC Res 2249 condemns terrorist acts conducted by ISIS and notes that ISIS 'has the capability and intention to carry out further attacks and regards all such acts of terrorism as a threat to peace and security'.[62] Moreover, paragraph 5 of this resolution required more efforts to suppress the threat of ISIS as follows:

> Calls upon Member States that have the capacity to do so to take all necessary measures, in compliance with international law, in particular with the United Nations Charter, as well as international human rights, refugee and humanitarian law, on the territory under the control of ISIL (ISIS) also known as Da'esh, in Syria and Iraq, to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL (ISIS) […] and to eradicate the safe haven they have established over significant parts of Iraq and Syria;[63]

56) 'World leaders react to 'barbaric' Paris attacks' *France 24* (15 November 2015) at <http://www.france24.com/en/20151114-paris-attacks-world-reactions-france-terrorism-hollande-putin-obama> accessed 1 May 2018.
57) European Union, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/01, art 42(7).
58) See Motoyoshi (n 1) 180.
59) 'Paris attacks: World leaders united against terrorism, says Cameron' *BBC* (16 November 2015) at <http://www.bbc.co.uk/news/uk-34829546> accessed 1 May 2018.
60) UNSC Res 2249 (20 November 2015) UN Doc S/RES/2249.
61) ibid.
62) ibid.
63) ibid (blanket added).

In the vote, the resolution was unanimously adopted by the permanent member States (China, France, Russia, the UK and the US), and other member States (Angola, Chad, Chile, Jordan, Lithuania, Malaysia, New Zealand, Nigeria, Spain and Venezuela). In the Security Council meeting in which this resolution was adopted, most States reacted favourably, for example, Nigeria stated that '[t]he situation calls for urgent action by the international community to intensify the fight against' ISIS.[64] Angola also severely criticised ISIS and stated that it is high time to 'build a global coalition to fight and eradicate terrorism in all its forms and manifestations'.[65] These statements explicitly admit that the adoption of SC Res 2249 advances the military operations against ISIS. SC Res 2249 was passed despite the differences among States including States such as Russia, which strongly questioned the legality of actions within Syria.[66]

Even though this resolution positively endorsed the military operations against ISIS not only in Iraq but also in Syria since 2014, the legal effect of SC Res 2249 has been one of the most controversial legal issues.[67] Firstly, it is discussed whether the phrase 'to take all necessary measures' employed in the resolution, authorises military operations against ISIS. As Akande and Milanovic argued there remains 'ambiguity' regarding the interpretation of this resolution,[68] without referring to Chapter VII of the UN Charter, it is difficult to regard the resolution as authorisation of the military operations by the Security Council. Other scholarly literature also indicates that this resolution cannot be 'an independent basis of military action' because of the omission to refer to Chapter VII.[69] Akande and Milanovic argued that:

> Resolution 2249 […] is constructed in such a way that it can be used to provide political support for military action, without actually endorsing any particular legal theory on which such action can be based or providing legal authority from the Council itself.[70]

64) UN Doc S/PV.7565 (20 November 2015) 5 (Nigeria).
65) ibid 7 (Angola).
66) See Motoyoshi (n 1) 182.
67) ibid 181.
68) Dapo Akande and Marko Milanovic, 'The Constructive Ambiguity of the Security Council ISIS resolution', EJIL: Talk!, 21 November 2015 at <http://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/> accessed 1 May 2018.
69) Anne Peters, 'German Parliament decides to send troops to combat ISIS − based on collective self-defense "in conjunction with" SC Res. 2249' EJIL: Talk! (2015) at <http://www.ejiltalk.org/german-parlament-decides-to-send-troops-to-combat-isis-%E2%88%92-based-on-collective-self-defense-in-conjunction-with-sc-res-2249/> accessed 1 May 2018.
70) Akande and Milanovic (n 64).

SC Res 2249 includes a certain degree of ambiguity with respect to its binding role without reference to Chapter VII. It does not authorise the military operations under Chapter VII unlike SC Res 678.[71] There is an additional concern with the resolution, which is whether SC Res 2249 successfully removed the ambiguity surrounding the 'Unwilling or Unable' theory as a part of the right of self-defence. This question arises because the resolution calls on Member states 'to eradicate the safe haven they [ISIS] have established over significant parts of Iraq and Syria'.[72]

With respect to the relationship between the meaning of 'safe haven' and the idea of the situation of unwilling or unable, both are closely related. 'Safe haven' was employed in SC Res 1373 and it means the place where terrorists 'finance, plan, support, or commit terrorist acts'.[73] If there exists the situation of unwilling or unable, such places where terrorists plan and commit terrorist acts can be established and kept within a territorial State. Thus, the argument of a 'safe haven' and the situation of unwilling or unable are linked.[74]

Before the adoption of the resolution, the military operations under the 'Unwilling or Unable' theory were based on uniliteral judgment by a State attacked by non-State actors regarding whether there exists the situation of unwilling or unable. However, in the context of the military operations against ISIS, SC Res 2249 plays a key role in the interpretation of the 'Unwilling or Unable' theory beyond the unilateral decision by the State because SC Res 2249 regarded some of its territories within Syria as a 'safe haven'.[75]

3. State Practice After SC Res 2249

After the adoption of SC Res 2249, some other States such as Germany, Belgium and Norway joined the military operations against ISIS within Syria.[76] Even though Germany's operations were initially restricted against ISIS in Iraq,[77] Germany decided to expand its operations from Iraq to Syria after the adoption of SC Res 2249.[78] Germany argued that their actions are

71) UNSC Res 678 (29 November 1990) UN Doc S/RES/678.
72) UNSC Res 2214 (27 March 2015) UN Doc S/RES/2214 (blanket added).
73) UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373.
74) Motoyoshi (n 1) 168.
75) See ibid 180-84.
76) ibid 182-83.
77) UN Doc S/PV.7316 (19 November 2014) 39 (Germany).
78) 'Germany joins fight against Isil after parliament approves military action in Syria' *Telegraph* (04 December 2015) at <http://www.telegraph.co.uk/news/worldnews/europe/germany/12032948/Germany-joins-fight-against-Isil-after-parliament-approves-military-action-in-Syria.html> accessed 1 May 2021.

based on the right of self-defence under Article 51 and stressed that they are 'directed against ISIL (ISIS), not against the Syrian Arab Republic'.[79] Germany also mentioned as follows:

> ISIL (ISIS) has occupied a certain part of Syrian territory over which the Government of the Syrian Arab Republic does not at this time exercise effective control. States that have been subjected to armed attack by ISIL (ISIS) originating in this part of Syrian territory, are therefore justified under Article 51 of the Charter of the United Nations to take necessary measures of self-defence, even without the consent of the Government of the Syrian Arab Republic.[80]

The phrase that Syria 'does not at this time exercise effective control' should be noted as German justification of the operation within Syria. This statement also endorses the 'Unwilling or Unable' theory because the phrase of failure to exercise effective control suggests that the Syrian authorities are not able to control the territory where ISIS is located.[81]

Moreover, Belgium justifies its military operations based on the right of collective self-defence and admitted that Syria 'does not, at this time, exercise effective control'.[82] In addition to the reference to 'effective control', Belgium stressed that the measures are directed against ISIS not Syria.[83] Norway also referred to a 'safe haven' established by ISIS and also employed the phrase 'directed against ISIL (ISIS) not Syria'.[84] The Netherlands expanded its operations to Syria after the adoption of SC Res 2249.[85] It decided to conduct military operations against ISIS 'in particular eastern part of Syria (in met name het oostelijk deel van Syrië)' based on the collective self-defence and international coalitions.[86]

In conclusion, these States which participated in the operations in Syria referred to or suggested the lack of effective control of the territory by Syrian government, which is closely related to the situation of unwilling or

79) UN Doc S/2015/946 (Germany) (10 December 2015) (blanket added).
80) ibid (blanket added).
81) Motoyoshi (n 1) 182-83.
82) UN Doc S/2016/523 (Belgium) (9 June 2016).
83) ibid.
84) UN Doc S/2016/513 (Norway) (3 June 2016) (blanket added).
85) 'Dutch jets to join bombing of Islamic State targets in Syria' *Reuter* (29 January 2016) at <http://www.reuters.com/article/us-mideast-crisis-syria-netherlands/dutch-jets-to-join-bombing-of-islamic-state-targets-in-syria-idUSKCN0V71SZ> accessed 1 May 2018.
86) Letter of the Government to Parliament, 'Bestrijding internationaal terrorisme' Kamerstuk 27925 nr. 570 at <https://zoek.officielebekendmakingen.nl/dossier/27925/kst-27925-570?resultIndex=21&sorttype=1&sortorder=4 > accessed 1 May 2018.

unable. The 'Unwilling or Unable' theory seeks to determine whether there exists the situation of unwilling or unable.[87] Therefore, the military operations against ISIS suggests that all these States share the core value of the theory, which enables a State to exercise the right of self-defence against non-State actors within a territorial State, and not the territorial State.[88]

With regard to the role of SC Res 2249, although it should not be regarded as a typical authorisation by the Security Council and it is not an independent legal justification beyond the legal basis in the UN Charter,[89] this resolution played a 'complementary' role to judge the validity of the operations based on the Unwilling or Unable' theory. Having adopted SC Res 2249, other States joined the operations in Syria such as Germany.

On the basis of the fact that the 'Unwilling or Unable' theory is legally acceptable under the inherent right of self-defence, this section showed that the military operations against ISIS strengthen and reaffirm the 'Unwilling or Unable' theory.[90] It should be noted that most States which joined the military operations against ISIS refer to the situation of unwilling or unable. Moreover, as will be closely discussed, the adoption of SC Res 2249 played a key role in the context of the application of the 'Unwilling or Unable' theory.[91]

V. Legal Framework to Avoid the Abusive Use of the 'Unwilling or Unable' Theory

As shown in previous sections, the interpretation of the existing international legal framework can respond to the contemporary threats from non-State actors based on the inherent right of self-defence. In a situation of unwilling or unable, the 'Unwilling or Unable' theory is an appropriate legal framework to supress the threat of non-State actors.[92] Yet, the fact that the 'Unwilling or Unable' theory fits within the UN Charter, should not be the end of the examination because the theory is open to abuse by a State.[93] The abusive use of the theory may occur firstly, if the decision regarding the situation of unwilling or unable is done arbitrarily and secondly, if

87) Deeks (n 4) 498-501.
88) Motoyoshi (n 1) 184.
89) Gabor Kajtar, 'The Use of Force against ISIL in Iraq and Syria-A Legal Battlefield' (2016) 34 Wisconsin International Law Journal 568.
90) See Motoyoshi (n 1) 184.
91) ibid.
92) ibid 190.
93) ibid 184.

the military operations are conducted without any guidelines.[94] Thus, this section examines mechanisms or guidelines regarding military operations based on the 'Unwilling or Unable' theory.

In the context of the detailed contents of the 'Unwilling or Unable' theory, Deeks proposes six standards to encourage the territorial State to address the non-State actor's threat and to reduce the abuse of the military operations.[95] The standards are: (1) Prioritization of Consent; (2) Nature of the Threat Posed by the Nonstate Actor; (3) Request to Address the Threat and Time to Respond; (4) Reasonable Assessment of Territorial State Control and Capacity; (5) Proposed Means to Suppress the Threat; and, (6) Prior Interactions With the Territorial State.[96] Deeks suggested that these factors are 'clear standards' to improve the decisional process of the State that wishes to exercise the right of self-defence.[97]

These standards proposed by Deeks are related to the prior contacts with the territorial State, a reasonable assessment of the condition of the territorial State and the efforts to avoid collateral damage by the military operations. Therefore, this research focused on three factors, (1) The Consent of the Territorial State, (2) A Reasonable Assessment of the Territorial State's Condition by International Organisations and (3) The Reliance on the Customary Requirement of Proportionality.

1. The Consent of the Territorial State

Although the right of self-defence against non-State actors within the territorial State is permissible under the UN Charter, the military operations should be carefully conducted to respect the territorial sovereignty of a territorial State as much as possible. As mentioned above, the consent of the territorial State should be firstly focused on. The reason is that with respect to the exceptions to the prohibition of the use of force under Article 2(4) of the UN Charter, valid consent by the territorial State precludes the violation of its territory under Article 20 of ARSIWA.[98] Therefore, the State attacked by non-State actors should try to secure prior consent from the territorial State.

Moreover, the existence of some kind of 'cooperation' by a territorial State is also important (although it is not an indispensable condition for military operations) because it is proof of the *willingness* of a territorial State.

94) ibid 190-91.
95) Deeks (n 4) 509-10.
96) ibid 519-33.
97) ibid 519.
98) ILC, ARSIWA in UN Doc A/51.10 (2001) art 20.

Deeks stated that the State should assess what the territorial State 'has done in response to any previous requests to take steps against' the non-State actors.[99] Thus, the lack of cooperation of the territorial State suggests that the territorial State is unwilling to suppress the threat of non-State actors. In addition, to avoid collateral damage to the State as much as possible, enough information and support from the territorial State is essential because military targets will be determined accurately by such corporations.

2. A Reasonable Assessment of the Territorial State's Condition by International Organisations

Although, the collective security measures under Chapter VII should be the primary method of responding to threats to peace and security, it remains ineffective due to the lack of the UN standing army under Article 43.[100] Moreover, because the function of the Security Council is easily paralysed if one of the permanent member States exercises a veto, collective security measures are not sufficient and are an ineffective means to suppress international threats.[101]

However, international organisations can play a key role to avoid the *unilateral and arbitrary* uses of the theory. Under the 'Unwilling or Unable' theory, a State attacked by non-State actors can conduct military operations within a territorial State unilaterally. Yet, it does not mean that the theory is employed without any other mechanisms or guidelines.

In this context, Ahmed proposes a mechanism which utilises the Security Council as a 'fact-finder' to determine the situation of the unwilling or unable to avoid the abuse of the theory.[102] Ahmed suggests that the Security Council determines the facts that would then confirm the applicability of the 'Unwilling or Unable' theory. This section explores Ahmed's proposal and suggests the Security Council is not the only factfinder that can assess whether there exists the situation of unwilling or unable.

(1) The Role of the Security Council

Even though one of the most controversial issues regarding the 'Unwilling or Unable' theory is in what situations a territorial State would be considered as *unwilling or unable*, there does not exist a framework for

99) Deeks (n 4) 531: See also Motoyoshi (n 1) 188.
100) UN Charter, art 43.
101) See UN Charter, art 27(3): Yuki Motoyoshi, 'The Legal Status of the Responsibility to Protect (R2P) in International Law-The Relevance of Military Actions for the Purpose of Protecting People Based on R2P- (in Japanese)' (2019) 27(3) Yokohama Law Journal 530.
102) Dawood Ahmed, 'Defending Weak States Against the 'Unwilling or Unable' Doctrine of Self-Defense,' (2013) 9 Journal of International Law and International Relations 1, 36.

deciding that.[103] In this context, Ahmed proposes a mechanism which utilises the Security Council as a 'fact-finder' to determine the situation of the *unwilling or unable* to avoid the abuse of the theory.[104] Firstly, he argues that a State is permitted to conduct military operations against non-State actors if the State 'is willing to bear the burden of disclosing to the Security Council why it deems' the territorial State is in the situation of unwilling or unable.[105] In addition, he suggests that in the event that information 'is still lacking as to discerning a state's effectiveness, or the host state [the territorial State] does not challenge the claim', the Security Council should set-up a fact-finding mission to examine the issue.[106] He maintains that:

> [T]he Security Council should act as a fact-finder and transmit information to the international community as to the accuracy of the victim state's claim. For this purpose, in addition to information voluntarily disclosed by the victim and host state, the Security Council should seek information on a host state's effectiveness […] and, if necessary, set-up fact-finding missions to verify host state effectiveness.[107]

The core of his proposal is to impose constraints on a State which conducts military operations; the State is only permitted to conduct military operations against non-State actors if the State 'is willing to bear the burden of disclosing to the Security Council why it deems' the territorial State to be ineffective before the military operations.[108] This suggestion is quite useful because such a mechanism avoids the abusive use of the theory because the decision regarding the situation of unwilling or unable cannot be done unilaterally as the Security Council will also examine the situation of the territorial State. Moreover, this kind of mechanism will improve decision-making processes. As the Security Council has 'a primary responsibility for the maintenance of international peace and security' under Article 24(1) of the UN Charter, Ahmed argues that it is best-placed to act as a fact-finder.[109]

As mentioned above, the Security Council played a crucial role in the operations against ISIS through the adoption of SC Res 2249 because this resolution, which calls on Member States to take all necessary measures

103) See Flasch (n 40) 37.
104) Ahmed (n 101) 36.
105) ibid 21.
106) ibid 21-22.
107) ibid.
108) ibid.
109) ibid 24.

'on the territory under the control of' ISIS in Syria,[110] suggests that Syria lost effective control over its territory where ISIS had power at that time.[111] The Security Council refers to the situation where Syria failed to control its own territory,[112] and this reference supports the military operations against ISIS.[113] Yet, it should be noted that such a role by the Security Council is on 'a case-by-case basis'.

It should be stressed that a State can act without Security Council authorisation in the right of self-defence if an armed attack occurs.[114] Moreover, the function of the Security Council is easily paralysed if one of the permanent member States exercises the veto power.[115] In this context, the role of the Security Council cannot and should not be decisive. Rather, when a State conducts military operations based on the 'Unwilling or Unable' theory, the reference by the Security Council legitimates the decision-making by the State.[116]

Moreover, because the UN Charter does not restrict the role of keeping international peace and security to the Security Council, the role of the Secretary General, the General Assembly, and other international organisations in the context of the 'Unwilling or Unable' theory can be explored.

(2) The Role of the Secretary General

The Secretary General could serve to determine whether the 'Unwilling or Unable' theory is applied through the reference to the condition of a territorial State. In fact, with regard to the role of the Secretary General in armed conflicts, it is suggested that the Secretary General has played an important role.[117] Under the UN Charter, the Secretary General has a role to 'bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security'.[118] In practice, the Secretary General has served to resolve disputes regarding international peace and security through his role as a fact-finder and negotiator.[119] For example, the Secretary General expressed his deep regret of the air strikes against Yugoslavia by the North Atlantic Treaty Organisation

110) UNSC Res 2249 (20 November 2015) UN Doc S/RES/2249.
111) See Motoyoshi (n 1) 184.
112) UNSC Res 2249 (20 November 2015) UN Doc S/RES/2249.
113) Motoyoshi (n 1) 184.
114) UN Charter, art 51.
115) UN Charter, art 27(3).
116) See Motoyoshi (n 1) 190.
117) Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (OUP 2001) 184.
118) UN Charter, art 99.
119) José Alvarez, *International Organizations as Law-makers* (OUP 2005) 433.

(NATO) in 1999. He states:

> I deeply regret that, in spite of all the efforts made by the international community, the Yugoslav authorities have persisted in their rejection of a political settlement, which would have halted the bloodshed in Kosovo and secured an equitable peace for the population there. It is indeed tragic that diplomacy has failed, but there are times when the use of force may be legitimate in the pursuit of peace.[120)]

Here the Secretary General is referring to the situation where the State (Yugoslavia) failed to secure the peace in the region. This also occurred in the context of the military operations against ISIS. The Secretary General noted that 'the strikes took place in areas no longer under the effective control of the Syrian government'.[121)] This statement suggests that there exists the situation where the territorial State is unable to suppress the threat of non-State actors.[122)] It is correctly argued that the Secretary General is expected to 'fill the gaps in the system instituted by the Charter'.[123)] Therefore, there is potential for the Secretary General to act as an arbitrator of the question of whether a State is in a situation of unwilling or unable.

(3) The Role of the General Assembly and Other International Organisations

The General Assembly is also a candidate to play a role in assessing whether there exists the situation of unwilling or unable. Article 11 of the UN Charter reads that the General Assembly 'may consider the general principles of co-operation in the maintenance of international peace and security […] and may make recommendations with regard to such principles to the Members or to the Security Council or to both'.[124)] Historically, the General Assembly played a greater role during the inaction of the Security Council because the General Assembly may make recommendations for the maintenance of international peace and security.[125)] The typical example is Resolution 377 (V) A (Uniting for Peace Resolution),[126)] and it was passed

120) UN Press Release SG/SM/6938 (24 March 1999).
121) Secretary-General Ban Ki-moon, 'Secretary-General of the U.N., Remarks at the Climate Summit Press Conference' (Including Comments on Syria) (23 September 2014), at <http://www.un.org/apps/news/infocus/sgspeeches/statments_full.asp?statID=2356#.VIrmZNFy-Z9A> accessed 1 May 2018; See also Motoyoshi (n 1) 180.
122) Motoyoshi (n 1) 184.
123) Alvarez (n 119) 433.
124) UN Charter, art 11; See also Motoyoshi (n 101) 547-48.
125) See Christine Gray, *International Law and the Use of Force* (3rd edn, OUP 2008) 259-61.
126) UN General Assembly Resolution 377 (V) A (3 November 1950).

when the Security Council was paralysed with the vetoes by the USSR during Korean War. According to this resolution,

> If the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.[127)]

Based on this resolution, it was shown that not only the Security Council but also the General Assembly may recommend collective measures to the UN Member States. Thus, regarding the maintenance of international peace and security, the General Assembly also potentially serves to determine the situation where the 'Unwilling or Unable' theory can be applied. The General Assembly should do so particularly when the Security Council is paralysed.

In addition to the Security Council, the Secretary General and the General Assembly, other international organisations such as the International Court of Justice (ICJ) or regional organisations can potentially serve to determine whether the territorial State is in the situation of unwilling or unable although the detailed analysis of the role of these organisations is not examined here.[128)]

(4) Summary

The key issue is that the reference of the terms regarding a situation of unwilling or unable by international organisations will provide the legitimacy of the decision regarding whether there exists the situation of unwilling or unable in the context of the application of the 'Unwilling or Unable' theory.[129)] It should be noted that Ahmed's proposal that the Security Council alone determines the facts in this context, is not realistic because if the Member States of the Security Council cannot agree to set up the mechanism, it never happens.

The Security Council, the Secretary General, the General Assembly and

127) ibid.
128) See Motoyoshi (n 101) 548-49.
129) Motoyoshi (n 1) 190.

other international organisations can potentially provide the legitimacy of the decision regarding the situation of unwilling or unable by a State. Furthermore, in this research, it is concluded that the role of international organisations in the context of the application of the 'Unwilling or Unable' theory is *complementary*, but not decisive because States can conduct military operations based on their own decisions under the right of self-defence.

3. The Reliance on the Customary Requirement of Proportionality

Although ultimately, the decision regarding the situation of unwilling or unable can be done unilaterally,[130] a State attacked by non-State actors should not and cannot employ its military forces without any limitations because the theory is a part of the right of self-defence.[131] It means that the State must follow the customary requirements of the right of self-defence, and particularly, the customary requirement of proportionality provides the practical limits on a State attacked by non-State actors.[132]

VI. Conclusion

This article dealt with one of the most controversial and contemporary legal questions whether international law, within the framework provided by the UN Charter, can address the threat posed by non-State actors in a situation of unwilling or unable. The 'Unwilling or Unable' theory, which has a solid legal basis on the inherent right of self-defence provides an appropriate legal framework to supress such threats. At the same time, it is an urgent matter how to construct the mechanisms to avoid the abusive use of the theory as the theory ultimately permits a State to conduct military operations within the territorial State although the target should not be the territorial State itself. How to take a balance between the national security of a State attacked by non-State actors and the territorial sovereignty of the territorial State should be focused on for future research.

130) Yoram Dinstein, *War, Aggression, and Self-Defence* (5th edn, Cambridge University Press (CUP) 2011) 272.

131) See Kimberley Trapp, 'Back to Basics: Necessity, Proportionality, and the Right of Self-Defence against Non-State Terrorist Actors' (2007) 56(1) International & Comparative Law Quarterly 156: The 'Unwilling or Unable' theory is considered as a part of the components of the customary requirement of necessity. See Deeks (n 4) 494: Motoyoshi (n 1) 187-88.

132) Trapp (n 131) 156: Motoyoshi (n 3) 156, 164 (footnote 140). The detailed analysis of customary requirement of proportionality in the context of military operations based on the theory is out of scope in this article and will be conducted in future research.