Abstract

Postdoctoral Thesis/Habilitation

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“The Unwilling or Unable State as a Challenge to International Law”

In the course of the forceful operations of the *Global Coalition against ISIL* in Syria the intervening states justified their conduct by arguing that “[s]tates must be able to defend themselves, in accordance with the inherent right of individual and collective self-defence […] when […] the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks” (Samantha Powers, 2014). This reading departs from the classical interpretation of the right to self-defence, which applies between an attacking state and a victim state. Art. 51 UN Charter is given a tripolar guise (non-state actor – host state – victim state). The standard of “unwilling or unable” (UoU) poses thus the question as to whether Art. 51 UN Charter is undergoing a process of normative evolution or modification.

Three questions appear to be most pressing in this context: First, is “unwilling or unable” (UoU) a legally established standard governing the exercise of the right to self-defence? Second, what is the substance of UoU and, third, how does it operate on the international plane? These questions form the starting point of the analysis presented in this thesis which approaches doctrinal and normative issues raised by UoU from a broader perspective its thematic scope extending thus beyond the right to self-defence.

The term UoU is not confined to the controversies surrounding the interpretation and application of Art. 51 of the UN Charter. It forms, for example, an integral part of the complementarity regime of the International Criminal Court, permeates the debate on the “Responsibility to Protect” and surfaces within the refugee protection regime. In some instances, UoU is an element of norms which follow the structure of a normative conditional, in others it forms part of non-binding standards. Occasionally it is employed merely as a (doctrinal) concept designed to systematize particular normative structures.

In light of the presence of UoU in several normative contexts, this thesis follows a multi-dimensional research agenda addressing UoU from a micro-, and macro- and *meta*-perspective.

The basic proposition of this thesis is that processes of normative dynamics occurring in international law are to be assessed in a dialectical manner both from an inductive as well as a deductive angle. This approach takes constitutional traits of the international legal order into account while simultaneously acknowledging the (limited) normative force of the factual within the international legal sphere. State practice and *opinio iuris*, which point towards the emergence and normative evolution of legal norms, are to be assessed through the rules and principles that the international legal order is comprised of. The same applies to practice of parties in the application of treaty rules

which potentially modifies their normative substance (“interpretative theory of custom and jurisgenerative practice”).

Based on this methodological assertion, the first layer of analysis comprises an examination of the normative status of the concept of UoU in the context of the right to self-defence as enshrined in Art. 51 of the UN Charter (“micro-level” of analysis). This thesis analyses and systematizes various doctrinal accommodation models which aim to establish that the standard of UoU conforms with the normative prerequisites of Art. 51 UN-Charter, assesses to what extent they find reflection in state practice and identifies the ambiguity of UoU as a standard. Beyond that, the major structural features of UoU and the ideas underlying it are delineated. These include “substitution and reallocation of functions”, “insensitivity to incapacity” and “subsidiarity”. According to this structural frame UoU reallocates the performance of certain functions onto another entity if the actor who is primarily expected to generate particular results fails to do so (substitution as well as subsidiarity). “Insensitivity to incapacity” suggests that identical normative consequences attach to state conduct regardless of a state’s “unwillingness” or “inability”. A state becomes subject to an external intervention which engenders a *de facto* sanctioning effect albeit it is not internationally liable for defaulting with the performance of functions attributed to it (i.e. prevention of activities of non-state actors which are harmful to other states). More precisely, UoU introduces in areas where it operates indirectly “imperfect obligations of result” in the sense of “Obliegenheiten” being shaped by an “obligation asymmetry”. Thereby it exerts potentially regulative effects by influencing state behaviour.

The thesis finds that UoU is echoed in some instances of past and present state practice representing hence a normative potentiality. Relevant state practice suffers, however, from ambiguity and inconsistency which has prevented UoU from consolidating as a legal standard steering the application of Art. 51 UN Charter so far. Based on these preliminary findings, the thesis turns to the macro-level of analysis.

At its second level of examination, the analytical angle of this thesis is extended beyond the normative context of the right to self-defence (“macro-level” of analysis). UoU is identified in various normative contexts both as an exact phrasing and, conversely, in its inverted form as “willingness and ability” [WaA]. In various issue areas some of its structural elements can be identified. This thesis asserts, in particular, a convergence the concept of the “Responsibility to Protect” with the right to self-defence which gravitates around UoU. The perspective taken at the macro-level of analysis goes beyond the context of international law. Supranational entities as well as domestic legal orders are likewise examined. This look beyond the right to self-defence and the Art. 51 UNC debate serves three purposes: First, UoU is an indeterminate term which – if becoming operational in the use-of-force context – requires the implementation of strategies that contain its arbitrary and abusive application. Other contexts in which this concept operates can be potentially taken as sources of inspiration for adding substance to UoU, identifying its essential flaws and designing specific containment strategies. Second, if UoU or some of its structural features are to be seen as manifestations or echoes of “structural principles” of international law or even a “general principles of law” in the sense of Art. 38(1)(c) ICJ Statute, this is an important aspect when assessing the validity of claims regarding UoU as an emerging legal standard in the context of the right to self-defence in line with the interpretative theory of custom and jurisgenerative practice proposed within this thesis. The idea to search for “general principles of law” behind the notion of UoU

justifies extending the focus towards national (and here both to public as well as private law) and supranational legal orders. Third, insights generated in terms of UoU and norms operating it shall form the basis of a broader critical assessment of UoU as a concept.

In order to assess whether "insensitivity to incapacity" is to be seen as a structural principle of international law or "general principle of law", this thesis looks also at normative contexts and rules which are – conversely – responsive to a state's "inability". Here it identifies when and why and how international legal rules are "responsive" to the "inability" of states. The analysis systematizes different mechanisms which respond to state "inability". It identifies legal consequences of a state's "inability" for the state itself on the one hand as well as for other states on the other. This generates some (modest) insights regarding a grander theme – the interrelatedness between the "ought" and the "can" in international law. In that regard antagonistic trends can be identified.

This layer of analysis closes with a reflection on the possibility, prospects and feasibility of transplanting particular containment strategies relating to UoU as employed in other legal contexts into the normative design of Art. 51 UN Charter *de lege ferenda.*

In its third analytical dimension this thesis assesses UoU and concepts closely related to it from a *meta*-perspective ("*meta*-level of analysis"): It embeds the concept of UoU into the discourse on the conceptualization of the state as a legal person and its anthropomorphic depiction in state theory and international legal theory. Furthermore, it reflects on the concept of a state's "ability" and "willingness" and delineates their possible substance. Beyond that, it evidences that terms coined in legal and political discourse in order to characterize states – which potentially engender a stigmatizing effect – oscillate between the concepts of "unwillingness" and "inability". Following the "turn to history", some continuities between UoU and colonial international legal theory are identified. The basic thesis in this part of this contribution is that UoU is a manifestation of processing the state as an entity through a functionalist prism which departs from the protection of its status. UoU is a conceptual instrument intended to draw the international legal order towards a world governance structure – a development that also entails dangers. A concept which represents this functionalist turn aptly is "contingent sovereignty": A state's performance is regarded as a moment on which its status and status rights are contingent. The concept of "contingent sovereignty" is particularly present in the debate on expansive interpretations of Art. 51 UN Charter hence meriting a critical analysis. This thesis examines whether the concept of "contingent sovereignty" as well as its alleged normative implications for the *ius ad bellum* could be substantiated by taking recourse to the "theory of principles". It closes with a broader reflection on a potential hierarchization of the use-of-force framework which the concept of "contingent sovereignty" entails.