

## The Unable or Unwilling Doctrine: A View from Private Law

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*May a threatened state use force against armed nonstate actors situated in another state without the other state's permission? Proponents of the "Unable or Unwilling Doctrine" ("UUD") answer in the affirmative, provided that the territorial state in which the nonstate actors are based is either unable or unwilling to tackle the threat by itself. Opponents reject the UUD, arguing that it has no place within existing international law. The intense, multi-layered debates over the UUD have thus far been grounded primarily in the international law of self-defense. Moreover, both proponents and opponents of the doctrine have tended to treat its two prongs as interchangeable, such that the legality of a use of force or the consequences that follow from it are unaffected by which of the two explains the territorial state's failure to negate the threat to the targeted state. This Article challenges both of these features of UUD analysis. Our first contention is that, while states enjoy limited leeway to use defensive force against nonstate actors in another state's territory, the prerogative to enter the territorial state without other authorization is rooted in principles of necessity, not self-defense. In turn—and here we reach our second main contention—grounding the UUD in necessity suggests that, for cases in which the territorial state is unable, rather than unwilling, to deal with the threat, the threatened state is obligated to compensate the territorial state for harm caused by its unpermitted entry. Our third contribution is to explain why compensation might be owed, as a matter of equity, even for the entry itself as a (justified) violation of sovereignty. All of these claims, we contend, are bolstered by interpreting international law through the lens of private law, particularly the Anglo-American law of tort and restitution and its rules for the imposition of liability in cases of "private necessity."*

### INTRODUCTION

Once at the margins of international legal debates, the question of whether a state may use force against nonstate actors located in another state is now at their center. With the "war on terror" has come increased reliance by the United States and other nations on targeted killings of suspected terrorists within and outside of immediate conflict zones.<sup>1</sup> The war in Syria also saw an intensified use of force by foreign nations in the territory of a

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1. See generally Philip Alston (Special Rapporteur on the Expulsion of Aliens), *Rep. of the Special Rapporteur on Extrajudicial Summary Arbitrary Executions: Study on targeted killings* ¶¶ 11–12, U.N. Doc. A/HRC/14/24/Add. 6 (May 28, 2010) [hereinafter Alston]; BENJAMIN WITTES & GABRIELLA BLUM, *THE FUTURE OF VIOLENCE: ROBOTS AND GERMS, HACKERS AND DRONES – CONFRONTING A NEW AGE OF THREATS* (2015); James Igoe Walsh, *The Rise of Targeted Killing*, 41 J. STRATEGIC STUD. 143 (2018).

state without the consent of its government.<sup>2</sup> Controversies over the legality of these killings have pitted government officials, scholars, activists, and pundits against one another, and have involved arguments of international and domestic law, ethics, politics, and military strategy. Central to these disputes is a basic question: May a threatened state strike nonstate actors in another state's territory when the *nonstate actors' conduct cannot be attributed to the other state*?

This last question today typically centers on the legitimacy of what is known as the “Unable or Unwilling Doctrine” (“UUD”). According to the UUD, a would-be victim state (the “threatened state”) may use force against persons located in another state (the “territorial state”) without the United Nations Security Council's authorization or the territorial state's consent, provided that those persons pose an imminent danger to the threatened state and the territorial state is “unable or unwilling” to neutralize the threat. Proponents of the doctrine typically maintain that the UUD is a legitimate interpretation or expansion of the international law of self-defense, while opponents reject the UUD as matter of law, policy, or practice.

With the UUD gaining traction in the international arena, and potentially justifying a greater number of targeted killings or other types of unilateral military action in foreign lands, it has become increasingly important to put it to legal and ethical scrutiny, and to consider not only the initial question of its validity *tout court*, but also the rules and consequences that follow from its adoption. It is in this space that our Article seeks to intervene.

Debates over the UUD have for the most part addressed whether it can be grounded in the international law of self-defense. Furthermore, both proponents and opponents of the doctrine have tended to treat the “unable” and “unwilling” prongs of the doctrine as interchangeable, such that the legality of a use of force or the consequences that follow from it are unaffected by which of the two explains the territorial state's failure to negate the threat to the targeted state. This Article challenges both of these settled features of UUD analysis.

Our first core contention is that while states do enjoy limited leeway to use defensive force against nonstate actors in another state's territory, the prerogative to enter the territorial state without consent or other authorization is rooted in principles of *necessity*, not self-defense. Under certain circumstances, when a territorial state is unable or unwilling to address the danger posed to the threatened state by nonstate actors within the territorial state, the threatened state is, as a matter of necessity, privileged to enter and take appropriate measures within the territorial state to neutralize the threat. At the same time—and here we reach our second core contention—

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2. See generally Amichai Cohen, *Syria: International Use of Force and Humanitarian Intervention*, in *THE SYRIAN WAR: BETWEEN JUSTICE AND POLITICAL REALITY* 11, 11–28 (Hilly Moodrick-Even Khen et al. eds., 2020).

grounding the UUD in necessity suggests that, for cases in which the territorial state is unable, rather than unwilling, to deal with the threat, the threatened state is obligated to compensate the territorial state for damage caused by its unpermitted entry (other than harm to legitimate targets). Our additional contribution is in explaining why compensation might be owed, as a matter of equity, for harms other than the material harm for which the threatened state is legally obligated to compensate, particularly the violation of the territorial state's sovereignty. These claims, we further contend, are bolstered by interpreting international law through the lens of private law, particularly the Anglo-American law of tort and restitution and its rules for the imposition of liability in cases of "private necessity." In the remainder of this introduction, we briefly explain the contours of the existing debates over the UUD, then elaborate on our intervention.

On the question of whether states can use force in the territories of other states without permission to address a threat of attack posed by nonstate actors, U.S. administrations, dating back at least to the 1970s,<sup>3</sup> have answered in the affirmative. American officials, starting with the Reagan administration<sup>4</sup> through Obama's and Trump's,<sup>5</sup> and now Biden's (however implicitly),<sup>6</sup> have maintained that the UUD, particularly as applied to terrorists in foreign lands, is a recognized rule of the *jus ad bellum*—the law that governs the threat or use of force in international relations—with a long pedigree in international law and state practice. A denial of the UUD, they contend, would massively compromise a state's guarantee under the United Nations Charter of its "inherent right [of] self-defence."<sup>7</sup>

The United States is not alone in claiming that the UUD is a legitimate doctrine under international law. At least ten countries openly endorse and rely on it,<sup>8</sup> while others follow it in practice without official endorsement.<sup>9</sup>

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3. See Kevin Jon Heller, *The Earliest Invocation of Unwilling or Unable*, OPINIO JURIS (March 19, 2019) <http://opiniojuris.org/2019/03/19/the-earliest-invocation-of-unwilling-or-unable/> [<https://perma.cc/5ZPT-9HCV>] (summarizing Brian Cuddy's work on the Nixon Administration's justification for attacks on North Vietnamese forces in Cambodia as an early invocation of the UUD). Note that other scholars find support for the UUD dating back to Daniel Webster's letter to Lord Ashburton following the *Caroline* incident of 1837. See, e.g., Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL. 237, 241–243 (2010).

4. See, e.g., Ronald Reagan, U.S. President, Address by Reagan on Libya (Apr. 14, 1986) (transcript available at <https://www.nytimes.com/1986/04/15/world/transcript-of-address-by-reagan-on-libya.html>) [<https://perma.cc/F92R-YJAT>].

5. See, e.g., Brian Egan, Legal Advisor at U.S. Dep't of State, Keynote Address at ASIL, LAWFARE (Apr. 8, 2016) (transcript available at <https://www.lawfareblog.com/state-department-legal-adviser-brian-egans-speech-asil>) [<https://perma.cc/M9KV-RP9H>].

6. According to news reports, the Biden Administration has introduced more stringent restrictions on drone strikes outside active battlefields but has not rejected the practice or its legal justifications altogether. See Charlie Savage & Eric Schmitt, *Biden Secretly Limits Counterterrorism Drone Strikes Away From War Zones*, N. Y. TIMES (March 3, 2021).

7. U.N. Charter art. 51.

8. These countries include Australia, Canada, the Czech Republic, Russia, Germany, Israel, the Netherlands, Turkey, and the United States. See Elena Chachko & Ashley Deeks, *Which States Support the 'Unwilling and Unable' Test* (Oct. 10, 2016), <https://www.lawfareblog.com/which-states-support-unwilling-and-unable-test> [<https://perma.cc/8MNS-ZWMP>]; see also Adil Adhmad Haque, *Self-Defense Against*

Russia invoked the doctrine to justify its attacks on Chechen rebels in Georgia,<sup>10</sup> as did Turkey against the Kurdistan Workers' Party ("PKK") fighters in northern Iraq and Israel against Hezbollah members in Lebanon.<sup>11</sup> The United Kingdom also alluded to the UUD to justify its airstrikes against ISIS fighters in Syria. In fact, proponents of the doctrine have been gaining so much ground since September 11, 2001, that in his 2010 report on targeted killings, the Special U.N. Rapporteur on Extrajudicial Executions cited the doctrine with endorsement<sup>12</sup> and several international law scholars have advocated the recognition of the doctrine as a settled rule of international law.<sup>13</sup>

Supporters of the UUD justify it on multiple grounds. As a matter of policy, they assert that the combination of greatly empowered nonstate actors and weaker territorial states mandates an expansion (or expansive interpretation) of the international law of self-defense.<sup>14</sup> Limiting the right to self-defense to meet only unlawful threats by states—or those that can be attributed to states under the very demanding tests of current international law—is, they say, both immoral and impractical.<sup>15</sup>

As a matter of law, some international lawyers maintain that the UUD is a fair application of the *jus ad bellum*, either by interpretation of the U.N. Charter or through the evolving customary international law ("CIL") that

*Non-State Actors: All Over the Map*, JUST SECURITY (March 24, 2021), <https://www.justsecurity.org/75487/self-defense-against-non-state-actors-all-over-the-map/> [<https://perma.cc/2FTY-CD6L>] (summarizing the statements made by states at an informal meeting of the U.N. Security Council on whether the U.N. Charter permits the use of armed force by one state against nonstate actors).

9. France, Belgium, Iran, and South Africa. See Chachko & Deeks, *supra* note 8. Note that France seemed to be in favor of the UUD with respect to ISIS but later, in a national cyberspace document, seemed to restrict its approach. See Ministère des Armées [Ministry of Armed Forces], *Droit International Appliqué Aux Opérations Dans Le Cyberspace [International Law Applicable to Operations in Cyberspace]*, 9 (Sept. 9, 2019) (Fr.).

10. Russia later backed away from the doctrine in debates surrounding the international campaign against ISIS in Syria. See Chachko & Deeks, *supra* note 8.

11. See *id.*

12. See Alston, *supra* note 1, ¶ 35 ("A targeted killing conducted by one State in the territory of a second State does not violate the second State's sovereignty if . . . the second State is unwilling or unable to stop armed attacks against the first State launched from its territory.")

13. Ashley S. Deeks, "Unwilling or Unable": *Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT'L L. 483, 503 (2012) (arguing that the "unwilling or unable" test is "an internationally-recognized norm governing of the use of force"); see also Elizabeth Wilmshurst, *The Chatbam House Principles of International Law on the Use of Force in Self-Defence*, 55 INT'L & COMP. L.Q. 963, 970 (2006); Nico Schrijver & Larissa van den Herik, *Leiden Policy Recommendations on Counter-Terrorism and International Law*, 57 NETH. INT'L L. REV. 513, 540 (2010) ("It should be emphasised that states considering the use of force against terrorists must take due account of the exceptional nature of military action on foreign territory. The territorial state's consent to military action is required, except where the territorial state is unable or unwilling itself to deal with the terrorist attacks."); Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. INT'L L. 770, 773 (2012) (proposing that the "unwilling or unable" test be adopted as a principle of international law in order to help clarify doctrinal confusion).

14. See, e.g., Kimberley N. Trapp, *Back to Basics: Necessity, Proportionality, and the Right to Self-Defense Against Non-State Actors*, 56 INT'L & COMP. L.Q. 141, 147 (2007).

15. See Vadyslav Lanovoy, *The Use of Force by Non-State Actors and the Limits of Attribution of Conduct*, 28 EUR. J. INT'L L. 563, 584–85 (2017).

complements the Charter's terms.<sup>16</sup> A variation on this view holds that the "unwilling or unable" test can be located in a notion of necessity implicit in Article 51.<sup>17</sup> Another variant finds deep roots for the doctrine in the international law of neutrality in times of war.<sup>18</sup> Still another rejects the notion that Article 51 permits attacks against nonstate actors, yet maintains that the limited, temporary use of force against them does not meet the threshold of U.N. Charter Article 2(4)'s prohibition on the threat or use of force against the political independence or territorial integrity of another state, and thus requires no self-defense justification.<sup>19</sup>

Finally, proponents point to state practice, which, they claim, proves that states (or at least some states) have long maintained that they are permitted to act militarily against violent nonstate actors in foreign territory even without attributing the threat to the government of that territory.<sup>20</sup>

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16. Deeks, *supra* note 13, at 496–503; see also YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 244–47 (2011); Paust, *supra* note 3, at 250 (2010) (arguing that the United States has a right under Article 51 to use drones in Pakistan, without consent and in self-defense, to target al-Qaeda and Taliban fighters).

17. See NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 67 (2010) (noting that "the requirement of necessity dictates the need to first establish that the territorial state itself is unwilling or unable to put an end to the armed attacks"); Trapp, *supra* note 14; Raphaël van Steenberghe, *Self-Defence in Response to Attacks by Non-state Actors in the Light of Recent State Practice: A Step Forward?*, 23 LEIDEN J. INT'L L. 183, 200 (2010) (arguing that a state "is only required to prove the existence of a link between the non-state actors and the 'harbouring' state, consisting in at least the inability or unwillingness of the latter to stop the activities of the former, and that such requirement does not stem from the responsibility rules but from the condition of necessity of the law of self-defence"); Gareth D. Williams, *Piercing the Shield of Sovereignty: An Assessment of the Legal Status of the "Unwilling or Unable" Test*, 36(2) U. NEW S. WALES L. J. 620 (2013) ("Simply put, if a host state is willing and able to counter the non-state actor within its territory, then the use of force by the victim state will not be necessary.").

18. Deeks, *supra* note 13, at 497–503. See also Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, 13 Y.B. INT'L HUMANITARIAN L. 3, 22–23 (2010) ("[The unable or unwilling test], notably, is consonant in important respects with the law of neutrality."); Eveylon Corrie Westbrook Mack, *Remotely Piloted Aircrafts (RPAs) in Targeted Killing Operations: The United States Is No Lone Wolf*, 26 FLA. J. INT'L L. 447, 478 (2014).

19. Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 WIS. INT'L L. J. 145, 166 (2000) ("The argument is simply that the use of limited, temporary, force to eliminate a terrorist threat does not violate the territorial integrity or political independence of the state in which the terrorists are being harbored, and is otherwise consistent with the United Nations Charter."); see also Ivan Shearer, *A Revival of the Just War Theory?*, in INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES 1, 15 (Michael N. Schmitt & Jelena Pejic eds., 2007); WALTER GARY SHARP, SR., CYBERSPACE AND THE USE OF FORCE (1999) (discussing sovereignty as principle as opposed to a rule).

20. See, e.g., Theresa Reinold, *State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11*, 105 AM. J. INT'L L. 244, 244–45 (2011); Tom Ruys, *Quo Vadit Jus ad Bellum?: A Legal Analysis of Turkey's Military Operations Against the PKK in Northern Iraq*, 9 MELBOURNE J. INT'L L. 334, 355 (2008); Deeks, *supra* note 13, at 486; Brian Finucane, *Fictitious States, Effective Control, and the Use of Force Against Non-State Actors*, 30 BERKELEY J. INT'L L. 35, 61 (2012) ("Historically, governments have been unwilling to tolerate security threats posed by independent violent non-state actors who exploit gaps in state control. Consequently, there is a long history of the use of force against non-state actors and a correspondingly long history of justifications premised upon self-defense in the face of state ineffectiveness."); GREGOR WETTBERG, THE INTERNATIONAL LEGALITY OF SELF-DEFENSE AGAINST NON-STATE ACTORS: STATE PRACTICE FROM THE U.N. CHARTER TO THE PRESENT 21 (2007) (arguing that state practice supports the use of self-defense against nonstate actors operating out of "unwilling or unable" states).

These arguments notwithstanding, the UUD is far from a consensus doctrine. Several countries have expressed grave misgivings about it, as have many scholars. Opponents argue that the international community's interest in peace demands an expansive reading of the prohibition on the use of force, as expressed in Article 2(4) of the Charter, and a minimalist reading of Article 51's self-defense exception.<sup>21</sup> For these critics, military force is justified only to repel *another state's* use of armed force—whether directly (through its national armed forces) or indirectly (for instance, through paramilitary forces that the state sends to fight on its behalf)<sup>22</sup>—not threats from nonstate actors that cannot be attributed to a state. In the latter case, they claim, the sovereignty of the territorial state must be respected and recourse must be found in diplomacy, extradition, other types of legal or military cooperation,<sup>23</sup> or an appeal to the Security Council seeking a Chapter VII resolution that would grant the threatened state the power to use force.<sup>24</sup>

Critics also argue that the UUD is the self-serving invention of a handful of powerful countries that has not gained sufficient support to become anything like a recognized exception under CIL to the general prohibition on the use of force.<sup>25</sup> Many international law scholars, in published academic

21. On the different approaches to Article 2(4) and Article 51 more generally, see Matthew C. Waxman, *Regulation Resort to Force: Form and Substance of the UN Charter Regime*, 24 EUR. J. INT'L L. 151 (2013).

22. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶¶ 8-9 (June 27) [hereinafter *Nicaragua*]; G.A. Res. 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States (Oct. 24, 1970); G.A. Res. 3314 (XXIX), Definition of Aggression (Dec. 14, 1974).

23. See, e.g., S.C. Res. 1373 (Sep. 28, 2001) (adopted in the wake of the 9/11 attacks and calling on states to suppress the financing of terrorist attacks, criminalize support to terrorists, establish warning mechanisms, and implement a variety of other counter-terrorism measures).

24. See Brent Michael, *Responding to Attacks by Non-State Actors: The Attribution Requirement of Self-Defence*, 16 AUSTL. INT'L L.J. 133, 143 (2009).

25. See, e.g., Dawood I. Ahmed, *Defending Weak States Against the "Unwilling or Unable" Doctrine of Self-Defence*, 9 J. INT'L L. & INT'L RELS. 1, 14 (2013); Mary Ellen O'Connell, *Dangerous Departures*, 107 AM. J. INT'L L. 380, 384 (2013) (arguing that there is no authority for "the assertion that states may resort to force against states 'unable or unwilling' to control terrorism on their territory," nor has any state ever accepted such a test). Over a decade earlier, however, O'Connell did write that when a state is attacked by nonstate actors, "defense may be taken to the territory of the failed or impotent state." Mary Ellen O'Connell, *Lawful Self-Defence to Terrorism*, 63 U. PITT. L. REV. 889, 901 (2002); Kevin Jon Heller, *Ashley Deek's Problematic Defense of "Unwilling or Unable" Test*, OPINIO JURIS (Dec. 15, 2011), <http://opiniojuris.org/2011/12/15/ashley-deeks-failure-to-defend-the-unwilling-or-unable-test/> [https://perma.cc/HB3J-H828] (critiquing Deeks for failing to engage with the ICJ's opinions in *Armed Activities of Congo* and *Wall Advisory Opinion* and for only noting five states—the United States the United Kingdom, Israel, Turkey, and Russia—that invoked the "unwilling or unable" test). Christian Tams offers a somewhat more qualified account of state practice, arguing that, between 1989 and 2009, state practice became more accommodating to extraterritorial use of force to combat terrorism. Nonetheless, he maintains that target states have attempted to justify their actions by claiming, however tenuously, that they were responding to actions by nonstate actors that were attributable to the territorial state (and if so, not relying on the UUD as much as on traditional self-defense against the territorial state). See Christian Tams, *The Use of Force against Terrorists*, 20 EUR. J. INT'L L. 359, 385 (2009); see also TOM RUYTS, 'ARMED ATTACK' AND ARTICLE 51 OF THE UN CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE 486–87 (2010); Tom Ruys & Sten Verhoeven, *Attacks by Private Actors and the Right of Self-Defence*, 10 J. CONFLICT & SEC. L. 289, 319–20 (2005).

works,<sup>26</sup> popular media,<sup>27</sup> and the blogosphere,<sup>28</sup> have also argued that the “unwilling or unable” doctrine has no genuine legal basis.

Understandably, much of the extensive commentary on the UUD has concentrated on whether it rests on a valid interpretation and application of the jus ad bellum. In part because of this focus, commentators have tended to treat its two prongs—“unable” and “unwilling”—as interchangeable: if one suffices to justify the use of force by the threatened state so does the other.<sup>29</sup> Moreover, both proponents and opponents have ignored questions about rights and obligations that may attend uses of force encompassed by the UUD, including whether a threatened state owes something to the territorial state and the people it harms (other than the nonstate actors who are the source of the threat), even if its use of force is in some respects legitimate.

This Article directly addresses these heretofore ignored questions. Instead of relitigating the debate over the jus ad bellum, we maintain, as a premise of our analysis, that there is a plausible case to be made for the legal validity of some version—perhaps narrow—of the UUD. Developing a claim entertained by a handful of scholars whose work is discussed below, we also maintain that its justification does not reside in the U.N. Charter’s recognition of a right of self-defense, but instead in the international law principle of necessity. We then take the analysis two steps beyond the current literature. First, we argue that recognition of the UUD’s grounding in necessity permits us to see why the doctrine comes with conditions that have not been previously identified or appreciated. Specifically, a use of force under the UUD generates for the threatened state a prima facie duty to compensate the territorial state for collateral damage to the territorial state resulting from

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26. See Dire Tladi, *The Nonconsenting Innocent State: The Problem with Bethlehem’s Principle*, 107 AM. J. INT’L L. 570, 576 (2013) (“[Unwilling or unable] is based on an erroneous assessment of customary international law and state practice and on an acontextual interpretation of Article 51.”); Christine Gray, *President Obama’s 2010 United States National Security Strategy and International Law on the Use of Force*, 10 CHINESE J. INT’L L. 35, 46 (2011) (“Despite the claims of some commentators, the use of force against non-State actors in response to past terrorist attacks or to prevent future attacks is far from being clearly established as lawful self-defense, even when the territorial State is unable or unwilling to act against the terrorists.”); Constantine Antonopoulos, *Force by Armed Groups as Armed Attack and the Broadening of Self-Defence*, 55 NETH. INT’L L. REV. 159, 169–71 (2008).

27. See Eric Posner, *Obama’s Drone Dilemma*, SLATE (Oct. 8, 2012), <https://slate.com/news-and-politics/2012/10/obamas-drone-war-is-probably-illegal-will-it-stop.html> [<https://perma.cc/26WT-54H8>] (arguing that the “unwilling or unable” test violates the U.N. Charter and its use “whittle[s] away at whatever part of the law on United Nations law on use of force blocks U.S. goals”).

28. See Heller, *supra* note 25 (rejecting Deeks’ argument that the “unwilling or unable” test is rooted in neutrality law and arguing that the ICJ’s decisions in *Nicaragua* strongly suggests that state attribution is necessary for another state to engage in defensive use of force).

29. Some exceptions are discussed below. For the most part, they have suggested that the distinction between “unable” or “unwilling” matter for purposes of evaluating the necessity of the use of force, but without inquiring into any further implications of such a distinction. De Wet suggests that the distinction is pertinent to questions of attribution, so that “unwilling” on the part of the territorial state would trigger attribution to it of the nonstate actors’ actions, but not so where it is “unable” to preempt the threat. See Erika de Wet, *The Invocation of the Right to Self-Defence in Response to Armed Attacks Conducted by Armed Groups: Implications for Attribution*, 32 LEIDEN J. INT’L L. 91 (2019).

that use of force. Second, we explain that the existence of this compensatory duty hinges on which prong of the UUD is at issue—that is, whether the territorial state was “unable” to prevent the threat posed by the nonstate actors (in which case compensation is owed) or “unwilling” (in which case compensation is not owed).<sup>30</sup>

The positions outlined above are novel within international law. We contend nonetheless that they are not only available as a matter of sound interpretation but also supported by analogies drawn from domestic private law, particularly Anglo-American tort and restitution doctrines. That guidance is to be found in private law is perhaps not surprising. After all, it provides a well-established and highly articulated framework specifying the terms on which individuals are entitled to enter land lawfully possessed by others, and the obligations they incur when doing so.<sup>31</sup>

To be clear from the outset, our point is not that international law should blindly mimic private law, or that state sovereignty and real property are symmetrical. Each of these bodies of law and concepts operates with different assumptions and within different realities: the context for and ramifications of doctrinal choices in the world of military attacks and the world of ordinary trespasses are very different. Still, we use established tort and restitution doctrines as a way to elaborate and test our intuitions about what would make for a sensible and fair treatment of the scope and consequences of the UUD.

As we have noted, the stakes here are high. As terrorist threats of one kind or another proliferate, more countries are faced with threats—some real and some merely perceived—by nonstate actors in foreign territories.<sup>32</sup> When combined with the international rules on neutrality, the UUD is also potentially critical to the justification (if any) of attacks on state actors in foreign territories, as in the case of the United States’ targeted killing of Qasem Soleimani, the commander of the Iranian Quds force, in Iraqi territory in January 2020.<sup>33</sup> Nor is it only traditional security threats that could potentially prompt a state to invoke the UUD. As the world becomes more interconnected and interdependent, the actions of individuals and small groups in any one territory are likely to cause or threaten various harms to

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30. Our focus will be on duties of compensation under international law, without distinction between monetary compensation and satisfaction (in the guise of, for instance, apologies). See *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 2(2) Y.B. INT’L L. COMM’N, art. 34, U.N. Doc. A/56/10 (Oct. 24, 2001) [hereinafter ARSIWA], art. 34.

31. On the practice of reliance on private law for the development of international law, see HERSCH LAUTERPACHT, *PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW: WITH SPECIAL REFERENCE TO INTERNATIONAL ARBITRATION (CONTRIBUTIONS TO INTERNATIONAL LAW AND DIPLOMACY)* (1975).

32. See, e.g., WITTES & BLUM, *supra* note 1.

33. U.S. White House Office, *Notice on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations*, [https://foreignaffairs.house.gov/\\_cache/files/4/3/4362ca46-3a7d-43e8-a3ec-be0245705722/6E1A0F30F9204E380A7AD0C84EC572EC.doc148.pdf](https://foreignaffairs.house.gov/_cache/files/4/3/4362ca46-3a7d-43e8-a3ec-be0245705722/6E1A0F30F9204E380A7AD0C84EC572EC.doc148.pdf) [<https://perma.cc/XDK4-AMJW>].



other states.<sup>34</sup> While international law, so far, has been reluctant to recognize threats of non-military or non-paramilitary harm as justifying breaches of another state's sovereignty, opponents of the UUD are correct to argue that the purported rationale of the doctrine might be employed vis-à-vis other foreign threats, including actions by nonstate actors that might foment crises such as mass drug addiction or a pandemic.<sup>35</sup> To take an extreme case, if the UUD justifies a threatened state in killing a suspected terrorist located in another state, might it justify the threatened state in bombing a foreign-based chemical plant that threatens to cause irreversible transboundary environmental devastation?

Our discussion proceeds as follows. Part I surveys the international rules on the use of force as invoked by both proponents and opponents of the UUD, including the law of self-defense, rules on attributing the actions of nonstate actors to states, the obligations of states to police their territories and minimize threats from within their borders to other states, and the obligations of neutral states vis-à-vis warring states. It also discusses international rules on state responsibility, which have remained largely neglected in existing debates over the UUD, but can help illuminate them, as well as our proposed intervention in them.

With the legal background in place, Part II dives deeper into the complexities of the UUD, and identifies three important questions raised by the doctrine. The first and most familiar concerns its contours—when it can be invoked, assuming it can be. Although this discussion sets the backdrop for our analysis, it will not be our focus. Instead, we pursue two other questions, neither of which has received attention in the vast UUD literature. One concerns whether a use of force by a threatened state that falls within the UUD (however best defined) gives rise to a duty to compensate the territorial state. The other is whether the threatened state can be relieved of this duty because the territorial state culpably created the need for the threatened state to use force.

As to compensation, we identify two potential grounds in international law that support an obligation on the part of a threatened state to compensate the territorial state for invading it. First, international law allows for the possibility that UUD attacks, even if legally justified, nonetheless give rise

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34. These actions might include, *inter alia*, cyber-attacks, humanitarian crises, or other actions that cause significant transboundary environmental or biological harm. See José Luis Aragón Cardiel et al., *Modern Self-Defense: The Use of Force Against Non-Military Threats*, 49 COLUM. HUM. RTS. L. REV. 99, 131–138 (2018). See generally WITTES & BLUM, *supra* note 1; KIM ZETTER, COUNTDOWN TO ZERO DAY: STUXNET AND THE LAUNCH OF THE WORLD'S FIRST DIGITAL WEAPON (2015); Russell J. Buchan, *Cyberspace, Non-State Actors and the Obligation to Prevent Transboundary Harm*, 21 J. CONFLICT & SEC. L. 429 (2016); *Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities with commentaries*, 2(2) Y.B. INT'L L. COMM'N, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (2001).

35. Cf. Michael Bothe, *Terrorism and the Legality of Pre-emptive Force*, 14 EUR. J. INT'L L. 227, 237–38 (2003) (arguing that more flexible standards of self-defense will put international law “on a slippery slope”); Harold Hongju Koh, *Comment*, in STRIKING FIRST: PREEMPTION AND PREVENTION IN INTERNATIONAL CONFLICT 102–103 (Michael Doyle & Stephen Macedo eds., 2008).

to a legal duty to compensate for material harm caused that is grounded in principles of restitution. On this understanding of the doctrine, a threatened state's use of force against nonstate actors located in another state involves, in effect, using the other state's resources without authorization for its own benefit, thus generating a duty to compensate for the involuntarily conferred benefit.

As to whether a claim to compensation can be lost, we note the possibility of distinguishing, within international law, between cases of territorial state *inability* and of territorial state *unwillingness*. If a threatened state owes compensation to a territorial state for crossing its borders and violating its sovereignty by means of conduct authorized by the UUD, the territorial state's inability to prevent the threat cannot provide a ground for withholding compensation. By contrast, if the territorial state is merely unwilling to address the threat, there may be such grounds.

The foregoing positions on issues of compensation are, we think, available as interpretations of international law. But this does not mean that they must be approached as *de novo* questions of morality or policy. For, as it turns out, there is a developed body of domestic private law dealing with them. Part III thus turns to private law, exploring rules that have been developed to apply to disputes over one person having entered another's land without permission for reasons somewhat comparable to the reasons raised by states that invoke the UUD. The most relevant of these, we demonstrate, is a particular rendition of what is sometimes called the "incomplete privilege of private necessity." By means of it, the private law adopts the very approach we adopt to the UUD. Thus, an actor facing a situation of private necessity is acknowledged to have a compelling reason to enter another's land, yet nonetheless is also deemed to owe the other restitution, and on that basis faces legal liability.<sup>36</sup> Furthermore, in keeping with our suggestion that there may be grounds for distinguishing cases of territorial state inability from cases of unwillingness, the possessor's claim to compensation in a case of private necessity applies in cases in which the possessor bears no responsibility for the necessity facing the entrant, but is lost (or reduced) if the possessor's own culpable actions contributed to the creation of the necessitous situation.<sup>37</sup>

In Part IV we bring together our explorations of international law and private law, arguing that the former is appropriately interpreted to include a counterpart to the latter's incomplete privilege of private necessity. On this rendering of international law, a territorial state has a presumptive legal claim to compensation from a threatened state that deploys force against nonstate actors located in the territorial state under the UUD. This duty to

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36. See W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS § 24, 147–48 (5th ed. 1984) (discussing privilege of private necessity with respect to entry upon land and describing it as a "incomplete and partial privilege, which does not extend to the infliction of any substantial harm").

37. *Id.*

compensate extends to people or things that were harmed and that were not the legitimate targets of the UUD-authorized attack. Our account further supports distinguishing between “unable” and “unwilling” scenarios. A territorial state that is genuinely *unable* to control the threat that prompts another state to invoke the UUD is entitled to reparations for the invasion of its sovereignty. But if the invaded state culpably failed to control the threat posed to the attacking state by the nonstate actors, its claim to reparations is forfeited, or it should recover less than it would have otherwise. Here we offer a sketch of how the distinction can be drawn in a manner that is both intuitive and responsive to distinctive features of the UUD context.

Having, we hope, demonstrated the value of looking across traditional subject-area boundaries in this particular instance, we conclude with brief thoughts on the potential value for both private law and international law of scholarship that aims to harness insights drawn from each.

## I. RIGHTS AND DUTIES OF STATES IN RELATION TO USE OF FORCE

In this Part, we review international law that bears on the UUD. Relevant here are rules pertaining to the use of force by states in self-defense against armed attacks; rules for attribution of attacks by nonstate actors to states; and rules specifying the general obligations of states to exercise due diligence in policing their own territories and the more specific obligations of neutral states during armed conflicts to which they are not parties.

### A. *The Jus ad Bellum Framework: Self-Defense in Response to Armed Attacks*

The reduction of interstate violence was the primary aspiration behind the creation of the United Nations and is the central theme of the U.N. Charter. The first sentence of the Charter’s Preamble states its purpose as “[saving] succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind.”<sup>38</sup> With its overriding interest in peace, rather than justice, Article 2(4) of the U.N. Charter opted for a broad prohibition on the “threat or use of force against the territorial integrity or political independence of any state.”<sup>39</sup> It is widely accepted that the terms “territorial integrity or political independence” were not intended to limit the prohibition in any way, and that any use of force in another state’s territory, regardless of its motivation or purpose, is *prima facie* unlawful.<sup>40</sup> Other

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38. U.N. Charter pmbl.

39. *Id.* art. 2, ¶ 4. For the Charter’s preference for peace over justice, see Gabriella Blum, *The Crime and Punishment of States*, 38 YALE J. INT’L L. 57 (2013).

40. See MALCOLM N. SHAW, INTERNATIONAL LAW 817–18 (7th ed. 2014) (observing that the “weight of opinion” favors the interpretation prohibiting any use of force); Louis Henkin, *The Use of Force: Law and U.S. Policy*, in RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE 37, 40 (2d ed. 1991) (“[G]overnments generally have insisted on the interpretations most restrictive of the use of force: the Charter outlaws war for any reason . . .”).

international instruments, such as the 1970 General Assembly's Declaration on Friendly Relations<sup>41</sup> and its 1974 Definition of Aggression,<sup>42</sup> reinforce the Charter's efforts to minimize the use of force between states and expound the many ways in which a state may be in violation of Article 2(4). The 1998 Rome Statute of the International Criminal Court went further in seeking to impose individual criminal responsibility for the crime of aggression,<sup>43</sup> though this part of the Statute is operational only among those countries that have explicitly ratified it.<sup>44</sup>

Only three circumstances provide a state with legal authority to use force in the territory of another. The first, and most straightforward, is where the recognized government of a state consents to another state's use of force in its own territory. When such valid consent is granted, it preempts the Charter's prohibition on the use of force altogether. The scope of the territorial government's consent (or permission, or invitation) delimits the scope of the permissible foreign military action in that state's territory.

The other two circumstances are provided for in the U.N. Charter itself, and operate as exceptions to the general prohibition on the use of force. Chapter VII of the U.N. Charter entrusts the Security Council with enforcement powers in the sphere of international peace and security.<sup>45</sup> Under Article 42 of the U.N. Charter, the Security Council has the power to authorize a state or a coalition of states to use force in another state's territory if it deems it necessary for maintaining or restoring peace and security.<sup>46</sup> Once under the mandate of the Security Council, such military operation is lawful regardless of the territorial state's consent or objection to the operation.<sup>47</sup>

Absent consent or a Security Council authorization, the only exception to the general prohibition on the use of force that is written into the U.N. Charter is granted by Article 51. It recognizes states' "inherent right to self-defence" to respond to an armed attack until such time as the Security

41. G.A. Res. 2625 (XXV) (Oct. 24, 1970).

42. G.A. Res. 3314 (XXIX) (Dec. 14, 1974).

43. Rome Statute of the International Criminal Court art. 8 *bis*, July 17, 1998, 2187 U.N.T.S. 90.

44. *Id.* art. 15 *bis*.

45. U.N. Charter art. 39.

46. Though there is some debate over the precise contours of the Security Council's possible authorizations to use force, it is widely agreed that the Council's powers in this area are expansive and that a state that operates under a Chapter VII resolution and within its parameters is safe from any allegation of aggression. *See, e.g.*, ERIKA DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL (2004); DAVID SCHWEIGMAN, THE AUTHORITY OF THE SECURITY COUNCIL UNDER CHAPTER VII OF THE UN CHARTER: LEGAL LIMITS AND THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE (2001); Susan Lamb, *Legal Limits to United Nations Security Council Powers, in THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNLIE* (G. Goodwin-Gill & S. Talmon eds., 1999); Georg Nolte, *The Limits of the Security Council's Powers and Its Functions in the International Legal System: Some Reflections, in THE ROLE OF LAW IN INTERNATIONAL POLITICS* (M. Byers ed., 2000); Jared Schott, *Chapter VII as Exception: Security Council Action and the Regulative Ideal of Emergency*, 6 NW. J. INT'L HUM. RTS. 24 (2008).

47. There are cases in which the Security Council prescribes a military action under Chapter VII even where the territorial government itself consents to the action and welcomes it. *See, e.g.*, S.C. Res. 2100 (Apr. 25, 2013) (authorizing a French-led force to assist the government of Mali to fend off rebels).

Council has taken action. Though not specified in the text itself, Article 51 is widely understood to condition the use of defensive force on observance of the customary legal requirements of necessity and proportionality.<sup>48</sup> This recognition is perhaps the only substantive aspect of Article 51 over which there is agreement. Otherwise, the law and policy debates over the scope of Article 51 and the CIL that complements it fill volumes, addressing questions including: What sort of armed attack suffices to trigger the right to use defensive force?<sup>49</sup> What sort of entity is capable of launching an “armed attack”?<sup>50</sup> What are the temporal limits on defensive force?<sup>51</sup> How do Security Council deliberations that fall short of sanctioning—or explicitly prohibiting—the use of force affect the use of defensive force?<sup>52</sup> Even the consensus over the conditions of “necessity” and “proportionality” dissolves once the precise meaning of these terms is analyzed.<sup>53</sup>

For present purposes, two contentious questions are of particular relevance. One is over anticipatory self-defense—whether force may be used in advance of an armed attack so as to preempt it. We leave this question aside. For one thing, there is some agreement (though by no means consensus) that notwithstanding the text of Article 51, necessary and proportionate preemptive force is permissible to meet an otherwise unstoppable imminent threat.<sup>54</sup> More importantly for present purposes, the UUD itself is not limited to preemptive action in anticipatory self-defense; rather, it may be in-

48. See, e.g., *Nicaragua*, 1986 I.C.J. at ¶ 176.

49. See TARCISIO GAZZINI, *THE CHANGING RULES ON THE USE OF FORCE* 138 (2005) (“State practice offers enough evidence to refute the existence of a threshold. . . .”); Antonopoulos, *supra* note 26, at 169–71 (2008) ([S]tate practice does not make a distinction between armed attack and a use of force short of an armed attack. . . .). Compare, e.g., *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. 161, ¶¶ 1213 (Nov. 6) [hereinafter *Oil Platforms*] (stating in dicta that a series of actions by Iran, including firing on U.S. helicopters, did not reach the level of an “armed attack” giving rise to the right of self-defense), with YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 176 (3d ed. 2001) (“There is certainly no cause to remove small-scale armed attacks from the spectrum of armed attacks.”).

50. See, e.g., Michael N. Schmitt, “*Attack*” as a Term of Art in International Law: *The Cyber Operations Context*, in 2012 4TH INTERNATIONAL CONFERENCE ON CYBER CONFLICT 284 (C. Czosseck et al. eds., 2012).

51. See generally RUYLS, *supra* note 25, at 250–367; James A. Green, *The Ratione Temporis Elements of Self-Defence*, 2 J. on Use of Force & Int’l L. 97 (2015); Noam Lubell, *The Problem of Imminence in an Uncertain World*, in *THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW* 1, 18–21 (Marc Weller ed., 2015).

52. See, e.g., Mahmoud Hmoud, *The Use of Force Against Iraq: Occupation and Security Council Resolution 1483*, 36 CORNELL INT’L L. J. 435 (2004); D.W. Greig, *Self-Defence and the Security Council: What Does Article 51 Require?*, 40 INT’L & COMP. L.Q. 366 (1991); Malvina Halberstam, *The Right to Self-Defence Once the Security Council Takes Action*, 17 MICH. J. INT’L L. 229 (1991).

53. See generally Matt Waxman, *Regulating Resort to Force: Form and Substance of the UN Charter Regime*, 24 EUR. J. INT’L L. 152 (2013) (discussing various approaches to necessity and proportionality, including “flexible, adaptable standards” or “fixed rules and processes”); David Kretzmer, *The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum*, 24 EUR. J. INT’L L. 235 (2013) (discussing various tests for proportionality, such as a “narrow proportionality”).

54. U.N. High-Level Panel on Threats, Challenges, and Change, *A More Secure World: Our Shared Responsibility* 54, U.N. Doc. A/59/565 (Dec. 2, 2004) (“[A] threatened State, according to long established international law, can take military action as long as the threatened attack is imminent, no other means would deflect it and the action is proportionate.”); see also MICHAEL DOYLE, *STRIKING FIRST: PREEMPTION AND PREVENTION IN INTERNATIONAL CONFLICT* 3 (2008).

voked to justify military force intended to halt and repel an attack or follows an attack that has already taken place, as long as its purpose is preventing imminent future violence.<sup>55</sup>

The other contentious question, on which most of the debate over the UUD has focused, is whether the source of the attack that might justify defensive action under Article 51 can be a nonstate actor, acting on its own volition, or whether defensive military force is permissible only against an attack that is conducted by—or at least can properly be attributed to—a hostile government.<sup>56</sup>

### B. Attribution of Conduct by Nonstate Actors to a State

When can an attack perpetrated (or about to be perpetrated) by a foreign nonstate actor be considered an attack by a foreign state? The answer is determined under the international rules of attribution of the conduct of individuals to states.

The rules for attribution have been increasingly debated since the attacks of 9/11.<sup>57</sup> The easier case arises where the territorial state's officials explicitly adopt or ratify the acts of the nonstate actor.<sup>58</sup> An example of such a case was the adoption by the government of Iran of the attacks on the American embassy in Tehran and the taking of American hostages in 1979.<sup>59</sup> In that

55. Note that in principle, all use of force against any type of enemy is supposed to be preemptive rather than punitive; even where force is employed after an armed attack has occurred, it is supposed to preempt future threats rather than punish the attacker for its past actions. See Kretzmer, *supra* note 53, at 272.

56. See, e.g., JUTTA BRUNNÉE & STEPHEN TOOPE, LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW 296 (2010) ("International practice seems to have evolved both to allow self-defence against armed attacks by non-state forces, and to loosen the required link between such forces and a state in which armed defensive measures are taken."); van Steenberghe, *supra* note 17, at 184 (concluding that recent state practice suggests that attacks committed by nonstate actors alone constitute armed attacks under Article 51); CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 136 (3rd ed. 2008) (arguing that the language regarding self-defense in *Wall* can be interpreted narrowly to permit defensive force against nonstate actors in other states); Albrecht Randelzhoder & Georg Nolte, *Article 51*, in CHARTER OF THE UNITED NATIONS 1397, 1417 (Bruno Simma et al. eds., 3rd ed. 2012) ("[T]he preferable view still seems to be that attacks by organized armed groups need to be attributed to a State in order to enable the effected State to exercise its right of self-defence, albeit under special rules of attribution."); Tladi, *supra* note 26, at 576 ("The use of force by a state against nonstate actors for acts not attributable at all to another state falls to be considered under the paradigm of the law enforcement (in which the consent of the territorial state would be required) and not the law of self-defence."); Mary Ellen O'Connell, *Dangerous Departures*, 107 AM. J. INT'L L. 380, 383 (2013) ("Attacking [nonstate actors] on the territory of another state is attacking that state as much as the [nonstate actors]."). For a broad overview of the present debate, see generally Monica Hakimi, *Defensive Force against Non-State Actors: The State of Play*, 91 INT'L L. STUD. 1 (2015); Deeks, *supra* note 13.

57. See, e.g., Deeks, *supra* note 13, at 492–93; BRUNNÉE & TOOPE, *supra* note 56, at 296–300; Dinstein, *supra* note 49, at 214; WETTBERG, *supra* note 20, at 19; Allen S. Weiner, *The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?*, 59 STAN. L. REV. 415, 435–36 (2006); Eric Myjer & Nigel White, *The Twin Towers Attack: An Unlimited Right to Self-Defence*, 7 J. CONFLICT & SEC. L. 5, 7 (2002).

58. ARSIWA, *supra* note 30, art. 8; United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. 3, ¶ 70 (May 24) [hereinafter *Tebnan Hostages Case*].

59. *Tebnan Hostages Case*, 1980 I.C.J. ¶¶ 70–74; ARSIWA, *supra* note 30, art. 11.

case, the state itself is considered the attacker and the victim state may generally act in self-defense against the attack.<sup>60</sup>

More difficult cases arise when a territorial state's government does not claim responsibility for the acts of the nonstate actor. Two international courts have proffered two different tests for attribution in such cases, though neither one dealt with the responsibility of a state for the actions of nonstate actors *within* its own territory.

In an application brought by Nicaragua against the United States, the International Court of Justice ("ICJ") ruled in 1984 that a state must exercise "effective control" over a nonstate armed group in order for the acts of the latter to be attributed to the former.<sup>61</sup> In that case, the ICJ found that, although the United States armed, financed, trained, equipped, and guided the Contras in Nicaragua, the group operated with sufficient independence that the United States lacked "effective control" over it.<sup>62</sup> Without effective control, the United States could not be held responsible for the Contras' crimes. In a different case, the International Criminal Tribunal for the Former Yugoslavia ("ICTY") rejected the "effective control" test in favor of an easier-to-meet "overall control" standard.<sup>63</sup> (However, the Tribunal was faced not with the question of attribution for purposes of assigning responsibility *per se*, but rather with the challenge of classifying the armed conflict in the former Yugoslavia for purposes of applying international criminal law. Specifically, the ICTY had to establish whether neighboring Serbia could be held sufficiently responsible for the acts of the Bosnian Serb Army so as to turn the civil war in Bosnia into an international armed conflict.)<sup>64</sup> In a later decision, the ICJ again applied the "effective control" test in ruling that Serbia could not be held responsible for the genocide that was committed in the Bosnian town of Srebrenica by the armed forces of the Bosnian Serb Army, given its lack of such control.<sup>65</sup>

Without going into detail, it will suffice to observe that both the "effective control" and "overall control" tests are highly demanding in terms of the nexus that must be proven between a state and nonstate actors in order to attribute the acts of the latter to the former. Moreover, when the nonstate actor in question is an individual, as opposed to an organized armed group,

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60. The question of whether the seizure of the embassies constituted an "armed attack" in the words of Article 51 is under some debate. Note that the ICJ frowned upon a failed military rescue mission by the United States, not on the grounds that the United States had no right to use force, but on the grounds that it took a unilateral action while the case was pending before the Court. *Tebran Hostages Case*, 1980 I.C.J. ¶ 93.

61. *Nicaragua*, 1986 I.C.J. ¶ 115.

62. *Id.* ¶ 116.

63. Prosecutor v. Tadić, Case No. IT-94-1-I, Judgment, ¶¶ 115, 145 (Int'l Crim. Trib. for the Former Yugoslavia, Jul. 15, 1999) [hereinafter *Tadić*].

64. *Id.* ¶ 81.

65. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), Judgment, 2007 I.C.J. 43, ¶ 407 (Feb. 26) [hereinafter *Genocide Convention*].

both tribunals have demanded that the individual operate on the basis of “specific instructions” of the government in order to turn her acts to an act of the state.<sup>66</sup>

In the aftermath of the attacks of 9/11, the Security Council adopted Resolutions 1368 and 1373, both “recognizing” and “reaffirming the inherent right of individual or collective self-defence” without any further statement about the responsibility of a state for the attacks. Importantly, however, the Security Council did not explicitly authorize the use of military force against the attackers. The United States had forwarded its own test for holding Afghanistan responsible for the al-Qaeda attacks, suggesting that the territorial state engaged in “harbor[ing] and support[ing]” the terrorists in its territory.<sup>67</sup> This theory allowed the United States-led coalition to attack not only al-Qaeda targets in Afghanistan, but also the Taliban government and its forces. Without necessarily embracing the American test, and against a growing threat of transnational terrorism, several scholars have similarly advocated a more relaxed test of attribution, under which states could be held accountable for a wider range of nongovernmental actions in their territory.<sup>68</sup> In the specific context of cyberwarfare, moreover, there have even been proposals to hold states ‘strictly liable’ for harms caused by any attack that emanates from their territory.<sup>69</sup> None of these proposals have been officially adopted in an international instrument or ruling, and as we shall see shortly, the ICJ has never endorsed the American position.

With the test for attribution remaining relatively demanding, many threats emanating from foreign territories would not be attributable to states under current international law. The pertinent question for the UUD debate is thus not what it takes to establish attribution, but what happens when attribution *cannot* be established.

66. *Nicaragua*, 1968 I.C.J. ¶ 80; *Tadić*, Case No. IT-94-1-I, ¶ 114.

67. See, e.g., George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001).

68. See, e.g., TAL BECKER, *TERRORISM AND THE STATE: RETHINKING THE RULES OF STATE RESPONSIBILITY* (2006); Vincent-Joël Proulx, *Babysitting Terrorists: Should States Be Strictly Liable for Failing to Prevent Transborder Attacks?*, 23 *BERKELEY J. INT'L L.* 615, 643–59 (2005); BRUNNÉE & TOOPE, *supra* note 56, at 296; Tams, *supra* note 25, at 384–87; Rainer Grote, *Between Crime Prevention or Prosecution and the Laws of War: Are the Traditional Categories of International Law Adequate for Assessing the Use of Force against International Terrorism?*, in *TERRORISM AS A CHALLENGE FOR NATIONAL AND INTERNATIONAL LAW: SECURITY VERSUS LIBERTY?* 951, 976 (Christian Walter et al. eds., 2004).

69. See, e.g., SHARP, SR., *supra* note 19, at 129–31; Eric Jensen, *Computer Attacks on Critical National Infrastructure: A Use of Force Invoking the Right of Self-Defense*, 38 *STAN. J. INT'L L.* 207, 232–35 (2002); Lorraine Finlay & Christian Payne, *The Attribution Problem and Cyber Armed Attacks*, 113 *AM. J. INT'L L. UNBOUND* 202, 206 (2019); cf. Sean Condron, *Getting It Right: Protecting American Critical Infrastructure in Cyberspace*, 20 *HARV. J.L. & TECH.* 404, 415–22 (2007) (“The problem with cyber warfare is that technology makes it nearly impossible to attribute the attack to a specific source or to characterize the intent behind it. . . . A legal system that requires a determination of the attacker’s identity and intent does not account for these features of the digital age. The current international paradigm therefore ties a state’s hands, making it difficult to effectively respond without risking a violation of international law.”).



### C. States' "Due Diligence" Obligations

Thus far, we have discussed the legal rules governing what targeted or threatened states are legally permitted to do in the face of armed threats emanating from foreign territories. Here, we shift the focus to the rules governing what states must do to ensure that their territories and citizens do not become a threat to others.

As noted, states generally are responsible for an attack they directly launch against another state by using their own armed forces or other forces of which they are in control, or when they adopt, as their own, an attack by a non-governmental force. Conversely, they are not responsible merely because an attack has emanated from their territory or is carried out by their citizens. Very few international obligations impose "strict" liability, and none applies in the context under consideration. It is clear, for instance, that no state is responsible for an attack carried out by a private citizen, of which the state was unaware and which it had no ability to prevent, even though there may be attendant obligations once such an attack occurs (for example, to apprehend and punish the perpetrators), or once it becomes known that such an attack is imminent (for example, to take suppressive measures).

In between these two poles, international law must mediate between the competing interests of sovereignty (and the sovereign equality of states), which signifies the freedom of a state to manage its own affairs as it sees fit, and the interest of all states in security. The guiding principle for striking this balance is that in exercising its own sovereignty, a state has a duty "to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war . . . ."<sup>70</sup>

This duty is part of what is known as the "due diligence" principle, which appears in various international law rules and accompanying guidance documents.<sup>71</sup> Though long recognized, the principle's application to instances of possible state responsibility for nonstate actors operating within the state's borders has been the subject of considerable disagreement.<sup>72</sup> U.N. General Assembly Resolutions offer some guidance, but their status under

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70. *Island of Palmas (U.S. v. Neth.)*, 2 R.I.A.A. 829, 839 (Perm. Ct. Arb. 1928).

71. See, e.g., *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 29 (July 8); *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, 2010 I.C.J. 14, ¶ 101 (Apr. 20) [hereinafter *Pulp Mills*]; *Corfu Channel Case (U.K. v. Alb.)*, 1949 I.C.J. 4, 22 (Apr. 9) [hereinafter *Corfu Channel*]. See generally JOANNA KULESZA, *DUE DILIGENCE IN INTERNATIONAL LAW* (2016); Jan Arno Hessbrügge, *The Historical Development of the Doctrines of Attribution and Due Diligence in International Law*, 36 N.Y.U. J. INT'L L. & POL. 265 (2018); Robert Barnidge, *The Due Diligence Principle in International Law*, 8 INT'L COMTY. L. REV. 81, 91–121 (2006).

72. See, e.g., Vladyslav Lanovoy, *The Use of Force by Non-State Actors and the Limits of Attribution of Conduct*, 28 EUR. J. INT'L L. 563, 584–85 (2017) (arguing that due diligence obligations "do not provide a satisfactory answer" to situations where a state repeatedly and knowingly fails to prevent unlawful conduct by a nonstate actor); Ilias Plakokefalos, *The Use of Force by Non-State Actors and the Limits of Attribution of Conduct: A Reply to Vladyslav Lanovoy*, 28 EUR. J. INT'L L. 587, 590–93 (2017) (disagreeing with Lanovoy). See generally VINCENT-JOËL PROULX, *TRANSNATIONAL TERRORISM AND STATE ACCOUNTABILITY* (2012).

international law is unsettled.<sup>73</sup> For instance, the 1970 General Assembly Resolution on Friendly Relations stipulates that

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.<sup>74</sup>

Obvious questions of interpretation then arise as to the scope of this duty and the consequences of its breach.

Decades before the 1970 General Assembly Declaration, the ICJ articulated its own version of the due diligence duty, and obligated every state “not to allow knowingly its territory to be used for acts contrary to the rights of other States.”<sup>75</sup> In a series of subsequent cases, the Court further elaborated the conditions under which a state would fail to discharge its duty.<sup>76</sup> First, for the duty to hold, a state must have notice of a threat emanating from its territory. Second, the state must have the capacity to address that threat. Third, the duty is breached if the state fails to act diligently to prevent the threat from materializing. This tripartite test has been echoed by many scholars who have engaged with the issue.<sup>77</sup>

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73. See JORGE CASTAÑEDA, LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS 14 (1969); BLAINE SLOAN, UNITED NATIONS GENERAL ASSEMBLY RESOLUTIONS IN OUR CHANGING WORLD 45–47, 68–69 (1991); Ingrid Detter, *The Effect of Resolutions of International Organizations*, in THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY – ESSAYS IN HONOUR OF KRZYSZTOF SKUBISZEWSKI (J. Makarczyk ed., 1996); Marko Divac Öberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*, 16 EUR. J. INT’L L. 879 (2005).

74. G.A. Res. 2625 (XXV), *supra* note 22.

75. *Corfu Channel*, 1949 I.C.J. at 22; see also U.N. Secretary General, *Survey of International Law in Relation to the Work of Codification of the International Law Commission: Preparatory Work within the Purview of Article 18, Paragraph 1, of the International Law Commission*, ¶ 57, U.N. Doc. A/CN.4/1/Rev.1 (Feb. 10, 1949).

76. See *Tebran Hostages Case*, 1980 I.C.J. ¶ 58, ¶ 68; *Nicaragua*, 1986 I.C.J. ¶ 157; *Pulp Mills*, 2010 I.C.J. ¶ 101, ¶ 205.

77. See, e.g., KIMBERLEY N. TRAPP, STATE RESPONSIBILITY FOR INTERNATIONAL TERRORISM 65 (2011) (suggesting that state compliance with the due diligence requirement is “evaluated in light of what the state knew (or ought to have known) about the threat emanating from its territory, and its genuine capacity to avert the threat”); Luigi Condorelli, *The Imputability to States of Acts of International Terrorism*, 19 ISR. Y.B. HUM. RTS. 233, 241 (1989) (identifying the *Tebran Hostages Case* test as canonical); Scott M. Malzahn, *State Sponsorship and Support of International Terrorism: Customary Norms of State Responsibility*, 26 HASTINGS INT’L & COMP. L. REV. 83, 104 (2002) (citing both the *Tebran Hostages Case* and the *Corfu Channel Case* for the same test); Richard B. Lillich & John M. Paxman, *State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities*, 26 AM. U.L. REV. 217, 275 (1977) (identifying from other case law a four-part test including knowledge or notice, failure to exercise due diligence, omission on the part of state organs, and injuries suffered by persons in another state, while also making clear that capacity can attenuate blame).

### 1. *Notice*

A state will not incur international responsibility for having failed to prevent an attack where it did not have notice of the relevant threat. In this context, “notice” is generally understood as not requiring actual knowledge; rather, states may be held responsible for failing to prevent conduct of which they should have been aware.<sup>78</sup> Under one theory, this is because state responsibility should in general be assessed under objective standards that allow for the imputation of knowledge even where individual state actors may have lacked it.<sup>79</sup> Alternatively, it could be that states have, at the very least, an obligation to keep themselves apprised of potential threats, including to outsiders, and that they may incur international responsibility for failing to act diligently if they were not aware of a threat in a circumstance where they should have been.<sup>80</sup>

In the *Corfu Channel Case*, for instance, the United Kingdom brought a claim against Albania after British naval ships were damaged by maritime mines in the Corfu Channel that were not placed there by the Albanian government. Albania denied knowledge of the mines, and therefore any responsibility for the ensuing harm. In its judgment, the ICJ determined that Albania “knew, or ought to have known” of any act perpetrated within its boundaries.<sup>81</sup> This statement was subsequently interpreted as imposing on Albania the “duty to take reasonable care to discover hazardous activities of third parties.”<sup>82</sup>

Repeated incidents can provide general notice of terrorist activity, a possibility acknowledged as far back as the late 1860s. A commission entrusted with adjudicating disputes between Venezuela and the United States determined that “sudden and unexpected deeds of violence” would not necessarily generate state responsibility, but that “[a] different rule of responsibility” would apply “where the act complained of is only one in a series of similar acts, the repetition, as well as the open and notorious character, of which raises a presumption in favor of it being known to the authorities and with it a corresponding accountability.”<sup>83</sup> A number of

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78. See, e.g., TRAPP, *supra* note 77, at 66 (allowing for either “knowledge or notice”); BECKER, *supra* note 68, at 133 (stating that “actual or presumed knowledge will be necessary to engage State responsibility”).

79. See BECKER, *supra* note 68, at 138–39.

80. See, e.g., TRAPP, *supra* note 77, at 66 (“States therefore have an obligation to keep themselves informed, but the obligation is one of conduct, not result.”).

81. *Corfu Channel*, 1949 I.C.J. at 18.

82. JAMES CRAWFORD, *BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 559 (7th ed. 2008). It seems that even the dissenting judges in that case accepted this framework, with Judge Krylov suggesting that the Albanian coastal watch had failed to discover the actions of the trespassers, and that in so doing he could not find “such a lack of diligence as might involve the responsibility of Albania.” *Corfu Channel*, 1949 I.C.J. at 72 (dissenting opinion by Krylov, J.).

83. *Whipperman’s Case (U.S. v. Venez.)*, 22 U.S.–Venez. Claims Comm’n (1885), reprinted in J.B. MOORE, 3 *HISTORY AND DIGEST OF INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY* 3041–42 (1898).

scholars have in turn suggested that, in the wake of 9/11, virtually all states are under general or constructive knowledge about the threat of terrorism. If this is so, suggests Tal Becker, “while a *specific* terrorist action may not be preventable without a *specific* degree of knowledge, neither can the absence of such detailed knowledge serve today as an excuse for a general lack of vigilance.”<sup>84</sup>

## 2. Capacity

As a general matter, a state that lacks actual practical capacity to stop an impending attack will not incur responsibility for its failure to do so.<sup>85</sup> This principle was of particular relevance in the ICJ case *DRC v. Uganda*. There, Uganda engaged in military operations directed against militants who had operated out of the DRC. Finding against Uganda—mostly on the grounds that the actions of the militants could not be attributed to the government of the DRC—the ICJ further held that the “absence of action by Zaire’s [DRC’s] Government against the rebel groups” in a mountainous, remote, and largely ungoverned border area was not necessarily “tantamount to ‘tolerating’ or ‘acquiescing’ in their activities.”<sup>86</sup> Moreover, the Court reiterated that the due diligence test stresses means, not results.<sup>87</sup> Where, due to lack of capacity, the state lacks the means to address a threat, there could be no breach of duty.<sup>88</sup>

The lack of capacity in this context must be practical or logistical, not institutional or legal. In other words, domestic legal rules that would not permit the state to take action against the threat would not serve as a defense for the defaulting state against an allegation that the state has not complied with its due diligence obligations.<sup>89</sup> This suggests that states bear an obligation to build capacity in the legal and institutional sense—an obligation that the Security Council has also reiterated in a number of resolutions pertaining to the war on terrorism, including by imposing obligations on states to criminalize, suppress, and punish acts of terrorism.<sup>90</sup>

84. See BECKER, *supra* note 68, at 135 (italics in original); see also TRAPP, *supra* note 77, at 78–79.

85. See TRAPP, *supra* note 77, at 70 (collecting citations).

86. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. 168, ¶ 301 (Dec. 19) [hereinafter *Armed Activities*]. Zaire was the former name of the Democratic Republic of Congo.

87. *Id.* ¶ 301–03; *Tebran Hostages Case*, 1980 I.C.J. at ¶ 68; *Genocide Convention*, 2007 I.C.J. at ¶ 430.

88. Olivier Corten, *The Military Operations Against the ‘Islamic State’ (ISIL or Da’esb)—2014*, in *THE USE OF FORCE IN INTERNATIONAL LAW: A CASE-BASED APPROACH* 873, 890 (Tom Ruys, Olivier Corten & Alexandra Hofer eds. 2018).

89. See Riccardo Pisillo-Mazzechi, *The Due Diligence Rule and the Nature of the International Responsibility of States*, 35 GER. Y.B. INT’L L. 9, 27 (1992).

90. See, e.g., S.C. Res. 1368, ¶ 4 (Sep. 12, 2001) (“[The Security Council c]alls also on the international community to redouble their efforts to prevent and suppress terrorist acts including by increased cooperation and full implementation of the relevant international anti-terrorist conventions and Security Council resolutions.”); S.C. Res. 1624, ¶ 1 (Sep. 14, 2005) (“[The Security Council c]alls upon all States to adopt such measures as may be necessary and appropriate and in accordance with their obligations under international law to: (a) Prohibit by law incitement to commit a terrorist act or acts; (b) Prevent

### 3. *Diligent Action*

When the notice and capacity requirements are fulfilled, what must a state do in order to discharge its due diligence obligation? A general agreement exists that a state may not simply tolerate the presence of armed bands on its territory, when it is aware of their presence and has the capacity to stop them.<sup>91</sup> This much has been recognized in a number of international agreements and texts, including the 1970 United Nations General Assembly's Declaration on Friendly Relations,<sup>92</sup> and the ILC's early Draft Code of Offences Against the Peace and Security of Mankind.<sup>93</sup>

Beyond this scenario, however, there is far less international guidance—or agreement—on the scope of the due diligence duty. One approach that has been suggested in existing commentary is to adjust it to the requirements of notice and capacity. Under such an approach, states with more specific knowledge will be obliged to take more specific measures to combat the threat, and states with greater capacity will be held to a higher standard than states with a lesser capacity.<sup>94</sup> This approach, though attractive in its simplicity, does not provide a general standard or objective criteria for the fulfillment of the due diligence requirement.

Another suggested approach has been to equate the due diligence standard with a negligence test.<sup>95</sup> Here, too, the shortfall is a lack of agreement

such conduct; (c) Deny safe haven to any persons with respect to whom there is credible and relevant information giving serious reasons for considering that they have been guilty of such conduct.”); S.C. Res. 2161 (June 17, 2014) (imposing a host of obligations on states to disrupt and combat terrorists’ finance sources).

91. See, e.g., Ian Brownlie, *International Law and the Activities of Armed Bands*, 7 INT’L & COMP. L.Q. 712, 729 (1958) (“The State practice is not very coherent in its legal content, but it is submitted that at least it shows that State complicity in incursions by armed bands or toleration of activities of such bands operating from national territory is ‘unlawful’ . . .”).

92. G.A. Res. 2625 (XXV), *supra* note 41, at 123 (“Every state has the duty to refrain from . . . acquiescing in organized activities within its territory directed towards the commission of [acts of civil strife or terrorist acts in another State].”).

93. See *Report of the International Law Commission covering the work of its sixth session, reprinted in* [1954] 2 Y.B. Int’l L. Comm’n 140, 150, U.N. Doc. A/2693 (forbidding either “the toleration of the organization of [armed] bands” within a state’s territory or “the toleration of the use by such armed bands of its territory as a base of operations or as a point of departure for incursions into the territory of another State . . .”).

94. See, e.g., Malzahn, *supra* note 77, at 104 (2002) (“[D]ue diligence . . . is defined as a function of the state’s knowledge about a threat and its power to prevent the harm”); BECKER, *supra* note 68, at 142 (“Compliance is measured not against an absolute standard but by reference to the actual capacity of the State in the circumstances.”); see also TRAPP, *supra* note 77, at 67–68 (observing that this approach was followed by the *Alabama Claims Tribunal*).

95. Analyzing the *Texas Cattle Claims* case, for instance, where Mexican officials both permitted the use of Mexican territory as a base for cattle-raiders and in some cases engaged in the wrongful activity themselves, Lillich and Paxman suggest a spectrum of responsibility. At one extreme would be active participation and knowing acquiescence, which would automatically incur state responsibility, while at the other end of the spectrum would be cases where the state may have simply neglected its duty to prevent its territory from being used by criminals or terrorists. In that latter case, they say, “the test is one of negligence.” See Lillich & Paxman, *supra* note 77, at 260; see also Ruys & Verhoeven, *supra* note 25, at 307 (“In the end, the due diligence rule only matters to situations of negligence or mere toleration of the conduct of private actors in a state’s territory.”); Malzahn, *supra* note 77, at 104 n.94 (“At a mini-

on what exactly constitutes negligence in this context. For instance, Becker argues that, because international law generally favors objective tests of responsibility, it is irrelevant to the negligence inquiry “whether the failure to prevent a given act resulted from the subjective intent of State officials or their negligence.”<sup>96</sup> Instead, he argues, state responsibility is incurred by an objective failure to act in circumstances that indicate a lack of due diligence.<sup>97</sup>

Perhaps the formulation that offers the most guidance is that forwarded by the *Alabama Claims* Tribunal, which adjudicated a series of claims brought by the United States against the United Kingdom over attacks on Union merchant ships by Confederate Navy vessels built in British shipyards during the American Civil War. In examining the British government’s responsibility, the Tribunal maintained that the duty calls for diligence “exercised . . . in exact proportion to the risks to which either of the belligerents may be exposed, from a failure to fulfil the obligations of neutrality on their part.”<sup>98</sup> In other words, the Tribunal called for weighing the costs of action against the costs of inaction, demanding a greater level of care if the costs of inaction are higher.

As with regard to more expansive notions of attribution, the attacks of 9/11 are said by some scholars to have raised the bar of compliance for states. Kimberley Trapp, for instance, claims that post-9/11, the “margin of appreciation” (discretion) enjoyed by territorial states about how to deal with risks of terrorism has decreased, in part because international standards have become more specific and because of resources being made available to support counter-terrorism efforts.<sup>99</sup> There is as of yet no independent judicial authority that supports this claim, nor are there significant public authorities that echo it. Nonetheless, it is interesting to note that, per Trapp’s view, the fact that some international resources are available to states in countering terrorist threats suggests that states’ obligations are heightened. In other words, the difference between “unable” and “unwilling,” on her account, narrows.

#### D. Neutrality

As noted earlier, some proponents of the UUD find support for the doctrine in the international law of neutrality.<sup>100</sup> The law of neutrality, both in

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mum, the duty of due diligence demands that states act in good faith and non-negligently in the performance of their international obligations.”); Brownlie, *supra* note 91, at 735 (identifying either “complicity in or negligence in control of armed bands” as an “international delinquency” justifying reparations).

96. BECKER, *supra* note 68, at 139.

97. For more on the debate between objective responsibility and fault in the due-diligence context, see IAN BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY, PART I 44–47 (1983).

98. *Alabama Claims* (U.S. v. Gr. Brit.), 19 R.I.A.A. 125, 129 (1872).

99. TRAPP, *supra* note 77, at 77–79.

100. Deeks, *supra* note 13, at 499–501.

treaty law and customary law,<sup>101</sup> has been developed in the context of traditional interstate conflicts and delineates the obligations of states claiming neutrality vis-à-vis the armed forces of warring states. To maintain the status of neutrality, states are under an obligation to prevent the use of their territory, either as a sanctuary or as a launching pad for attacks, by the armed forces of any party to the conflict. Belligerent troops that enter a neutral territory must be disarmed and interned by the neutral state until the end of hostilities.

The law of neutrality also appears to be the original locus, in international law, of the use of the phrase “unable or unwilling.”<sup>102</sup> If a neutral state is unable or unwilling effectively to prevent the use of its territory by belligerents of either party to a conflict, the rival party may take such steps as are necessary to counter the operations of the enemy belligerents in the neutral territory.<sup>103</sup> Note that inability or unwillingness, in this context, falls well short of active provision of assistance by a neutral state to a belligerent: in a case of assistance, the state would lose its neutrality and may, depending on the degree and nature of its assistance, be considered a party to the conflict by the rival belligerent.

The legal relevance of the “unable or unwilling” test of neutrality law to our present context should not be overstated. For one thing, neutrality law in general applies to international armed conflicts, not armed conflicts between states and nonstate actors.<sup>104</sup> It is entirely possible that its rationale carries over to non-international armed conflicts, but this cannot be assumed. In fact, international law scholars are divided over this precise question.<sup>105</sup> For another, the law of neutrality emerged prior to the adoption of the U.N. Charter, leaving under debate the question of its endurance in light of the Charter’s general prohibition on the use of force. (In this respect,

101. See also Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land arts. 1, 2, 10, Oct. 18, 1907, 36 Stat. 2310; Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, 36 Stat. 2415.

102. Michael Bothe, *The Law of Neutrality*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 484, 494–95 (Dieter Fleck ed., 1995); Deeks, *supra* note 13, at 497; see also Heller, *supra* note 3 (“[T]he doctrine was first articulated by the Nixon administration in 1970, as a way of expanding the US’s ground campaign against North Vietnamese forces in neutral Cambodia. . . . This is the true origin of the ‘unwilling or unable’ test.”).

103. Deeks, *supra* note 13, at 499–501.

104. See *id.* at 497, 502 (“[N]eutrality law does not directly govern uses of force between states and nonstate actors.”); cf. Alfred P. Rubin, *The Concept of Neutrality in International Law*, 16 DEN. J. INT’L L. & POL. 353, 364–65 (characterizing neutrality law as law governing relations between states).

105. Compare Deeks, *supra* note 13, at 497 (“[T]he equities and concerns of the neutral state and an offended belligerent state in the neutrality law context are analogous to those of the territorial state and the state seeking to use force in self-defense against a nonstate actor in that territory. . . . [N]eutrality rules developed to govern acts by states during international armed conflict [have] expanded beyond that context to govern acts by nonstate actors during peacetime (and in noninternational armed conflicts).”); with Heller, *supra* note 25 (“The law of neutrality . . . applies only in international armed conflicts between two legitimate belligerents; it says nothing about the use of extraterritorial force against NSAs. . . . The law of neutrality may provide *normative* support for the ‘unwilling or unable’ test in the context of attacks against NSAs, but it does not provide *legal* support for it.”).

the debates over neutrality law are not very different from those over the legal status of the UUD.<sup>106</sup>) The United States did invoke neutrality specifically as a justification for its targeting operations against Viet Cong forces in Cambodia,<sup>107</sup> but its legal position has not been universally embraced.<sup>108</sup>

To the extent that the traditional rules on neutrality give credence to a present-day moral or legal application of the UUD against nonstate actors, the question of whether and how one might distinguish between the two prongs of the test—"unable" and "unwilling"—cannot benefit significantly from any reference to rules pertaining to neutrality. As far as we are aware, there are no specific authorities with regard to either the procedural or substantive rules that guide the application of the "unable or unwilling" test in the law of neutrality. And though, as we shall see later, some scholars have attempted to elaborate such rules in the context of the UUD, they, too, admit that there is little to draw from the law of neutrality.

#### *E. State Responsibility: Wrongful Acts, Reparations and Equitable Compensation*

We turn now to the rules of state responsibility—a body of international law that has received too little attention in existing debates over the UUD. This neglect has been unfortunate. As we aim to show, attending to these rules can help point the way toward a more nuanced and satisfactory analysis of what duties, if any, a state incurs when it uses force against a threat posed by nonstate actors located within another state.

Note that we focus on the rules of state responsibility as they pertain to states' extraterritorial uses of force. At this point, we do not address the responsibility of a state for failing to discharge its due diligence obligations to police its territory and prevent it from becoming a ground for attacks on others. That type of responsibility will become pertinent later in our discussion of how to think about any reparations owed to the territorial state as a result of an attack justified under the UUD.

A general principle of international law holds that a state that violates an international obligation owed to another state commits an international wrong for which it is required to make reparations.<sup>109</sup> This principle serves

106. Heller, *supra* note 25.

107. See Deputy Permanent Rep. of the United States to the U.N., Letter dated Mar. 9, 1970 from the Deputy Permanent Rep. of the United States to the President of the Security Council, U.N. Doc. S/9692 (Mar. 10, 1970); John R. Stevenson, Legal Advisor, U.S. Dep. of State, Statement on Legal Aspects of U.S. Military Actions in Cambodia to the NYC Bar Association 5–6 (May 28, 1970).

108. See, e.g., George H. Aldrich, Wolfgang Friedmann & John Lawrence Hargrove, *Comments on the Articles on the Legality of the United States Action in Cambodia*, in 3 THE VIETNAM WAR AND INTERNATIONAL LAW 96, 98 (Richard A. Falk ed., 1972); Richard A. Falk, *The Cambodian Operation and International Law*, in 3 THE VIETNAM WAR AND INTERNATIONAL LAW 33, 42 (Richard A. Falk ed., 1972); Eliot D. Hawkins, *An Approach to Issues of International Law Raised by United States Actions in Vietnam*, in 1 THE VIETNAM WAR AND INTERNATIONAL LAW 163, 193 (Richard A. Falk ed., 1968).

109. See, e.g., *Factory at Chorzów* (Germ. v. Pol.), Judgment, 1927 P.C.I.J. (ser. A) No. 9, at 21 (July 26) ("It is a principle of international law that the breach of an engagement involves an obligation to



as a rough analogue to *ubi jus ibi remedium*, the common law principle holding that a violation of a legal right guaranteed by domestic law ordinarily generates in the victim an entitlement to a legal remedy.<sup>110</sup> It is general in the sense that it transcends any particular field of regulation under international law, including the *jus ad bellum*. And it received its most thorough explication in the 2001 Articles on Responsibility of States for Internationally Wrongful Acts (“ARSIWA”) propounded by the International Law Commission (“ILC”).<sup>111</sup> The ARSIWA explain that internationally wrongful acts require reparations, whether or not such reparations are provided for in the primary rule that has been breached. For reasons that will become clear, it is important to note that, under the ARSIWA, the requirement is *prima facie* or presumptive. Thus, as noted in Article 39, the final determination of what reparations are owed must reflect consideration of the contribution, if any, of willful or negligent action or omission of the injured state.<sup>112</sup> In this respect, the ARSIWA roughly tracks domestic tort law notions of comparative responsibility, according to which a tortfeasor’s obligation to compensate a victim often is adjusted when the victim is deemed also responsible for her injury.<sup>113</sup>

In addition to stating the general principle of states being presumptively responsible via reparations for their international wrongs, and defining when wrongful conduct is attributable to a state, the ARSIWA includes provisions that elaborate on what, in domestic tort or criminal law, would be called “privileges”—special considerations that warrant treating an act that fits the definition of an international wrong as nonetheless justified or excused, thereby eliminating the obligation to make reparations. Specifically, these provisions, found in Chapter V of Part I of the ARSIWA, identify six “Circumstances Precluding Wrongfulness” (“CPWs”). In order, these are: actions taken with the consent of the state now complaining of them (Article 20); actions taken in self-defense in a manner compatible with the U.N. Charter (Article 21); actions that constitute countermeasures against another state’s wrongful acts (Article 22); actions taken under *force majeure* (Article 23); acts taken in distress (Article 24); and actions taken out of necessity (Article 25).

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make reparation in an adequate form.”); see also *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, 184 (Apr. 11); *Phosphates in Morocco (Italy v. Fr.)*, Judgment, 1938 P.C.I.J. (ser. A/B) No. 74, at 28 (June 14), *Gabčíkovo-Nagymaros Project (Hung. v. Slov.)*, 1997 I.C.J. 7, ¶ 50 (Sept. 25) [hereinafter *Gabčíkovo-Nagymaros*].

110. See JOHN C. P. GOLDBERG & BENJAMIN C. ZIPURSKY, *RECOGNIZING WRONGS* 30–31, 82–103 (2020).

111. Though not a treaty, the ARSIWA is generally considered to be CIL and are regularly cited in international jurisprudence. See, e.g., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶ 140 (Jul. 9) [hereinafter *Wall*]; *Gabčíkovo-Nagymaros*, 1997 I.C.J. ¶ 47. The ILC is a body of independent experts that advises the United Nations on matters of international law.

112. ARSIWA, *supra* note 30, art. 39.

113. See *RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY* § 7 (2000) (stating and explicating the rule of comparative fault).

Debates over the UUD have by and large avoided an in-depth treatment of the ARSIWA. This is not surprising because, when it comes to defining what counts under international law as a non-wrongful use of force by a state against another state, the focus has traditionally been on self-defense, and, on that issue, the ARSIWA is explicitly derivative. Indeed, ARSIWA Article 21 expressly incorporates into its definition of self-defense the relevant terms of the U.N. Charter, reading as follows: "The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations."<sup>114</sup> If, therefore, the UUD is understood as a lawful exercise of the right of self-defense as a matter of *ius ad bellum* under the Charter, then Article 21 adds nothing; and if it is not, Article 21 cannot cure its illegality.

In fact, however, as we will explain in Part III, the ARSIWA may have more to offer on the question of when a use of force under the UUD is non-wrongful. Of particular relevance is Article 25's identification of "necessity" as a CPW, separate and apart from self-defense. According to subheading (1)(a) of that article, a state that commits a *prima facie* breach of international law can negate the breach if it was "the only way for the State to safeguard an essential interest against a grave and imminent peril." On its face, this language might seem to support recognition of the UUD, given that it is precisely the necessity of dealing with the threat posed by nonstate actors that is said to justify the invasion of the state in which those actors are located. Indeed, the ILC lists "preserving the very existence of the State and its people in time of public emergency, or ensuring the safety of a civilian population" as two of the "essential interests" cited in common invocations of necessity.<sup>115</sup> And this necessity could hold even if there is no separate self-defense claim that the threatened state could rely on *vis-à-vis* the nonstate actors.

The contours of necessity as a CPW, however, are highly constrained. For, having identified necessity as a principle, Article 25 quickly introduces a crucial qualification under subheading (1)(b), according to which necessity may only be invoked to justify state conduct that "does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole."<sup>116</sup> "In other words," according to the ILC, "the interest relied on must outweigh all other considerations, not merely from the point of view of the acting State but on a

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114. ARSIWA, *supra* note 30, art. 21 (emphasis added).

115. *Id.* art. 25 cmt. 14.

116. Article 25(2) introduces further qualifications: "necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) the international obligation in question excludes the possibility of invoking necessity; or (b) the State has contributed to the situation of necessity." ARSIWA, *supra* note 30, art. 25.

reasonable assessment of the competing interests, whether these are individual or collective.”<sup>117</sup>

As the violation of a state’s sovereign territory without permission might well qualify as a serious impairment of an essential interest, the effort to enlist the principle of necessity to explain the UUD now appears more problematic. Moreover, subparagraph (2) states: “In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) the international obligation in question excludes the possibility of invoking necessity.”

It is worth noting that the qualifications of the necessity justification contained in Article 25(1)(b) were not uncontroversial when adopted. In his critique of the ILC’s work in this context, Robert Sloane argues:

Neither the early publicists nor anything in the incidents cited in the ILC Commentary suggests that the determination of necessity requires that one weigh the “grave and imminent peril” to the invoking state’s interests against the nature or degree of “impair[ment]” to the interests “of the State or States towards which the obligation exists, or of the international community as a whole, . . .”<sup>118</sup>

Notably, in offering historical support for Article 25, the ILC Commentary itself mentions the “Caroline” incident of 1837, in which British armed forces entered American territory and captured and destroyed a vessel owned by U.S. citizens that was providing military support to Canadian insurgents.<sup>119</sup> In an exchange of letters between American and British officials, the “necessity of self-defence and self-preservation” was acknowledged by both sides, though the parties disputed the contours of that necessity and the conditions under which it could be invoked.<sup>120</sup> And indeed, some proponents of the UUD, including the government of the United Kingdom, have invoked a general notion of “necessity” as a justification—though without direct allusion to the ARSIWA.<sup>121</sup>

Moreover, though the contours of the qualification have not been probed extensively, some debate exists over whether a territorial incursion would necessarily constitute the impairment of an “essential interest” of a state. In his 1980 *Addendum to the Eighth Report on State Responsibility*, Special Rapporteur Robert Ago raised the question of whether conditions of necessity

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117. *Id.* art. 25 cmt. 17. In *Gabčíkovo-Nagymaros*, the Court affirmed the need to take into account any countervailing interest of the other State concerned. *Gabčíkovo-Nagymaros*, 1997 I.C.J. ¶ 56.

118. Robert D. Sloane, *On the Use and Abuse of Necessity in the Law of State Responsibility*, 106 AM. J. INT’L L. 447, 457–58 (2012).

119. ARSIWA, *supra* note 30, art. 25 cmt. 5.

120. Letter from Mr. Webster to Mr. Fox, (Apr. 24, 1841), in 29 BRITISH AND FOREIGN STATE PAPERS 1129–39 (Libr. and Keeper of the Papers, Foreign Office ed., 1857).

121. See Corten, *supra* note 88, at 893; see also Jure Vidmar, *The Use of Force as a Plea of Necessity*, 111 AJIL UNBOUND 301, 302–06 (2017).

might “have the effect of precluding, by way of exception, the wrongfulness of an assault [into a foreign territory] which proved, especially when viewed in context, to be less serious.”<sup>122</sup> Some examples, he continued, might include incursions into foreign territory to “forestall harmful operations by an armed group which was preparing to attack the territory of the State,” instances of hot pursuit, or protection of nationals.<sup>123</sup> The common feature of these examples, he concluded, “is the limited character of the actions in question, in terms both of duration and of the means employed, in keeping with the purpose, which is restricted to eliminating the perceived danger.”<sup>124</sup> Accordingly, a state of necessity could—given the existence of its associated conditions—“preclude the wrongfulness . . . of an intervention in foreign territory.”<sup>125</sup> In the years since Ago made this observation, others have built on his work by further suggesting that necessity might sometimes justify the cross-border pursuit of criminals<sup>126</sup> and interventions to protect nationals abroad.<sup>127</sup>

Coming from the opposite direction, other critics argue that “in contemporary international law, ‘necessity’ is not recognized as a separate legal basis justifying a use of force.”<sup>128</sup> As Olivier Corten, for instance, argues, the customary requirement of necessity under the *jus ad bellum* “is not considered as *opening* a right to self-defence, but as *restraining* its exercise.”<sup>129</sup> Tom Ruys asserts:

[C]ontrary to what is sometimes suggested, necessity cannot be invoked to justify the use of force in the sense of UN Charter Article 2(4). In addition to the fact that necessity cannot be invoked to justify a breach of a peremptory norm, the Charter rules on the use of force constitute a closed system. . . . In other words, the primary rules—including, in particular, UN Charter Article 51 on the right of self-defense—implicitly exclude any reliance on necessity (as per Article 25(2)(a) of the Articles on State Responsibility).<sup>130</sup>

A final complication comes from Article 26 of the ARSIWA, which states that none of its CPWs, including necessity, applies “if to do so would con-

122. Robert Ago, *Addendum to the Eighth Report on State Responsibility*, 2 Y.B. INT’L LAW COMM’N, A/CN.4/318/Add.5-7, ¶ 56 (1980).

123. *Id.*

124. *Id.*

125. *Id.* ¶ 57.

126. See, e.g., Andreas Laursen, *The Use of Force and (the State of) Necessity*, 37 VAND. J. TRANSNAT’L L. 485 (2004).

127. Jean Raby, *The State of Necessity and the Use of Force to Protect Nationals*, 26 CAN. Y.B. INT’L L. 253 (1988).

128. See, e.g., Corten, *supra* note 88, at 894.

129. *Id.*; see also ROBERT KOLB, *THE INTERNATIONAL LAW OF STATE RESPONSIBILITY* 133 (2017).

130. Tom Ruys, *The Meaning of “Force” and the Boundaries of the Jus ad Bellum: Are “Minimal” Uses of Force Excluded From UN Charter Article 2(4)?*, 108 AM. J. INT’L L. 159, 161–62 (2014) (internal citations omitted).

flict with a peremptory norm of general international law.”<sup>131</sup> Whether or not the prohibition on the use of force is indeed a peremptory norm (*jus cogens*) is a question under debate among international lawyers.<sup>132</sup> If it is peremptory, then Article 25’s necessity provision cannot salvage the legality of the UUD if it is considered aggression in violation of that prohibition.<sup>133</sup> Yet, Louise Arimatsu argues, “surmounting the argument that the plea of necessity involving a use of force did *not* survive the Charter regime remains hugely problematic.”<sup>134</sup>

In sum, there are important disputes about the breadth and legitimacy of Article 25’s “necessity” provision. As we will explain below, these ambiguities track ambiguities in the application of necessity in private law settings. Indeed, we will suggest that the private law’s handling of these ambiguities can help, to some extent, guide the application of Article 25 to the UUD.

One final aspect of the international rules of state responsibility will be relevant to our analysis. It concerns the question of whether compensation might sometimes be owed by one state to another for harm done to the other, even if the harm results from state conduct that is *prima facie* wrongful but justified by one or more considerations of the sort identified by the ARSIWA as a CPW. The prevalent position among international lawyers maintains that a successful invocation of a CPW removes any obligation to make reparations to an injured state. Robert Kolb, for instance, asserts that “the acts a State commits in the context of lawful [self-defense] will not trigger its responsibility, i.e. mainly the duty to make reparation.”<sup>135</sup> Federica Paddeu, similarly, finds that the CPWs are justifications, rather than excuses, and that if justified, there is no internationally wrongful act and therefore no duty to make reparations arises.<sup>136</sup> And Mathias Forteau concludes, “[i]f wrongfulness is excluded, then, automatically, so is responsibility. . . . [n]o obligation to make reparation can therefore be imposed on the State that benefits from such a circumstance.”<sup>137</sup> Kolb, moreover, explicitly rejects the possibility—known in domestic law—of denying for any particu-

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131. ARSIWA, *supra* note 30, at 71.

132. Compare, e.g., Sondre Torp Helmersen, *The Prohibition of the Use of Force as Jus Cogens: Explaining Apparent Derogations*, 61 NETH. INT’L L. REV. 167 (2014), with James A. Green, *Questioning the Peremptory Status of the Prohibition of the Use of Force*, 32 MICH. J. INT’L L. 215 (2011).

133. For the same reason, Article 22 of the ARSIWA can similarly not override the prohibition on aggression. Article 22 provides that the wrongfulness of “an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of Part Three.” Even if one could claim that a military action is taken as a countermeasure for the initial violation of the territorial state of its own obligations against the threatened state, that fact still could not justify countermeasures that would amount to aggression.

134. Louise Arimatsu, *The Law of State Responsibility in Relation to Border Crossings: An Ignored Legal Paradigm*, 89 INT’L L. STUD. 21, 49 (2013) (emphasis in original).

135. KOLB, *supra* note 129, at 118.

136. Federica Paddeu, *Clarifying the Concept of Circumstances Precluding Wrongfulness (Justifications) in International Law* (University of Cambridge, Faculty of Law, Legal Studies Research Paper No. 18, 2017).

137. Mathias Forteau, *Reparation in the Event of a Circumstance Precluding Wrongfulness*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* 887, 888 (James Crawford et al. eds., 2010).

lar act culpability as a matter of criminal law but still supporting a claim for redress as a matter of civil law.<sup>138</sup>

With respect, we shall argue that the rejection of any duty to compensate when a state's action is taken under circumstances that preclude wrongfulness is too quick. Though the general principle under the ARSIWA is that internationally wrongful acts warrant reparations, the ARSIWA does not suggest the opposite: that reparations are never owed for an act that is not wrongful. Certainly, there are some primary obligations in international law that demand compensation even without wrongdoing. This is the case, for instance, for various environmental obligations.<sup>139</sup> Moreover, Article 27(b) of the ARSIWA states unequivocally that the invocation of one of its CPWs is without prejudice to the "question of compensation for any material loss caused by the act in question."<sup>140</sup> The ILC's commentary to Article 27 explains that the term "compensation"

is not concerned with compensation within the framework of reparation for wrongful conduct, which is the subject of Article 34. Rather, it is concerned with the question whether a State relying on a circumstance precluding wrongfulness should nonetheless be expected to make good any material loss suffered by any State directly affected.<sup>141</sup>

Article 27 has been read by many commentators as rooted in equity, and as such, limited in its reach and consequences. Kolb, for instance, argues that "The provision leaves the matter to agreement between the States concerned or to *ex gratia* action of the State benefitting from the CPW. . . . [It] . . . does not create a subjective right to such compensation. It just creates a subjective right to seek such compensation."<sup>142</sup>

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138. KOLB, *supra* note 129, at 110.

139. *See, e.g.*, Convention on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies, art. VII, Jan. 27, 1967, 610 U.N.T.S. 206 (imposing strict liability for harm caused by the launching of an object into space); Convention on International Liability for Damage Caused by Space Objects, art. III, Mar. 29, 1972, 961 U.N.T.S. 188 (imposing "absolute liability" for damage caused by a launching State's space object on the surface of the earth or to aircraft in flight); United Nations Convention on the Law of the Sea, art. 139, Dec. 10, 1982, 1833 U.N.T.S. 397 (establishing strict liability for activities carried out within "The Area").

Other treaties do not directly deal with the responsibility of states but impose strict liability on private persons. *See, e.g.*, Convention on the Liability of Operators of Nuclear Ships, May 25, 1962, IAEA Leg. Ser. No. 4 at 34; Paris Convention on Third Party Liability in the Field of Nuclear Energy, Jan. 28, 1964, 956 U.N.T.S. 264; Vienna Convention on Civil Liability for Nuclear Damage, May 21, 1963, 1063 U.N.T.S. 266; International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 973 U.N.T.S. 4; International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, Oct. 1, 1996, 35 I.L.M. 1415; International Convention on Civil Liability for Bunker Oil Pollution Damage, Mar. 23, 2010, 40 I.L.M. 1493.

140. ARSIWA, *supra* note 30, art. 27(b).

141. *Id.* art. 27 cmt. 4.

142. KOLB, *supra* note 129, at 137.

But this is not the only possible view. In the case of the Gabčíkovo-Nagymaros dam, the ICJ noted Hungary's admission in its pleadings that the state of necessity, which it invoked to justify its actions, did not relieve it of the duty to provide compensation for damage incurred by Czechoslovakia.<sup>143</sup> Since the ICJ ultimately rejected the plea of necessity, it did not consider the legal consequences of a successful claim of necessity for reparations.<sup>144</sup> In the investment dispute of *CMS Gas Transmission Company v. Argentina*, an arbitral award went further and determined that the invocation of some CPW (particularly in that case, necessity) did not free the State from all obligations to make reparations.<sup>145</sup> Again, the Tribunal did not consider that a state of necessity existed in this case, but went on to conclude that even if it did, "it does not exclude the duty to compensate the owner of the right which had to be sacrificed."<sup>146</sup> Though some commentators have been critical of this assertion, it remains part of applicable case law.<sup>147</sup>

Outside the ambit of the ARSIWA, some have suggested that at times, compensation might be warranted even where there is no violation of international law. For example, Michael Reisman has argued that states should compensate victims of war for collateral harm inflicted in the course of "elective international conflicts," even if no violation of the law of war has occurred.<sup>148</sup> As he points out,

[T]here is certainly nothing remarkable in the notion that the consequences of an *illegal* action should be repaired by those causing them. But it does not follow, as a necessary corollary, that compensation should *not* be owed for injuries caused by officials who were operating *lawfully* and whose actions were, accordingly, not illegal.<sup>149</sup>

For Reisman, the fact that the injurer benefits from the conduct that causes the harm is sufficient grounds for requiring compensation. Likewise, the Draft ILC Articles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Conditions distinguish between responsibility and liability and, under certain circumstances, call for states to compensate for harm to other states caused by internationally lawful conduct.<sup>150</sup>

143. Memorial of the Republic of Hungary, Gabčíkovo-Nagymaros Project (Hung. v. Slov.), 1994 I.C.J. Pleadings 1 (May 2 1994) ¶¶ 7.97, 9.18, 10.19; *Gabčíkovo-Nagymaros*, 1997 I.C.J. ¶ 73.

144. *Gabčíkovo-Nagymaros*, 1997 I.C.J. ¶ 59.

145. *CMS Gas Transmission Company v. Arg.*, ICSID Case No. ARB/01/08, Award, ¶ 306 (May 12, 2005), 14 ICSID Rep. 151 (2005).

146. *Id.* ¶ 388.

147. See Forteau, *supra* note 137, at 890.

148. Michael Reisman, *Compensating Collateral Damage in Elective International Conflict*, 8 INTERCULTURAL HUM. RTS. REV. 1, 10 (2013). Reisman notes, however, that the Foreign Claims Act currently exempts the United States from such claims.

149. *Id.* at 3 (emphasis in original).

150. *Draft Articles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities with commentaries*, 2(2) Y.B. INT'L L. COMM'N, U.N. Doc. A/61/10, at 59-60 (2006) (calling for each State to establish mechanisms that will enable other States to obtain compensation for trans-

## II. OPEN QUESTIONS AND A NEGLECTED DISTINCTION

With the relevant international law background in place, we can now take a closer look at particular questions raised by the UUD. We begin with the question that has received significant attention in the existing literature: namely, whether and how the UUD can be adequately defined and operationalized as a rule of international law. We then address the two further questions at the center of this paper. One concerns the legal effect on state responsibility of successful invocations of the UUD: specifically, whether it absolves a state that invokes it of responsibility for having invaded the territory of another state. The second concerns whether a distinction ought to be drawn between the two prongs of the UUD—cases of inability as opposed to cases of unwillingness. We suggest that both of these questions are open questions of international law that, as such, can ultimately benefit from an investigation of how analogous questions have been addressed in private law.

### A. *The Scope of the UUD*

Opponents charge, and supporters concede, that the UUD raises basic unanswered questions pertaining to its scope and its procedural requirements.<sup>151</sup> The only publicly available documents spelling out the conditions for the application of the UUD, are the U.S. Presidential Policy Guidelines (“PPG”) on the targeting of suspected terrorists outside the immediate battlefield,<sup>152</sup> as well as the Israeli High Court of Justice’s (“HCJ”) decision on the legality of targeted killings in Palestinian territories.<sup>153</sup> In a nutshell, both identify the following as conditions for the invocation of the doctrine in cases in which the threatened state uses force to respond to a threat of terrorism emanating from nonstate actors located in another state:

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boundary harms caused by a hazardous activity within the State, including in some cases from the State itself, irrespective of whether there is any basis for the State to be held responsible on the basis of an international law violation).

151. See, e.g., Deeks, *supra* note 13, at 503; Hakimi, *supra* note 56, at 2–3 (arguing that there is a legal justification for defensive force against nonstate actors, but because the current legal test is so vague and not completely accepted, there has been “a sizeable gap between the norms that are widely articulated as law and the ones that reflect the operational practice”); Ruys, *supra* note 25, at 487.

152. EXEC. OFFICE OF THE PRESIDENT, PROCEDURES FOR APPROVING DIRECT ACTION AGAINST TERRORIST TARGETS LOCATED OUTSIDE THE UNITED STATES AND AREAS OF ACTIVE HOSTILITIES (2013) [hereinafter PPG].

153. HCJ 769/02 Pub. Comm’n Against Torture in *Isr. v. Gov’t of Isr.*, 57(6) PD 459 (2005) (Isr.) [hereinafter *PCATT*]. Note that Israel does not recognize Palestinian statehood, so the UUD here meets an extra complication of an extraterritorial operation that is not in another sovereign’s territory. Still, the Court’s decision does specify some conditions that are useful more generally, and that the American PPG seems to echo in some important aspects. Several states have made submissions to the Security Council under Article 51 expressing their views on the UUD. These tend to be articulated in general terms, without spelling out the substantive or procedural conditions for the invocation of the doctrine. For a catalogue of these submissions see Dustin A. Lewis, Naz K. Modirzadeh & Gabriella Blum, *Quantum of Silence: Inaction and Jus ad Bellum*, Harv. L. Sch. Program on Int’l L. & Armed Conflict, 2019.



- The terrorist is a “high value[d] terrorist” (per the PPG)<sup>154</sup> or is involved in a direct, continuous, and substantial manner in terrorism (per the HCJ);<sup>155</sup>
- The threat that the terrorist poses is “imminent,” though imminence is to be interpreted broadly, given the realities of a threat emanating from a place which is not under the control of its would-be victims;<sup>156</sup> and,
- It is impossible to stop the threat through capture or other non-lethal means.<sup>157</sup>

Neither the American nor the Israeli public policies say anything about the need to obtain consent from the territorial government, the sharing of intelligence, or any other procedural requirements that are not solely domestic, other than perhaps what is implicit in the obligation to consider a capture-alternative—presumably, one that would require the cooperation of the local authorities—before a lethal operation is launched.<sup>158</sup> And indeed, other states that have invoked the doctrine have said little on what they believe its exact content or conditions for application are, other than in broad general terms.<sup>159</sup>

### 1. *Substantive Questions*

Substantively, the UUD turns on standards—inability and unwillingness—that are contestable and contested. The plain words of the doctrine arguably offer clear guidance only in the starkest cases.

Start with “unable.” If there are clear cases of inability, they would involve a complete failure of government (as in certain periods in the life of the Democratic Republic of Congo, as the ICJ has observed in its decision against the Ugandan military activities in the DRC,<sup>160</sup> or for certain periods in the recent history of Somalia<sup>161</sup>) that leave both domestic and foreign actors perpetually exposed to harm. Alternatively, a state might be function-

154. PPG, *supra* note 152, at 1. Note that press reports claimed that President Trump had relaxed the condition of a high-valued target to include lower-level militants, but there has been no official acknowledgment of this move. See Charlie Savage & Eric Schmitt, *Trump Poised to Drop Some Limits on Drone Strikes and Commando Raids*, N.Y. TIMES, Sep. 21, 2017.

155. PCATI, 57(6) PD at 490–502.

156. PPG, *supra* note 152, at 16; PCATI, 57(6) PD at 495.

157. PPG, *supra* note 152, at 1.

158. Note that the HCJ decision preceded the Hamas takeover of Gaza, while Israel was still engaged in some security cooperation with the Palestinian Authority in the area.

159. See Lewis et al., *supra* note 153; see also, e.g., Ministry of External Affairs of the Government of India, “Statement by Foreign Secretary on 26 February 2019 on the Strike on JeM Training Camp at Balakot” (issued Feb. 26, 2019).

160. See, e.g., *Armed Activities*, 2005 I.C.J. ¶ 342.

161. See, e.g., S.C. Res. 2568 (2021); U.N. Security Council, “Report of the Secretary-General on Somalia,” U.N. Doc. S/2017/1109 (Dec. 26, 2017); U.N. Security Council, “Report of the Secretary-General on Somalia,” U.N. Doc. S/2018/1149 (Dec. 21, 2018).

ing yet lack effective security forces, for instance, when transitioning from a civil war or revolution (as in the case of Iraq or Afghanistan<sup>162</sup>).

Most cases will not be so clear, and for these the conditions for the proper application of the UUD may vary. Suppose, for example, the territorial state has the personnel, infrastructure, or resources to counter threats posed to other states by nonstate actors in its midst, but nonetheless lacks the ability to deploy them effectively. The nonstate actors may be adept at hiding themselves within the general population, or may otherwise operate in a way that prevents their detection or destruction. The Assad government's inability to defeat ISIS within Syria for several years, notwithstanding numerous lawful and unlawful attacks, is a case in point (though also note that the ISIS threat persisted even in the face of substantial foreign military intervention).<sup>163</sup> In other cases, the state might simply lack knowledge of the threat, despite all governance structures operating reasonably well. The failure of the French and Belgian security forces to preempt the terror attack in Paris in 2015 are pertinent examples.<sup>164</sup> In such a situation, it is plausible to maintain that provision by the threatened state of intelligence or other technical capacity might allow the territorial state to act effectively, thus obviating the need and justification for an attack under the UUD. At the very least, this difference suggests that a state that wishes to rely on the UUD might be subject to different procedural requirements in these different scenarios. For instance, the law might demand that, in these scenarios, the threatened state must first offer its assistance to the territorial state and have that offer refused or fail to neutralize the threat before being able to invoke the UUD.

Likewise, one can question whether the distinction between "able" and "unable" is measured by effort or by results, and whether it is binary or a matter of degree. What if the territorial government makes some effort but is unable to track down or apprehend terrorists? What if it is only successful in diminishing the threat, but not eliminating it? Russia, for instance, attacked Chechen rebels located in Georgia, even though Georgia had made efforts to build its military capacity and take action against the rebels—efforts that Russia deemed unsatisfactory.<sup>165</sup> Pakistan, for its part, repeatedly

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162. See generally Anthony H. Cordesman, *Iraq as a Failed State* (Ctr. for Strategic & Int'l Stud., Working Paper, Nov. 12, 2019).

163. See generally CARLA E. HUMUD & CHRISTOPHER M. BLANCHARD, CONG. RSCH. SERV., RL33487, *ARMED CONFLICT IN SYRIA: OVERVIEW AND U.S. RESPONSE* (2020).

164. See generally Homeland Security Advisory Council, *Attacks on Paris: Lessons Learned* (July 20, 2016).

165. See Permanent Representative of the Russian Federation, Letter dated Sept. 12, 2002 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, U.N. Doc. S/2002/1012 (Sept. 12, 2002) (invoking self-defense to justify Russia's continuing incursions in Georgia to fight Chechen rebels and noting that "[t]he continued existence in separate parts of the world of territorial enclaves outside the control of national governments, which, owing to the most diverse circumstances, are unable or unwilling to counteract the terrorist threat is one of the reasons that complicate efforts to combat terrorism").

claimed that it was perfectly capable of dealing effectively with threats of terrorism coming from within its borders, a claim that the United States obviously has doubted as it continued its drone attacks in that country (presuming not all such attacks were carried out with the Pakistani government's blessing).<sup>166</sup> Must the effort by the territorial state be comparable to the effort the victim state would have exerted? Comparable to what the territorial state itself exerts with regard to other threats in its territory? Or is a "good faith" or "reasonable" effort sufficient? Is effort enough, or is "ability" measured by outcomes?

"Unwillingness" is similarly difficult to pin down. The clearest cases would be those in which the government of the territorial state openly and explicitly refuses to take any action against the nonstate actor. While such failure may fall short of rendering the nonstate actors' actions attributable to the territorial state (see Section I.A, *supra*), it nonetheless would seem to demonstrate unwillingness of the sort contemplated by the UUD. Examples might include Lebanon's evident sympathy for the actions of Hezbollah<sup>167</sup> (although there are open questions as to its ability to address the threat posed by Hezbollah militants).<sup>168</sup> Likewise, the 2010 assassination of Mahmoud Al-Mabhouh by Israeli Mossad operatives in Dubai might fall under the heading of an action justified under the "unwilling" prong of the UUD, at least assuming Israeli officials believed that the Dubaiian authorities were ideologically sympathetic to Al Mabhouh's support for Hamas and its violence towards Israel and Israelis.<sup>169</sup>

Other cases of possible unwillingness will involve closer calls. In some instances, the sympathy for the nonstate actors might lie not with the territorial state's government, but with the local population or parts of it. The government's unwillingness to act in this case might derive from its reluctance to bear the political costs of acting against the wishes of powerful domestic actors. Concerns about Pakistani officials tipping off Osama Bin-Laden about an impending American assault would fall under this category.<sup>170</sup> It is also possible that neither the government nor most of the local population is particularly sympathetic to the perpetrators of the threat; yet,

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166. See, e.g., Asif Ali Zardari, Opinion, *Pakistan Did Its Part*, WASH. POST, May 2, 2011 (defending Pakistan's role in fighting terrorism); *Pakistan Capable of Defending Itself: Defence Minister Khurram Dastgir*, Radio Pakistan (Jan. 2, 2018); U.N. Secretary-General, "Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism," U.N. Doc. A/68/389 (Sep. 18, 2013); *Foundation for Fundamental Rights v. Federation of Pakistan*, (2013) 4 PLD (K.P.K.) 94, ¶ 19 (Pak.) ("Under the International Law & Conventions of the UNO, no State can choose and hit its enemy, hiding in another State, unless the latter State consent to it in writing and with mutual collaboration . . .").

167. See CARLA E. HUMUD, CONG. RSCH. SERV., IF10703, *LEBANESE HEZBOLLAH* (2021); CARLA E. HUMUD, CONG. RSCH. SERV., IF11617, *LEBANON* (2020).

168. See CHRISTOPHER M. BLANCHARD, CONG. RSCH. SERV., R42816, *LEBANON: BACKGROUND AND U.S. POLICY* (2014).

169. See Robert F. Worth and Isabel Kershner, *Hamas Official Murdered in Dubai Hotel*, N.Y. TIMES, Jan. 29, 2010.

170. See Carlotta Galli, *What Pakistan Knew About Bin Laden*, N.Y. TIMES MAG., Mar. 19, 2014.

either or both prefer to spend scarce resources on causes such as education, healthcare, infrastructure, and fighting crime rather than on defending foreign actors against a possible threat.

Here, too, we do not offer an exhaustive list of possible scenarios of an unwilling government, but a few examples that hint at the possible different ramifications for purposes of the UUD. For instance, we may think that sympathy for the nonstate actors' threatening actions is an inadequate reason for the local government to be unwilling to tackle the threat. Perhaps this is also the case where it is the local population, rather than the government, who is sympathetic to the threat. And yet, in the last case posited above—where a local government has legitimate domestic needs competing against legitimate foreign security concerns—the “unwilling” label seems less apt. As we articulate in Section II.C. below, “unwillingness” often refers to a refusal to take some action in the absence of a compelling reason not to take it, and in these cases, such reasons are present.

Other questions are raised by the notion of an “unwilling” territorial state. What if the state does not know about or does not investigate terrorist threats in its territory? What if it receives some information about such a threat but does not believe the information to be reliable enough to take any action? What if it has contradictory information which it believes to be more accurate? What if it conditions its consent to a military action by the threatened state on a vast payment that that state refuses to make—does that render the state “unwilling” for purposes of the doctrine?

Additional questions pertain to the broader security policies of the territorial state. What if the territorial state's government justifiably believes that a certain terrorist threat is real, but further concludes that the threat is but one of several security challenges it faces, and prioritizes its efforts toward other threats? Alternatively, what if the state believes the terrorist threat is real, and must be tackled, but prefers a strategy of dialogue, engagement, and appeasement over capture or punishment? Ecuador, for instance, faced growing popular support in some of its regions for the Revolutionary Armed Forces of Colombia (“FARC”). It then enacted social and economic programs with a view to “invest in sustainable development and community policing rather than the military.”<sup>171</sup> Pakistan, too, has voiced objections to the U.S. drone attacks within its territory<sup>172</sup> (again, whether or not the government has consented or acquiesced to most of these attacks remains publicly unknown), claiming its own strategy was one of combining law enforcement with “dialogue and development in an effort to tackle not only the manifestations of terrorism, but also its root causes in the

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171. STAFF OF S. COMM. ON THE JUDICIARY, 110TH CONG., PLAYING WITH FIRE: COLOMBIA, ECUADOR, AND VENEZUELA: REP. TO MEMBERS OF THE COMM. ON FOREIGN RELATIONS 8 (Comm. Print 2008).

172. *See, e.g.*, *Foundation for Fundamental Rights v. Federation of Pakistan*, (2013) 4 PLD (K.P.K.) 94, (Pak.).

region.”<sup>173</sup> Do these sorts of policy choices amount to an “unwillingness” to deal with the threat in their territories?

One might imagine proponents arguing for an interconnection between the unable and unwilling prongs of the UUD: if the territorial state is unable itself to deal with the threat, it comes under an obligation to consent to the threatened state conducting a military operation in its territory; if it withholds such consent, it meets the definition of unwillingness. This reasoning moves too quickly. As we have noted, there are relevant differences among different types of inability and unwillingness. Thus, even granting that the territorial state is “unable” in the requisite sense, it does not follow that its withholding of consent to military action generates unwillingness.

For instance, a government that is experiencing domestic challenges to its legitimacy and authority may wish not to allow a foreign military to operate in its territory, even though that government harbors no particular sympathy for the perpetrators of the threat. Or it may withhold consent so as not to become itself a target of the terrorist threat by forging or being deemed to have forged an alliance with the threatened state. Withholding consent under these circumstances seems different—again, for some purposes—than withholding consent because of affinity to the perpetrators and their cause. If so, whatever the implications may be for a military exercise of self-defense, there may be different implications for purposes of determining what, if any, remedies must accompany such military operations.

## 2. *Procedural Questions*

A number of procedural questions arise by virtue of the “self-judging” nature of the UUD. It is the threatened state that initially makes the determination about the territorial state’s ability or willingness to address the threat posed by nonstate actors to the threatened state, without any checks or review by a third party. Necessarily, that determination will be based on the threatened state’s interpretation of whatever information it has regarding the threat, and the territorial state’s willingness and ability to deal with the threat. As a condition to using force, must the threatened state first approach the territorial state and request that it address the threat posed by the nonstate actors? Must it first pursue cooperative measures with the government of the territorial state? Must it divulge any or all the information it has about the threat? What if the threatened state is concerned that divulging such information would be at best futile and at worse helpful to the terrorists? Recall that according to at least some reports, the United States did not share its plans to capture or kill Osama Bin Laden in Abbottabad, Pakistan because of concerns about the degree to which the Pakistani secur-

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173. Press Release, Office of the High Commissioner for Human Rights, Statement of the Special Rapporteur Following Meetings in Pakistan, U.N. Press Release OHCHR (Mar. 14, 2013).

ity services could be trusted with this information.<sup>174</sup> If intelligence is shared, must the threatened state give the territorial state reasonable time to address the threat on its own terms? Must it offer to contribute its own resources to the territorial state's efforts? Opponents of the UUD are thus right to worry that at best, the malleability of the doctrine allows those who would invoke it a large margin of discretion, and that at worst, it offers them a blanket cover to employ force in foreign lands.

Given that states invoking the UUD have said very little about their understanding of the substantive or procedural elements of the doctrine, much of the effort of fleshing out those elements has been taken on by scholars. Ashley Deeks, for instance, proposes six requirements for invocation of the doctrine, arguing that threatened states should: 1) attempt to act with the consent of or in cooperation with the territorial state; 2) assess the nature and scope of the threat in relation to the territorial state's capacity to counter it; 3) ask the territorial state to address the threat itself and provide adequate time for the latter to respond; 4) assess the territorial state's control and capacity in the relevant region as accurately as possible; 5) reasonably assess the means by which the territorial state proposes to suppress the threat; and 6) evaluate its prior (positive and negative) interactions with the territorial state on related issues.<sup>175</sup> Michael Schmitt, similarly, contends that for a state to be considered "unable or unwilling," the victim state

must first demand that the State from which the attacks have been mounted act to put an end to any future misuse of its territory. If the sanctuary State either proves unable to act or chooses not to do so, the State under attack may, following a reasonable period for compliance (measured by the threat posed to the defender), non-consensually cross into the latter's territory for the sole purpose of conducting defensive operations.<sup>176</sup>

And Dawood Ahmed, in an effort to add a check on the self-executing nature of the doctrine, suggests that the threatened state must be "willing to bear the burden of disclosing to the Security Council why it deems the host state to be ineffective—or 'unwilling or unable.'" <sup>177</sup> As we noted earlier, it remains unknown whether governments endorsing the UUD have also endorsed these suggested conditions.

174. Husain Haqqani, *What Pakistan Knew About the Bin Laden Raid*, FOREIGN POLICY (May 13, 2015), <https://foreignpolicy.com/2015/05/13/what-pakistan-knew-about-the-bin-laden-raid-seymour-hersh/> [<https://perma.cc/8ZJK-S5ZU>]; see, e.g., NDTV, *US Didn't Share Osama Bin Laden's Location with Pak Over Lack of Trust* (Oct. 2, 2020), <https://www.ndtv.com/world-news/us-didnt-share-osama-bin-ladens-location-with-pakistan-over-lack-of-trust-report-2304352> [<https://perma.cc/EW22-JV65>].

175. Deeks, *supra* note 13, at 506.

176. Michael N. Schmitt, "Change Direction" 2006: *Israeli Operations in Lebanon and the International Law of Self-Defense*, 29 MICH. J INT'L L. 127, 161 (2008) (internal citation omitted).

177. Ahmed, *supra* note 25, at 21–22.

B. *The UUD, Self-Defense, and Necessity Revisited*

Although debates about the UUD generally assume that the question can and should be resolved by reference to the *jus ad bellum*—specifically, the Charter’s recognition of the right of self-defense,<sup>178</sup> as well as (redundantly) ARSIWA Article 21’s recognition of the same right—UUD scenarios depart in a basic and important respect from standard self-defense cases. As we have noted from the outset, the UUD, if recognized, permits a threatened state to use force in the confines of a territorial state without the latter’s permission (and without United Nations authorization) in order to eliminate a threat *posed by nonstate actors whose actions are not attributable to the government of the territorial state*. By definition, it thus authorizes the threatened state to violate the sovereignty of the territorial state even though the territorial state is not the source of the threat.

The “triangular” configuration as between threatened state, nonstate actors, and territorial state generates a complication in the application of self-defense principles to UUD scenarios. In the standard case of self-defense, a state can justify using appropriate defensive force *against an aggressor state* but not against innocent or uninvolved third parties.<sup>179</sup> For example, if State A attacks State B, it is clear that State B is entitled to defend itself by using appropriate force against State A. It is far less clear however that State B can invoke self-defense against an attack by State A as a justification for sending troops into neutral State C.

A further wrinkle is that the right of self-defense recognized in Article 51 of the Charter is generally understood to be a right to use force against another state.<sup>180</sup> In this setting, the legal right of self-defense almost by definition involves a right to use force against another state in response to an imminent threat from that state. Yet in UUD scenarios, the use of force is a response to, and directed, at nonstate actors. And, to reiterate, their actions are not attributable to the territorial state in which they are located. While some proponents of the UUD have argued that the use by a threatened state of force against nonstate actors can be properly cast as self-defense,<sup>181</sup> such arguments rely on an untenably broad conception of attribution or otherwise blur the line between state actor and nonstate actor in a way that would have broad revisionary implications for international law generally, not just for the UUD. In particular, this approach poses a significant threat to traditionally robust notions of state territorial sovereignty by rendering states’ ability to insist that other states respect their borders highly vulnerable to the actions of private actors for whose actions they have no responsibility, and over whom they may have little control.

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178. U.N. Charter art. 51.

179. *Id.*

180. *Nicaragua*, 1986 I.C.J. ¶¶ 8–9.; Hakimi, *supra* note 56, at 4.

181. Hakimi, *supra* note 56, at 5.

So if, as critics of the UUD have urged, self-defense cannot serve in any straightforward way as the grounding for the doctrine, what, if any, principles of international law can? Here, in league with a handful of other scholars, we turn to necessity. Although, with these scholars, we believe necessity provides a plausible basis for some version of the UUD, we also believe that the recognition of necessity as its grounding principle has important implications for how to analyze the rights and obligations of threatened states.

As noted in Part II, Article 25(1) of ARSIWA recognizes that an act otherwise wrongful under international law can be rendered non-wrongful if it is “the only way for the State to safeguard an essential interest against a grave and imminent peril.”<sup>182</sup> One could imagine that, at least in some instances, a use of force under the UUD would fit this description: When, in order to defend itself against a threat of imminent harm, it really is *necessary* for that state to violate the territorial sovereignty of another state that is not itself the source of the threat, then the threatened state has a compelling reason to use force even though doing so will result in the violation.

Espousing this approach, Louise Arimatsu argues for invoking necessity as either a justification or an excuse (depending on the circumstances) for invading another country in order to disable a threat emanating from nonstate actors in that territory.<sup>183</sup> In support of her position, Arimatsu points to the ICJ’s endorsement of the customary status of the plea of necessity in two separate cases.<sup>184</sup> She also provides the example of Turkey, who, while

not expressly claim[ing] that its use of force in Iraq against the Kurdistan Workers’ Party (PKK) in 1995 was justified by reason of necessity, [made] submissions to the Security Council justifying force [that] were more redolent of necessity than self-defense in that Turkey made no effort to link its use of force to a prior wrongdoing on the part of Iraq. In fact the opposite was the case.<sup>185</sup>

Like Sloane,<sup>186</sup> Arimatsu argues that, rather than rejecting the possibility of invoking necessity in cases of use of force, the better reading of Article 25 permits an inquiry into the “balance of evils,” whereby the essential interests of both affected states are weighed against each other.<sup>187</sup>

182. ARSIWA, *supra* note 30, art. 25(1)(a).

183. Arimatsu, *supra* note 134, at 43.

184. Those cases were the *Gabèikovo-Nagymaros* dispute and the *Wall* advisory opinion; in the latter case, Israel’s plea of necessity was rejected on the facts, as the Court was not convinced the erection of a wall along the chosen route was the only way for Israel to safeguard its security interests. *Wall*, 2004 I.C.J. ¶ 142.

185. Arimatsu, *supra* note 134, at 40.

186. See Sloane, *supra* note 118.

187. *Id.* at 37; Nicholas Tzagourias, *Self-Defence Against Non-State Actors: The Interaction Between Self-Defence as a Primary Rule and the Limits of Attribution of Conduct*, 29(3) LEIDEN J. INT’L L. 801, 811 (2016).



Admittedly, Arimatsu's invocation of necessity holds only under a broad reading of Article 25, such as the reading suggested by Sloane, and only if one accepts that it overrides the further constraints stipulated under Article 26 with regard to preemptory norms.<sup>188</sup> Whether this is the best reading of the ARSIWA is debatable. Taken literally, the ARSIWA's necessity CPW seems to be too narrow to permit this interpretation. As noted in Part I, Article 25 does not allow for necessity to preclude wrongfulness for actions that "seriously impair an essential interest of the State," and it seems to be the case that a military incursion in violation of a state's territorial sovereignty counts as such an impairment.<sup>189</sup> Indeed, even for Arimatsu, who accepts in principle that necessity can sometimes justify or excuse the crossing of another state's border in order to tackle a threat emanating from nonstate actors therein, that threat must be extremely grave. The example she gives is the invasion of Afghanistan following the 9/11 attacks.<sup>190</sup> On her account, it does not seem that the vast majority of targeted killing operations would pass muster where the test is one of balancing the security interests of the UUD-invoking state and the sovereignty interests of the territorial state.<sup>191</sup>

Our own view, consistent with those of a handful of other scholars in the field,<sup>192</sup> is that the principle of necessity is sufficiently ambiguous that, at a minimum, it is open to an interpretation that would allow it to justify some version of the UUD, and perhaps even a version slightly broader than the one articulated by Arimatsu. For present purposes, the availability in international law of such an interpretation of the principle of necessity is sufficient. Below, with guidance from private law, we offer affirmative reasons favoring the adoption of such an interpretation, while also exploring some of the important implications of casting the UUD as a necessity doctrine, including the duty of the threatened state to compensate the territorial state for its violation of the latter's sovereignty.

### C. "Unable" or "Unwilling" – *The Neglected Distinction*

As we have noted from the outset, the debates surrounding the UUD have paid little attention to the significance or consequences of any distinction between the two conditions that are identified by the doctrine as necessary to legitimize a use of force under it. This is puzzling. For, notwithstanding the difficulties of drawing the distinction (discussed below), it seems commonsensical to suppose that, in response to an accusation

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188. Sloane, *supra* note 118.

189. ARSIWA, *supra* note 30, art. 25.

190. Arimatsu, *supra* note 134, at 53.

191. *Id.*

192. DE WET, *supra* note 46 (though De Wet never specifies what the required threshold for a plea of necessity might be, it does not seem to be as high as the one suggested by Arimatsu).

of wrongdoing, a plea of (genuine) inability will have a very different impact on responsibility than a plea of (genuine) unwillingness.

Imagine a person who fails to meet her friend for dinner as promised. Now imagine two different explanations she might offer: (1) "I'm so sorry, out of nowhere I came down with a stomach bug, and I wanted to call you but I was so sick that I just crawled into bed and collapsed," and (2) "I'm sorry, I just didn't feel like getting dressed to go out in public, so I decided to stay home and watch TV. I guess I should have called." The first, plausibly described as a plea of inability, surely at least excuses the breach even if it does not justify it. The second plea is not a plausible candidate for a justification or an excuse—if anything, it compounds the initial wrong of not showing up.

While there are of course many reasons why international law might and does depart from ordinary morality, such departures generally require some explanation having to do with the distinctive character of and setting for law and its application.<sup>193</sup> Yet little or no attention thus far seems to have been devoted to determining the difference between how ordinary morality treats individual efforts to excuse wrongful actions, and how international law treats a state's failure to control a terrorist threat that is within its midst.

What is the explanation for this rather surprising lacuna? Our hunch is that it owes something to the difficulty of drawing the distinction between inability and unwillingness in particular cases. It is easy enough to articulate the difference between being unable and unwilling in the abstract. However, things get complicated as soon as one descends to real-world examples, whether of individual or state behavior. There is also the complication of elaborating on what the precise failure is: unable to do what? Or, unwilling to do what? If the state is unable to deal with the threat, it is presumably still able to give its consent to the threatened state to operate in its territory; and if it refuses to give consent, then isn't it just unwilling?

We will ultimately suggest that private law can provide helpful guidance on how to draw a meaningful distinction between the two prongs. In particular, we will argue, consonant with private law, that, in the UUD context, unwillingness can and should refer to a situation in which the territorial state's action or inaction is culpably irresponsible. We will further suggest that, in such cases, and only in such cases, the territorial state's presumptive entitlement to reparation should be lost (or at least the amount it recovers should be reduced). But we are getting ahead of ourselves. First it will be worth elaborating briefly on the difficulty of drawing the unable/unwilling distinction even in everyday parlance.

In the context of ordinary interpersonal interactions, to be unable to do something is to lack the "power . . . to do or perform (undergo or experi-

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193. See, e.g., Peter L. DeStefano, *The Emerging Moral Framework of International Law*, 1 *FORDHAM INT'L L. J.* 2 (1977).

ence) something specified.”<sup>194</sup> It is synonymous with “powerless,” “incapable,” “impotent,” “inept,” and “incompetent.”<sup>195</sup> Inability in its purest case seems to contemplate the existence of a physical obstacle that makes it impossible to take some action (or avoid taking some action). To ask a person to lift, without assistance, a one-ton boulder, to run a mile in a minute, to gather up all the water from the Charles River, or to be physically present in two different cities at the same time is to ask of her something that no one is able to do. In all of these cases, the inability at issue is a function of physics and biology, and independent of any disposition one might have toward the task at hand. Notions of blame seem out of place when a person fails to do something she lacks the physical ability to do, at least if the inability does not trace back to some prior responsible act of hers.

Willingness, by contrast, concerns an actor’s motives or dispositions. When a person is “unwilling,” she is “reluctant,” “disinclined,” “averse,” “indisposed,” or “grudging.”<sup>196</sup> Thus a person might be able yet unwilling to pay \$1,000 for a pair of shoes, to exercise for two hours every day, or to convert from one religion to another. Warranted reactions to an unwilling actor will depend on the grounds for the unwillingness—on whether the lack of willingness owes to sloth, debilitating fear, deeply held convictions, or some other source.

Of course, in everyday language, the concepts of inability and unwillingness are often intermingled, although this phenomenon arguably reaffirms our point about the different valences associated with the two concepts. When, outside of cases of physical impossibility, a person claims “inability” it is often to emphasize that she has particularly compelling reasons not to do the action in question, such that there are no grounds for others to react adversely. A faculty member who asserts that she is “unable” to attend an important faculty meeting because she has decided that the weather is simply too nice to spend part of her afternoon indoors presumably is likely to earn scorn or dismay from her colleagues. On the other hand, if she explains that she is “unable” to attend the meeting because she long ago made a promise to accompany a dear friend to a medical procedure about which the friend is very fearful, the language of inability gains obvious purchase. Having made the promise (and assuming that it was one she was justified in making), the faculty member might be morally required to fulfill the promise (even at the cost of breaching an obligation of employment), and in that sense can in some plausible version of the term be deemed “unable” to attend the meeting.

These homely illustrations demonstrate that, depending on the particular sense in which an actor is unable or unwilling to do something, others will be justified in responding to the actor’s failure in different ways. And yet

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194. *Unable*, *Oxford English Dictionary* (11th ed. 2001).

195. *Id.*

196. *Unwilling*, *Collins English Thesaurus* (8th ed. 2019).

there are also occasions on which we might well be indifferent to any distinction between inability and unwillingness. Consider the inquiry that flight attendants now make of persons sitting in exit rows on commercial airplanes. The attendant simply asks whether they are willing and able to assist the crew in case of emergency. If a passenger answers “no,” the flight attendant does not make further inquiry as to whether that passenger is unable or merely unwilling. The passenger is reseated.

The point is that there are more and less compelling grounds for a person to explain why she has done or not done something even where there was no physical obstacle that made it impossible for her to act otherwise. It also becomes apparent that there are compelling and unconvincing grounds for a person’s unwillingness to do something. The generic “unable” or “unwilling” formula masks over these important differences. As we shall argue below, there are times where these differences do not and should not matter, but for some other contexts, they are crucial.

It also becomes apparent that our sympathies to a person’s unwillingness to do something depend, in part, on that person’s duties to act or refrain from acting in a particular way. A person’s unwillingness to perform her duties will be met with greater moral (and possibly legal) condemnation where there is no breach of another duty and the individual preferences at issue are more a matter of personal choice.

Returning to international law and the UUD, only a handful of commentators have suggested unpacking the phrase “unwilling and unable,” mostly fleetingly and without further explanation of how or why. Daniel Bethlehem, in setting forth his “principles relevant to the scope of a state’s right of self-defense against an imminent or actual armed attack by non-state actors,” breaks “unwilling” and “unable” into two separate principles, but provides no further analysis for how or why the two would operate differently.<sup>197</sup> A number of scholars have also observed that “unwilling” and “unable” describe two different scenarios: Raphaël van Steenberghe notes that an “unwilling” state has engaged in “wrongful conduct” whereas an “unable” state has not, yet he concludes that, in practice, the line between the two “is often very difficult to draw.”<sup>198</sup> Gareth D. Williams, similarly, suggests that the “unable” scenario is often moot because, in such a case, the territorial state is likely to give its consent to the victim state.<sup>199</sup> Louise Doswald-Beck posits that in the case of “willing but unable,” assisting the territorial state’s police force, if possible, is preferable to unilateral action, but when a state is “able but unwilling,” then “genuine self-defense measures may well be necessary.”<sup>200</sup> Dawood Ahmed, likewise, points out that

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197. Bethlehem, *supra* note 13, at 773.

198. van Steenberghe, *supra* note 17, at 201.

199. Williams, *supra* note 17, at 627.

200. Louise Doswald-Beck, *Confronting Complexity and New Technologies: A Need to Return to First Principles of International Law*, 106 AM. SOC’Y INT’L L. 107, 113.

when a state is “unable,” it has not breached its “duty to suppress illegal conduct carried out by non-state actors,” while for an “unwilling” state, it is a “more complex question” whether it acted in “due diligence” to prevent illegal activity by nonstate actors.<sup>201</sup> All of these scholars, however, make their observations regarding the unwilling/unable distinction in passing and none explore fully the different doctrinal roots of the two standards or the potential ramifications of the distinction.

The most elaborate treatment of a possible distinction is offered by Gregor Wettberg, who argues that the assessment of proportionality in the use of force should vary with the level of support offered by the territorial state to the nonstate actors.<sup>202</sup> He accepts that in both cases the threatened state has a right to use defensive force but suggests that in the “unwilling” case, the response may be more severe, potentially allowing for the targeting of the territorial state itself.<sup>203</sup> This is a departure from the generally accepted view of the UUD, which limits the military action to the nonstate actor itself, and might suggest a different, more lenient test for attribution of the threat to the local government.

Wettberg’s suggestions, as well as those of others who have attempted to unpack the compound phrase “unwilling or unable,” all go to the question of when and under which conditions a state is allowed to invoke Article 51 of the U.N. Charter to justify its military operations.<sup>204</sup> Even for these authors, it seems, if the action is permissible as a matter of *jus ad bellum*, and presuming it follows the conditions of the *jus in bello* (distinction, proportionality, etc.) there could be no further legal consequences in terms of the duties of the threatened state.<sup>205</sup> This conclusion follows squarely from the traditional reading of the ARSIWA, as discussed in the previous section, and the reliance on the self-defense argument as precluding the wrongfulness of any *prima facie* breach of international law.

Yet, if we return to our inquiry into the conditions under which a UUD-invoking state might owe something to the territorial state, we will discover that the presence or absence of any such reparative obligation will depend on whether the situation involves a territorial state that is unwilling—as opposed to merely unable—to tackle the threat itself.

### III. PRIVATE LAW ANALOGUES: TRESPASS, NECESSITY TORT, AND RESTITUTION

There are several other instances in law, beyond the *jus ad bellum*, where the phrase “unable or unwilling” is employed without distinction between

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201. Ahmed, *supra* note 25, at 8–9.

202. Wettberg, *supra* note 20, at 114–23.

203. *Id.*

204. *Id.*

205. *Id.*

the two adjectives. For instance, the International Criminal Court has the power to adjudicate certain international crimes where the nation state of the suspected criminal is unable or unwilling to pursue the case on its own.<sup>206</sup> Asylum seekers who claim they are subject to persecution at home can obtain asylum if they prove that their persecution emanates from a person or group that the government is unable or unwilling to control.<sup>207</sup> Children may be placed in child protective services when their parents are unable or unwilling to provide them with a safe home.<sup>208</sup> And the mentally ill may be subject to civil incarceration if they are unable or unwilling to meet their treatment demands.<sup>209</sup>

Rather than examining these bodies of law, we turn for guidance to Anglo-American domestic law, and particularly the law of tort and restitution.<sup>210</sup> These might seem on their face to be quite distant from the *ius ad bellum*, and in some respects they are. Private law, of course, addresses interactions and liabilities between and among natural persons, as well as entities such as business corporations, rather than states. Perhaps more crucial are the systemic differences between the two fields, including the degree to which the rights and duties of nations under international law can be vindicated through court proceedings, as well as the degrees to which self-help could be checked—or replaced—by an appeal to public enforcement agents.<sup>211</sup> We are by no means suggesting that private law somehow determines the content or operation of international law.

Still, there are good reasons to look to private law to illuminate possible choices for the interpretation and application of international law relating to responsibility and liability.<sup>212</sup> The relation of states to one another under

206. Rome Statute art. 17(1)(a).

207. This language is not found in the immigration statute itself. It comes from various cases from the courts and the Board of Immigration Appeals, or B.I.A., for example, *Matter of Villalta*, 20 I. & N. Dec. 142, 147 (B.I.A. 1990).

208. *Grounds for Termination of Parental Rights*, CHILD WELFARE INFORMATION GATEWAY (2016).

209. See, e.g., IDAHO CODE § 66-317(13); ARIZ. REV. STAT § 36-540(a).

210. Criminal law is a less apt source of guidance because the question in criminal law is whether an actor has violated rules against culpable misconduct so as to be eligible for punishment. The central issues arising in connection with UUD are not whether a target state that uses force within a territorial state is eligible for punishment, but whether it is sometimes permitted to do so and, if so, whether that privilege comes with a duty to pay reparations. TRAPP, *supra* note 77, at 10 (suggesting that state responsibility is not punitive in nature). Likewise, an exploration of legal rules concerning the powers of domestic law-enforcement personnel to enter private property often will not be illuminating of the UUD, precisely because such personnel possess authority to investigate or prevent crimes that no state enjoys in relation to another state.

Obviously, our treatment focuses on lessons that can be drawn from Anglo-American private law. One of the ambitions of this project is to encourage other scholars studying problems of international law to consider how other bodies of private law might shed light on international law.

211. Without downplaying the problems of individuals' access to justice, even in relatively well-functioning domestic legal systems, it seems fair to say that, in general, the prospects for nations who have suffered legal rights violations of obtaining redress through civil actions are worse. The significance of international law's "underenforcement" will be discussed below.

212. See, e.g., Roger P. Alford, *Apportioning Responsibility among Joint Tortfeasors for International Law Violations*, 38 PEPP. L. REV. 233, 233-235 (2011) (noting that modern international law has departed

international law bears important resemblances to the relation of individuals under private law. Much in the manner of natural and artificial persons under domestic law, states have legal rights against being invaded and injured by other states and owe duties to refrain from invading and injuring each other.<sup>213</sup> States also enjoy an equality of status within international law comparable to the status-equality persons enjoy in relation to one another under domestic law.<sup>214</sup> In focusing on “horizontal” relations among status-equals, international law and private law thus stand apart from law that governs the relation of state to citizen, which focuses on the ways in which officials may or may not exercise the “vertical” authority they enjoy over polity members, particularly law-enforcement authority.<sup>215</sup> It is not surprising therefore that various provisions of the ARSIWA are often said to reflect principles of private law.<sup>216</sup>

In addition, courts applying and revising common law have, over centuries, developed an elaborate jurisprudence of responsibility that includes refined accounts of the circumstances under which, and the ways in which, one person is responsible and accountable for another’s injuries or losses.<sup>217</sup> Within this body of law are thus a number of doctrines that might inform a more nuanced application of the UUD.

The particular focus of this section will be on cases in which courts have addressed applying the law of trespass to real property, supplemented by the law of restitution. This choice, too, is warranted by obvious resemblances between trespasses and the use by one state of military force in the territory of another state. A trespass to land is an intentional, unpermitted physical entry by an actor onto property possessed by another,<sup>218</sup> irrespective of whether any damage occurs as a result of the entry.<sup>219</sup> But if damage does

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from earlier incarnations in recognizing the responsibility and liability not only of states but of individuals and corporations).

213. U.N. Charter art. 2(4); Sompong Sucharitkul, *State Responsibility and International Liability Under International Law*, 18 LOY. L.A. INT’L & COMP. L.J. 821, 828 (1996) (discussing the development of principles of state responsibility into a “comprehensive regime of the law of obligations, covering general principles of States’ international responsibility, including primary rules that establish all types of internationally wrongful acts attributable to a state and secondary rules that flow as a legal consequence from a State’s breach of an international obligation”); *id.* at 828–29 (noting origins of international liability in private law principles drawn from Roman and common law).

214. G.A. Res. 2625 (XXV), *supra* note 41.

215. See generally, HERSCH LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW (1970) (discussing the various ways in which international law has incorporated private law doctrine).

216. Ilias Plakokefalos, *Causation in the Law of State Responsibility and the Problem of Overdetermination: in Search of Clarity*, 26 EUR. J. INT’L L. 471, 475–76 (2015) (arguing that the remedial sections of the ARSIWA are “directly analogous to the framework of general tort law”); see also *Draft Articles on the Allocation of Loss in the Case of Transboundary Harm*, *supra* note 150, at 78–79 (citing domestic-law principles of strict liability as a basis for imposing liability under international law for transboundary harms resulting from hazardous activities).

217. LAUTERPACHT, *supra* note 215, at 7 (referencing “the gigantic edifice of human thought and experience in private law”).

218. RESTATEMENT (SECOND) OF TORTS § 158 (AM. L. INST. 1965).

219. *Id.*

result from the trespass, the trespasser is ordinarily liable for it.<sup>220</sup> Likewise the UUD concerns intrusions by the threatened state into the territory of the territorial state without the territorial state's permission. Much as domestic tort law recognizes simultaneously a possessor's right against certain physical invasions of the possessor's land and a corresponding duty on others not to undertake or cause such invasions, the notion of state sovereignty and its attendant rights to territorial integrity and political independence confer on each state a right to exclude that corresponds to other states bearing duties to refrain from entering or invading.<sup>221</sup>

Consistent with its emphasis on possessors' rights to exclude, trespass is defined on terms that make for a form of liability that in some respects is strict. There can be no trespass liability unless the actor *intends* to enter or occupy the physical space in question, as opposed to ending up in the space by accident, or against her will.<sup>222</sup> Yet domestic courts have consistently given this intent requirement a thin description that allows for liability even under conditions in which the trespasser can point to an excuse that might seem sufficient to defeat or limit responsibility.<sup>223</sup> For example, an actor can commit a trespass even if she does not know, or *have reason to know*, that the space she is intentionally occupying belongs to another.<sup>224</sup> For Adam to build a fence that happens to be located on Beatrice's land is for Adam to trespass. This is so even if Adam had every reason to believe that he was building the fence on his own land. It is enough that he intended to place the fence where he placed it, and that the swath of land on which he placed it is lawfully possessed by Beatrice. Yet even though trespass liability is in the foregoing respect strict, the law of trespass also recognizes privileges or justifications that defeat liability, some of which bear a resemblance to the conditions under which a state might invoke the UUD.

This section will proceed "dialectically" in its examination of these privileges. It begins by canvassing candidates for domestic law counterparts to the UUD that it will ultimately reject as insufficiently analogous. With these false starts out of the way, it then arrives at the most promising domestic law analogy, and explains how that analogy helps make the case for a version of the UUD that treats cases of inability (defined in a certain way) differently from cases of unwillingness.

To preview: our core claim is that a version of Anglo-American private law's *incomplete privilege of private necessity*—according to which an actor simultaneously enjoys a privilege to enter land possessed by another but, if

220. *Id.* § 218.

221. U.N. Charter art. 2(4).

222. RESTATEMENT (SECOND) OF TORTS § 158.

223. See, e.g., *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221, 222 (Minn. 1910) (discussed in detail below) (holding the defendant accountable for damage to the plaintiff's property even though such damage was the result of prudent action).

224. See, e.g., *Harrod Concrete & Stone Co. v. Crutcher*, 458 S.W.3d 290, 294 (Ky. 2015) (noting tort law's recognition of "innocent" trespasses).



the entry causes damage, also ordinarily incurs an obligation to compensate for harms incident to the entry—applies in the UUD context. A UUD-invoking state thus will usually bear an obligation to compensate for harms other than those suffered by the intended targets. We then further argue that there is a subset of UUD cases that tracks an analogous subset of private necessity cases in which the entrant’s responsibility to compensate ceases *because the lawful possessor of the land bears responsibility for the necessity*. For reasons we will explain, it is appropriate, in the UUD context, to treat this subset of necessity cases as instances of “unwillingness” rather than inability. Thus, the rule (that entries out of private necessity require compensation) and its exception (for cases in which the possessor bears culpability for the necessity) have as their UUD counterparts cases of inability, on the one hand, and cases of unwillingness, on the other.

### A. *Public Necessity*

Public necessity is a common-law privilege to enter—and indeed destroy—private property. The paradigm case involves an actor who, in the face of a conflagration threatening an entire town, deliberately burns down a privately owned building to create a fire break to halt the fire’s spread.<sup>225</sup> Under such circumstances, courts have held that the owner has no claim to compensation against the actor who caused the destruction of the property so long as the actor, in the context of the emergency, either correctly or reasonably believed that torching the building was necessary to save the town.<sup>226</sup> Importantly, this privilege is not one that attaches exclusively to government actors. If a private citizen undertakes the relevant actions, he or she enjoys the same privilege.<sup>227</sup>

While the case for recognizing the public necessity privilege is hardly self-evident, it rests on certain plausible suppositions. First, in the run of public necessity cases, it may be that the property that is intentionally destroyed was doomed anyway. Second, tort law gives actors faced with emergencies the benefit of the doubt in assessing whether their conduct satisfies its standards. For example, in the United States, the legal standard of negligence requires a defendant facing an emergency to exercise the care that an ordinarily prudent person would exercise under such circumstances.<sup>228</sup> The public necessity doctrine likewise seems designed to give actors facing crises leeway to make decisions without facing liability.

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225. Brian Angelo Lee, *Emergency Takings*, 114 MICH. L. REV. 391, 397 (2015) (discussing such cases).

226. See, e.g., *Surocco v. Geary*, 3 Cal. 69, 72 (1853).

227. RESTATEMENT (SECOND) OF TORTS § 196 (“One is privileged to enter land in the possession of another if it is, or if the actor reasonably believes it to be, necessary for the purpose of averting an imminent public disaster.”). Professor Lee suggests that case law’s recognition of public necessity as a ground for denying compensation to property owners is less consistent than the Restatement supposes. Lee, *supra* note 225, at 449–53. For purposes of argument, we will take the doctrine as settled.

228. 57A Am. Jur. 2d, *Negligence* § 198 (2004).

Third, it is important for private law, when dealing with public emergencies, to send a clear signal to actors. In the “heat” of the moment, when faced with an impending catastrophe, they should focus on public welfare and worry less about private property rights. Admittedly, were the law to require compensation in public necessity cases, it would not necessarily be marking off the destruction of private property in such circumstances as wrongful (not-to-be-done). Constitutional clauses that require governments to compensate owners of private property taken for public use are not generally understood to render governmental takings of private property for public use *wrongful* or illegitimate. Rather, they specify a condition on the exercise of this particular governmental power.<sup>229</sup> However, even if understood as a mere condition on the exercise of a power, the imposition of a compensation requirement in cases of public necessity could invite hesitation about whether to take certain actions necessary to address imminent, grave threats to the public. Or it might induce actors to make decisions about which properties to destroy based on economic considerations rather than considerations as to the best way of addressing the emergency. Merely by putting a price on the permissible exercise of a governmental power, the just compensation provisions in constitutional takings clauses are designed to encourage officials to think twice about whether they can accomplish their policy goals (for example, the building of a road) without infringing on private property rights.<sup>230</sup> By contrast, in the type of emergency situations that are ripe for invocation of the public necessity doctrine, the law arguably does not want to induce deliberation of this sort.

Finally, on the plaintiff's side of the equation, it seems unlikely that plausible understandings of rights of private property render them so strong or unqualified as to confer on owners a right that others not enter even in an emergency that involves an imminent, serious threat to the public or a subset of it. To be sure, rights to private property can provide security and its attendant benefits only if they are not too heavily qualified. As one moves, for example, from emergency access to something akin to an ongoing occupation, the claim of a possessor to a rights-infringement becomes more compelling.<sup>231</sup>

Supposing, then, that the public necessity doctrine is a valid doctrine of justification and is normatively plausible, we consider its potential relevance to disputes about the UUD. Here the argument may seem straightforward. When military force is exercised under the UUD, it is exercised in the name of protecting a public from imminent, serious harm. This in turn seems to

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229. Lee, *supra* note 225, at 403–04.

230. Micah Elazar, “Public Use” and the Justification of Takings, 7 U. PA. J. CONST. L. 249, 252 (2004).

231. And indeed some courts have held that when armed forces seize private property for use in a war effort (as when a building is seized to quarter soldiers or store weaponry), compensation for the use is owed on the theory that the government has implicitly contracted for these services. Thus, even though destruction of private property—as when done by a retreating army to prevent advancing hostile forces from gaining the benefit of such property—is often non-compensable, commandeering is compensable.

establish that the relevant sort of incursion into the other state's territory—one that aims to prevent the harm—can be justified under the UUD, and that no compensation is owed to the invaded state for damage attendant to such an invasion.

Though superficially attractive, the analogy is problematic. As noted, the best justification for the public necessity doctrine limits its applications to genuine emergencies requiring on-the-spot decisions that aim to fend off imminent, widespread harm. Much of the import of the UUD is its provision to threatened states of a justification for premeditated and preemptive uses of force that do not fit this model. Generally, even a narrow interpretation of what constitutes an "imminent" threat would not require the equivalent of an emergency that is already underway so as to justify a public necessity claim.

More fundamentally, the notion of public necessity does not comfortably fit interactions among states. The premise of public necessity doctrine is that the individual whose property is destroyed is a member of a community that stands to benefit from the destruction.<sup>232</sup> In the face of a certain kind of exigency, the property of one resident can be destroyed to protect the rest of "us." This idea does not translate seamlessly into the international context. To adopt it, one would have to assume that the actions of the threatened state benefit the entire international community. This is not impossible, and indeed, the broader ramifications—positive or negative—of a threatened state's action are appropriately a factor in assessing necessity. Thus, the ILC commentary on Article 25 of the ARSIWA stresses that, in the balance of interests between those of an injured state and those of an injuring state, "the interest relied on must outweigh all other considerations, not merely from the point of view of the acting State but on a reasonable assessment of the competing interests, whether these are individual or collective."<sup>233</sup> And international law in some contexts recognizes *erga omnes* obligations (obligations owed towards all), the violation of which constitutes an injury to the entire international community.<sup>234</sup>

Still, the immediate impetus for most UUD strikes is national self-interest, even if sometimes tempered by consideration of global interests. A state that uses force under the doctrine might well claim, perhaps in some cases plausibly, that it has struck a blow for the security of all nations. The fact remains that the UUD, if recognized, is grounded in the threatened state's right to vindicate its rights and interests. Advancement of a common interest among states has never been specified as a condition that, strictly speaking, must be met in order successfully to invoke it. And casting the UUD in

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232. See, e.g., *Surocco*, 3 Cal. at 72.

233. ARSIWA, *supra* note 30.

234. See *Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain)*, Judgment, 1970 I.C.J. 3, ¶¶ 33–34 (Feb. 5).

these terms might encourage its overuse, as states will be inclined to conceive of their self-interested actions as serving a greater global good.

### B. *The Privilege to Abate a Private Nuisance*

Under the rules of Anglo-American tort law, a person is sometimes privileged to enter another's land without permission in order to abate a condition or activity that unreasonably interferes with that person's use and enjoyment of her own land, and thus amounts to an ongoing nuisance.

For example, suppose *Up* owns an apartment situated one floor above *Down's* apartment. Before departing for a week-long trip, *Up* takes a bath, drains the bathtub, and replaces the stopper in the tub's drain, but fails fully to shut off the water, which slowly begins to accumulate in the tub. Two days into *Up's* trip, water starts overflowing onto *Up's* bathroom floor, in turn dripping through *Down's* ceiling, damaging *Down's* furniture.

After learning that building manager *M*, who has a key to *Up's* apartment, is unavailable, *Down* succeeds in contacting *Up* by phone. *Down* explains the situation, and asks *Up* for permission to enter the apartment. Apologetically, *Up* responds that, although there is a key to *Up's* apartment hidden somewhere in the building, he is not willing to allow *Down* access to the apartment and thus refuses to divulge the key's location. Instead, *Up* instructs *Down* to wait until he (*Down*) can locate *M*. Unsatisfied, *Down* uses a crowbar to break into *Up's* apartment to turn off the water and prevent further leakage and damage. *Down* then arranges for *M* to install a temporary lock on *Up's* broken door to prevent others from entering.

*Down's* actions meet the definition of a trespass: he intentionally entered *Up's* apartment without permission. However, if *Up* were to sue *Down*, demanding compensation for the entry and the damage, *Up's* claim should fail. *Down's* trespass was privileged, because it was done for the purpose of abating a nuisance that *Down* was experiencing, and that emanated from *Up's* apartment, and because *Down's* actions were necessary to achieve, and limited to achieving, that purpose.<sup>235</sup> This result obtains regardless of whether *Up* was unable or merely unwilling to stop the flow of water from his tub.

To the extent one might be inclined to draw lessons for the application of the UUD from tort law, the foregoing example of the abatement privilege would seem to support those who favor recognition of the doctrine, in two respects.<sup>236</sup> First, as just indicated, it suggests that UUD should apply irrespective of whether there is an inability or an unwillingness on the part of the territorial state to address a threat to other states located within its borders. Second, it suggests that when the UUD does apply, it provides a com-

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235. RESTATEMENT (SECOND) OF TORTS § 201.

236. While the *Up* and *Down* example involves actions taken to bring a halt to an ongoing interference with property rights rather than actions taken to bring a halt to the infliction of death or physical harm (as might be the case for an attack commenced under the UUD), the case for a privilege to abate is presumably even stronger when the nuisance generates the latter type of harms.

plete justification for the threatened state's actions (so long as those actions are necessary and proportionate), and hence denies the territorial state any claim to compensation for damage caused by the threatened state's actions.

However, there are crucial disanalogies between the parable of *Up* and *Down*, on the one hand, and standard UUD scenarios, on the other.

First, the privilege to abate a nuisance applies only when a nuisance is taking place, or when something that will amount to a nuisance is nearly certain to take place imminently.<sup>237</sup> Likewise, the privilege to enter vanishes when the nuisance ceases.<sup>238</sup> For the analogy to hold, then, the UUD would have to be limited to cases in which the threatened state was actually under attack (or certain to be subjected to an imminent attack) by nonstate actors located in the territorial state. For many UUD supporters, the requirement of "imminence" is satisfied even under far more flexible interpretations of the term.<sup>239</sup>

Second, the privilege to enter another's property to abate a nuisance emanating therefrom, as presently defined in U.S. law, does not include a privilege to use force against the *person* of the possessor or any other lawful occupant, either to effect entry or to accomplish the abatement.<sup>240</sup>

Third, nuisance abatement arguably only operates as a privilege to trespass *on the property of a person who is responsible for the nuisance-generating activity*.<sup>241</sup> As we have explained, the UUD, by contrast, comes into play only for cases in which there is *no* basis for *attributing* the threat emanating from nonstate actors to the territorial state, and no basis for state responsibility based on the territorial state's breach of its due diligence obligations.<sup>242</sup> *Down* is privileged to enter *Up's* apartment precisely because the nuisance generation is attributable to *Up*: it is *Up's* "doing." The privilege does not obviously extend to cases in which the trespass is to property in possession of a person not responsible for the nuisance. If, for example, the only way for *Down* to stop the water running in *Up's* tub was to turn off a valve accessible exclusively through building manager *M's* basement apartment, and if, in *M's* absence, *Down* were to break into *M's* apartment to gain access to the

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237. RESTATEMENT (SECOND) OF TORTS § 201 (noting that an actor is privileged to enter another's land and to alter or damage structures thereon to ward off certain imminent, harmful invasions, and offering an illustration of an actor being privileged to enter a neighbor's land to dismantle a downspout that will, when the next rain comes, causes water to flow onto and damage the actor's land).

238. See, e.g., *State v. Tippetts-Abbott-McCarthy-Stratton*, 204 Conn. 177, 183 (Conn. 1987) (describing the second element of nuisance, "(2) the danger created was a continuing one").

239. See Ashley Deeks, "Imminence" in the Legal Adviser's Speech, *LAWFARE* (Apr. 6, 2016), <https://www.lawfareblog.com/imminence-legal-advisers-speech/> [<https://perma.cc/Y3QZ-FGEH>].

240. RESTATEMENT (SECOND) OF TORTS § 201 cmt. k. The typical abatement case, and the *Up* and *Down* example, involve actions taken to bring a halt to an ongoing interference with *property rights* rather than actions taken to avoid a risk of death or physical harm (as might be the case for an attack commenced under the UUD). The case for a privilege to abate is presumably stronger when the nuisance in question risks these sorts of harms, and perhaps in such cases the privilege would extend to the abatement efforts that cause bodily harm to the person responsible for the nuisance.

241. See RESTATEMENT (SECOND) OF TORTS § 822 (noting the scope of the abatement privilege).

242. See DE WET, *supra* note 46, at 104.

valve, *Down* probably would not be able to invoke the abatement privilege to defeat a suit for trespass by *M*.

A closer analogy might be the following scenario. Imagine that landlord (*L*) owns a building containing multiple apartments and a common area. *L* leases individual apartments on an annual basis. The standard lease agreement includes a provision stating that tenants must maintain and use their apartments in a manner consistent with applicable laws, including nuisance law. The lease also grants *L* a privilege to enter a tenant's apartment without the tenant's permission, albeit in a reasonable manner and at a reasonable time, if necessary to abate a nuisance emanating from the apartment.

Tenant (*T*) leases an apartment from *L*. *T* then engages in conduct in her apartment that constitutes a nuisance as to *O*, the owner of a residence located adjacent to *L*'s building. (For example, *T* engages in otherwise lawful activities in her apartment that nonetheless constantly send nauseating odors onto *O*'s property.) *O* repeatedly complains to both *T* and *L* about the odors, as well as to local police, but the complaints are ignored, except that *L* leaves a note for *T* reminding *T* of the terms of the lease, including the obligation to refrain from nuisance-generating activities. When *T*'s conduct continues, *O* asks *L* for permission to enter the building and *T*'s apartment to deal with the nuisance-generating activity. *L* refuses to grant permission. The next day, during daylight hours, *O* waits until she knows that *T* has left her apartment, then breaks into *L*'s building, damaging its front door and its buzzer entry system. *O* then picks the lock on *T*'s apartment and takes steps necessary to eliminate the nuisance-creating condition without causing more damage than is necessary to accomplish that result.

It would seem that, if *T* were to sue *O* for trespass, the privilege to enter another's land to abate a nuisance would provide *O* with a complete defense to liability. But would the privilege defeat a trespass claim by *L* against *O*, thereby denying *L* compensation from *O* for the damage caused by *O*'s entry? As noted, the abatement privilege in its canonical form presupposes: (a) entry onto another's land by a person who is a victim of a nuisance; (b) possession of the entered land by the plaintiff now suing the entrant for trespass; and, (c) the presence on plaintiff's land of the activity or condition that generated the nuisance. The idea seems to be that a possessor cannot complain of another's unpermitted entry if the possessor is responsible for having maintained or used the entered-upon land in a way that unduly interferes with the entrant's use and enjoyment of his neighboring property. The possessor's responsibility for generating the nuisance, in other words, results in a forfeiture of the right she would otherwise enjoy to complain about the unpermitted entry, but only with respect to an entry by someone who is a victim of her nuisance-generating conduct and who enters to abate the nuisance.

One might plausibly argue that *L*, in addition to *T*, bears *some* responsibility for *O*'s misfortune. Yet *L*'s responsibility is one step removed from *T*'s.

*L* is *not* the immediate cause or source of the nuisance, and indeed *L* made some effort to address the problem. True, *L*, by virtue of being landlord and by the terms of the lease, enjoyed a special privilege to abate the nuisance, and perhaps, relatedly, a duty to do so.<sup>243</sup> Still, the most that can be said of *L* is that *L* failed to fulfill an obligation to take affirmative steps to eliminate a nuisance generated by someone else. In the language of the common law, *L*'s liability to *O*, if any, would sound in nonfeasance rather than misfeasance.<sup>244</sup> Specifically, it would rest on *L*'s failure to control the wrongful conduct of another, independent actor.<sup>245</sup> *L*'s 'wronging' of *O*, if any, consists of failing to take steps that would have controlled *T*'s behavior so as to spare *O* from the effects of that behavior.

Is the sort of nonfeasance attributable to *L* sufficient to defeat *L*'s trespass action against *O*? Alas, on this question, the law of nuisance abatement has little or nothing to say: there is no rule or leading case of which we are aware that gives a decisive answer to the question at hand. Largely for this reason, we must look for guidance in adjacent private law doctrine. Yet our consideration of the privilege to abate a nuisance is helpful in isolating the sort of privilege for which we are searching. Specifically, *it must be a privilege that authorizes a person to enter space that is possessed by another to address a danger that, although arising within that space, is not attributable to the possessor*. It is also helpful in a second sense: *the privilege to abate a nuisance is in some respects a special application of a more general idea, namely, the idea that trespasses begat of*

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243. A provision in the Second Restatement of Property suggests that a landlord is under an affirmative duty to all tenants to prevent a tenant from engaging in conduct that "interferes with a permissible use" by another tenant of that tenant's leased property. RESTATEMENT (SECOND) OF PROPERTY, LANDLORD AND TENANT § 6.1 (AM. L. INST. 1977). (The Restatement deems the disruptive conduct of the other tenants as "attributable" to the landlord.) *Id.* An illustration of conduct breaching this duty is a landlord who fails to prevent other tenants and their guests from repeatedly using common areas of the building in a manner that is disruptive for other tenants. *Id.*, cmt. d, illust. 10. When such a breach occurs, the harmed tenant is entitled to "equitable and legal relief," including the right to terminate the lease or to obtain damages. *Id.* This provision of the Second Restatement of Property concerns a duty owed by landlord to tenant: it does not address whether a comparable affirmative duty is owed by landlords to neighboring nontenants.

244. We use the term "nonfeasance" to identify wrongdoing that involves a person failing to protect or rescue another from a danger not posed in the first instance by that person. Misfeasance, by contrast, involves an actor wrongfully inflicting an injury upon another. (Sitting idly while the stranger at the next restaurant table chokes on his food is nonfeasance. Carelessly driving one's car into a stranger is misfeasance.) We do not mean the term "nonfeasance" to convey a conclusion about legal liability. In our usage, some nonfeasance generates legal liability, other nonfeasance does not. For example, if *D* happens to witness a person who is drowning and fails to throw that person a nearby life-preserver, such that the person drowns when she would not have had the life-preserver been thrown, *D* in most U.S. states will not be subject to liability (the rule of no duty to rescue) unless *D* occupied a certain role (e.g., on-duty lifeguard at the pool at which the victim drowns) or stood in a certain kind of relationship to the victim (e.g., parent of minor child). On the importance of the distinction to an adequate understanding of modern tort law, see John C. P. Goldberg & Benjamin C. Zipursky, *Intervening Wrongdoing in Tort: The Third Restatement's Unfortunate Embrace of Negligent Enabling*, 44 WAKE FOREST L. REV. 1211 (2009).

245. *T* is an independent actor because her conduct cannot be attributed to *L* in the way that an agent's conduct can be attributed to his principal, or in the way that one co-conspirator's conduct can be attributed to another.

*private necessity deserve distinct treatment.* It is to the idea of private necessity we thus turn.

### C. *The Incomplete Privilege of Private Necessity*

In the much-discussed case of *Vincent v. Lake Erie Transp. Co.*, the master of a boat moored it to the plaintiff's dock for purposes of unloading cargo, but then refused to leave the dock after the unloading was complete, as he was required to do by the terms of use, because a fierce storm had arisen.<sup>246</sup> Faced with the choice of keeping the boat at the dock or cutting it loose and risking its loss, the master chose to keep it tied to the dock, with the dock suffering damage as a result of the boat being bashed by the storm against it. When the dock's owner sued the boat's owner for the damage, the Minnesota Supreme Court was left to determine if the necessitous situation afforded the boat owner a privilege that would defeat liability.

Apropos of our discussion thus far, the court identified several circumstances in which the boat owner would face no liability because the captain's actions either would not have been prima facie tortious, or would have been fully privileged or justified. If the boat had been on the water when the storm unexpectedly arose, and the storm smashed the boat into the dock despite the captain's making reasonable efforts to avoid any such collision, there would be no liability because, on these facts, there would be no tort in the first place.<sup>247</sup> Alternatively, the court observed, if this had been "a case where life or property was menaced by any object or thing *belonging to the plaintiffs*, the destruction of which became necessary to prevent the threatened disaster," there might have been a privilege on the model of the abatement privilege.<sup>248</sup> But the dock owner had done nothing to generate a danger to the boat. (The Coase Theorem notwithstanding, the mere existence of the dock was not deemed by the court to 'generate' a danger to the boat.)

Instead, the defendant, through the boat's master, an employee of the defendant's, had "prudently and advisedly availed itself of the plaintiff[s]' property for the purpose of preserving its more valuable property." On these facts, the majority concluded, the plaintiff was entitled to compensation for the dock damage.<sup>249</sup>

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246. *Vincent*, 124 N.W. at 221 (emphasis added). The case caption indicates that there was at least one other plaintiff in the case besides *Vincent*, and the Court's opinion at times refers to "plaintiffs" and "owners" of the dock. However, it also refers to "plaintiff" or "respondent" in the singular. For ease of exposition, we will follow the latter usage.

247. There would be no prima facie trespass on these facts because, as noted above, trespass requires an intention on the part of the actor to enter or make contact with land or fixtures possessed by another. Likewise, there would be no negligence because negligence liability requires proof of unreasonable conduct.

248. *Vincent*, 124 N.W. at 222 (emphasis added).

249. *Id.*



The best characterization of the reasoning in *Vincent* has long been a subject of debate. Frances Bohlen, principal Reporter for the First Restatement of Torts, read the case to recognize an “incomplete privilege” to trespass in circumstances of “private necessity.”<sup>250</sup> The entrant’s private necessity, on this view, denies the property owner her usual entitlement to take steps to exclude an unpermitted entrant from entering or remaining. In that sense, there is a genuine privilege enjoyed by the entrant as against the owner. However, the entrant’s privilege is incomplete because it is conditioned on the obligation to pay for any harm caused during the occupation of the possessor’s land.

Alternatively, it has been suggested that the result in *Vincent* can be explained without invoking the apparatus of incomplete privilege.<sup>251</sup> On this view, the master’s decision to keep the boat at the dock without permission was a trespass, plain and simple, which is all that was needed to generate liability for the dock damage. The fact that the master had good reason to trespass—namely, that doing so was probably necessary to save the ship—did not generate any sort of privilege to remain. As noted above, trespass liability is in many respects quite strict or unforgiving.

This alternative account does not deny that the risk to the ship posed by the storm can have legal significance. It instead attributes a different significance to it than did Bohlen. As the Vermont Supreme Court recognized in the earlier case of *Ploof v. Putnam*,<sup>252</sup> the fact that the storm put the ship at risk of sinking (if it were cast off the dock) did not confer on the boat owner a privilege to trespass. Instead it set a limit on the privilege enjoyed by the dock owner as possessor of property, namely, the qualified or limited privilege of a possessor to use force to repel a trespasser.

While property owners have some leeway to respond to trespassers, they are limited to using *reasonable* measures to oust them. A homeowner who

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250. Francis H. Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality*, 39 HARV. L. REV. 307 (1926). According to Bohlen, the recognition of such a privilege is warranted by a combination of two considerations: (1) society’s interest in the preservation of property and human life, and (2) considerations of justice, which counsel “that he whose interests are advanced by the act should bear the cost of doing it rather than that he should be permitted to impose it upon one who derives no benefit from the act.” *Id.* at 316.

A worry about this explanation—and other explanations that posit cases such as *Vincent* as instances in which the presence of an unjust allocation of burdens and benefits suffices to entitle the claimant to damages, see, e.g., Stephen A. Smith, *Rights-Threats, Wrongs and Injustices: The Common Law’s Causes of Action*, 27 N.Z. UNIV. L. REV. 1033, 1052–54 (2017)—is that it seems to extend well beyond cases of private necessity, and would warrant the imposition of liability in various instances in which the law does not impose it. ARTHUR RIPSTEIN, *PRIVATE WRONGS* 156 (2016). For example, Bohlen’s rationale would seem to call for liability in a case in which a driver who is running an errand for his own benefit, yet driving with all due care, strikes and injures a cyclist. Yet the law does not allow for the imposition of liability on such a driver.

251. See, e.g., JOHN C. P. GOLDBERG & BENJAMIN C. ZIPURSKY, *THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS* 151 (2010); John C. P. Goldberg, *Inexcusable Wrongs*, 103 CAL. L. REV. 467, 481–84 (2015); see also John Gardner, *What is Tort Law For?* Part I, 30 LAW & PHIL. 1, 43 n. 68 (2011); NATHAN TAMBLYN, *THE LAW OF DURESS AND NECESSITY: CRIME, TORT, CONTRACT* 139 (2018).

252. *Ploof v. Putnam*, 71 A. 188 (Vt. 1908).

comes home in the evening to find a happy couple picnicking in her backyard, and posing no threat of harm to him personally, cannot use lethal force merely to evict them.<sup>253</sup> Given the storm and the risk of sinking that it posed, the expulsion of the boat by the dock owner, like the imagined shooting at the picnickers, would have been *unreasonable* and hence would exceed the scope of the possessor's privilege to take measures to repel trespassers. Thus, if the dock owner in *Vincent* had forcibly cast off the boat during the storm—as actually happened in *Ploof*—the dock owner would have been subject to tort liability for personal injury or damage to the boat precisely because, under the circumstances, it would have been unreasonable to eject the boat. But this counterfactual concerning possible dock-owner liability to the boat owner is neither here nor there on the question of whether the boat's remaining at the dock without permission was a trespass—it was.

A third account of *Vincent* maintains that, even though it has many of the attributes of a tort case, its resolution is governed by a different body of law, namely, the law of restitution. On this view, articulated by Ernest Weinrib among others, the boat master was justified in keeping the boat at the dock. He therefore could not have committed a tort (on the understanding that torts are wrongs and that tort liability therefore requires wrongful conduct). Still, the boat owner had no permission to remain, and moreover received a benefit from the dock owner that the dock owner did not bestow as some sort of gift—namely the use of the dock during the storm. Accordingly, the boat owner, though he was entitled to keep the boat at the dock to save it, owes something to the dock owner for the involuntarily conferred benefit. Notably, in 2011, a version of the restitutionary account of *Vincent* was endorsed in Section 40 of the Third Restatement of Restitution and Unjust Enrichment. Observing that “[u]njust enrichment from interference with real property” commonly involves situations in which “what the defendant has ‘taken’ from the claimant is an unauthorized use of property from which the claimant had a right to exclude him,” it deems the boat owner in *Vincent* liable “whether or not [his] conduct is tortious.”<sup>254</sup>

While the restitutionary reconstruction of *Vincent* provides a plausible explanation of the obligation of the boat owner to pay *something* to the dock owner, it leaves open, to some degree, just what the boat owner's measure of recovery should be. In its *Vincent*-based illustration, the Restatement suggests that, because the boat owner is an “innocent” (non-culpable) recipient of the benefit involuntarily conferred, the dock owner is not entitled to demand transfer of the full value of the benefit that the boat owner gained by

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253. See *Katko v. Briney*, 183 N.W.2d 657, 660 (Iowa 1971).

254. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 40 cmt. c, illus. 9 (Am. L. Inst. 2011) (deeming the dock owner, in a case modeled on *Vincent*, to have a claim in restitution against the boat owner); see also ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 196–203 (1995); Daniel Friedmann, *Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong*, 80 COLUM. L. REV. 504, 540–45 (1980); Richard A. Posner, *Can Lawyers Solve the Problems of the Tort System?*, 73 CALIF. L. REV. 747, 753 (1985).

remaining at the dock (the value of the boat, perhaps multiplied by the probability of its sinking if unmoored). Instead, it says, the dock owner should recover an amount equal to the reasonable rental value of the extra time at the dock, plus cost of repair.<sup>255</sup> This account of the scope of the boat owner's compensatory duty is certainly contestable. One might suppose, for example, that the dock owner should recover only the reasonable rental value, and not compensation for the damage, on the theory that the rental fee for each user of the dock already includes a (presumably modest) charge designed to cover, over the run of rental payments, repair costs. On the other hand, one can argue that the cost of dock repair is an appropriate measure of the extent to which the boat owner was enriched, given that, if the boat owner happened to own both the boat and the dock, he or she would have chosen to incur the dock damage. Alternatively, one might argue that arm's length negotiations would have resulted in agreement by the boat owner to indemnify for damage caused to the dock by the boat.<sup>256</sup>

Importantly for present purposes, the incomplete privilege of private necessity is settled law in the United States.<sup>257</sup> Moreover, its moral analogue—exemplified by Joel Feinberg's famous example of a backpacker caught in an unexpected storm who breaks into a cabin and burns some of its furniture to save his life—likewise seems to be widely though not universally accepted.<sup>258</sup> (Feinberg's backpacker example is also useful because it involves a defendant who physically invades another property, rather than remaining after permission to remain has expired.) What, then, can private necessity tell us about the UUD?

For proponents of the UUD, a rationale that builds on an analogy to the doctrine of private necessity has one important advantage over one that builds on the nuisance-abatement privilege. Where there is private necessity, an unpermitted entry onto land is permissible, or at least not properly resisted. Yet permissibility—as the *Vincent* court noted—does *not* derive

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255. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 40, cmt. c, illus. 9.

256. See Robert E. Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401, 411 n.25 (1959) (arguing that the appropriate measure of relief on a restitutionary theory would be rental value, and that this amount, as calculated in *Vincent*, “would not be equal to the damage to the dock, in the absence of a question-begging construction of a fictional rental price in the form of an agreement to pay for damage to the dock”); see also Andrew Kull, *Rationalizing Restitution*, 83 CAL. L. REV. 1191, 1201 (1995); Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1285–86 (1989); Lionel Smith, *Restitution: The Heart of Corrective Justice*, 79 TEX. L. REV. 2115, 2146–48 (2001).

257. RESTATEMENT (SECOND) OF TORTS § 197. Some have suggested that the rule is different in English law. For skepticism about this characterization, see John C.P. Goldberg, *Tort Law's Missing Excuses*, in DEFENCES IN TORT 53 (Andrew Dyson, James Goudkamp & Frederick Wilmot-Smith eds. 2015).

258. Joel Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, 7 PHIL. & PUB. AFF. 93, 102 (1978); see also JULES L. COLEMAN, RISKS AND WRONGS 282, 300 (1992). Some scholars have criticized the result in *Vincent* as unjust or immoral. See Stephen D. Sugarman, *The “Necessity” Defense and the Failure of Tort Theory: The Case Against Strict Liability for Damages Caused While Exercising Self-Help in an Emergency*, 5 ISSUES IN LEGAL SCHOLARSHIP 1, 28 (2005); John Oberdiek, *Specifying Rights out of Necessity*, 28 OXFORD J. LEGAL STUD. 127, 143–44 (2008); George C. Christie, *The Defense of Necessity Considered From the Legal and Moral Points of View*, 48 DUKE L.J. 975 (1999).

from harmful or threatening conditions on the land *attributable to the possessor* of the land. (Again, in *Vincent*, it was the storm that posed the danger, not anything the dock owner did.) Thus, private necessity seems a potentially promising route for explaining why a territorial state might be vulnerable to invasion by a threatened state even though the threat emanating from the territorial state is *not attributable* to the territorial state.

Likewise, private necessity holds an advantage for those who favor the UUD over arguments grounded in an analogy to public necessity. As mentioned above, public necessity arguments presuppose a common interest as between the person whose property rights are invaded and the community that benefits from that invasion. In scenarios in which the UUD might be invoked, there may be no such common interest across nations. As the name of the doctrine indicates, private necessity does not rest on the same presupposition. Rather, it involves situations in which one private actor advances her interests at the expense of another.

Another advantage for UUD proponents that comes with the private necessity privilege is that it privileges not only entries onto land, but also the use of a certain degree of force against the person of the possessor and even third parties. As stated in the Second Restatement of Torts:

Whether the entry is for the protection of the actor or his belongings or for the protection of the possessor or of a third person or the belongings of either of them, the privilege stated in this Section carries with it the subsidiary privilege to use reasonable force to the person of the possessor or any third person.<sup>259</sup>

#### D. *Private Necessity, Compensation, and Possessor Responsibility*

The sorts of interpersonal interactions governed by the doctrine of private necessity are in important respects analogous to state interactions governed by the UUD. In both, an actor enters another's territory without permission, does so out of necessity, yet cannot claim to be doing so as a means of defending itself against a threat *for which the possessor of the invaded territory is responsible*. Thus, supporters of the UUD can, at least at a general level, point to the private necessity privilege as analogical legal support for the doctrine, though of course the support is indirect and hardly conclusive. Were they to do so, however, they would also be inviting the thought that uses of military force under the UUD come with important strings attached. For even as it provides a justification for the threatened state's use of military force in the territorial state, it also calls on the threatened state to provide compensation for the invasion and resulting harm. This, of course, is precisely the upshot of describing the private necessity privilege as "incomplete"—the boat

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259. RESTATEMENT (SECOND) OF TORTS § 197 cmt. g.

owner may keep his boat at the dock, but is obligated to pay for the invasion of right and the damage he causes by so doing.

Here, too, however, a qualification is in order—and it is this qualification that returns us to the question of distinguishing cases of inability from cases of unwillingness. The rule, discussed above, that a trespass born of private necessity generates a duty to compensate is subject to an exception. In the language of the Second Torts Restatement, an actor who intentionally enters another's property out of necessity is *not* subject to liability if “the threat of harm to avert which the entry is made is caused by the tortious conduct or contributory negligence of the possessor.”<sup>260</sup> In other words, if the entrant is dealing with a threat for which the possessor of the land being entered is responsible (in the requisite sense), the entry is fully rather than incompletely privileged, and thus no compensation is owed.

To elaborate, consider the following variation on *Vincent*. In this case, the defendant introduces compelling evidence that the dock owner foolishly, and for no good reason, chose not to build the dock in a more sheltered location that would have allowed boats facing unexpected storms to leave the dock and moor in an adjacent safe harbor. *Vincent* implied that there would have been no liability if the boat had been “menaced by any object or thing belonging to the plaintiffs, the destruction of which became necessary to prevent the threatened disaster.”<sup>261</sup> It is not clear what sort of situation would fit this description—perhaps a dock constructed in a shoddy manner so as to threaten to puncture the hulls of ships docked at it. However, given (in this imagined variation) the unnecessary and unwarranted risk posed to boats by the placement of the plaintiff's dock and the plaintiff's indifference to that risk, it seems plausible to describe this case as one in which the defendant's boat was “menaced” by the plaintiff's dock. In other words, there comes a point at which a dock owner bears sufficient responsibility for the peril posed to boats moored at its dock by a sudden storm that the dock owner is no longer entitled to compensation for damage caused by the boat

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260. *Id.* § 197(2). Since the American Law Institute's promulgation of the Second Torts Restatement in the 1960s and 1970s, most American jurisdictions have shifted from the all-or-nothing rule of contributory negligence to comparative fault regimes. See Kenneth S. Abraham, *Adopting Comparative Negligence: Some Thoughts for the Late Reformer*, 41 MD. L. REV. 300, 300 n.1 (1982) (noting that comparative negligence has become the law in “the vast majority of American jurisdictions”). While this shift has been important in many ways, its significance should not be overstated. About two-thirds of comparative fault regimes are so-called “modified” systems. See RESTATEMENT (THIRD) OF TORTS: APPOINTMENT OF LIAB., § 7 reporters' note cmt. a, tbl. (AM. L. INST. 1999). As opposed to “pure” systems, modified systems continue to cut off liability entirely once the plaintiff's fault passes a certain percentage threshold, typically set at 50% or greater than 50%. Moreover, many U.S. jurisdictions continue to recognize assumption of risk as a separate and complete defense. See, e.g., *Kennedy v. Providence Hockey Club, Inc.*, 376 A.2d 329 (R.I. 1977) (holding that the adoption of comparative negligence by Rhode Island had no effect on the defense of assumption of risk, which would remain a complete bar to recovery). The upshot is that highly culpable tort plaintiffs often continue to be barred from any recovery even after the shift from contributory negligence to comparative fault.

261. *Vincent*, 124 N.W. at 222.

master's necessitous trespass upon the dock, *even if the necessity was in the first instance generated independently of anything the dock owner did.*

We grant that our analysis of this imagined case involves a specification or extension of the incomplete privilege of private necessity beyond that provided in *Vincent* itself. Yet *Vincent* and the Second Restatement of Torts clearly endorse the general idea that no compensation is owed for a necessitous trespass undertaken to escape or ward off a threat *for which the possessor is culpably responsible.* And indeed they must do so if the incomplete privilege of private necessity is to be reconciled with the rule (discussed earlier) of no liability for trespasses undertaken to abate a private nuisance that emanate from the plaintiff's property. After all, cases in which the abatement privilege applies will often be cases in which the defendant trespasses on and damages the plaintiff's property to preserve defendant's more valuable property. Private necessity is present in all such cases, but liability does not attach because of the role played by the plaintiff in generating the necessity.

In sum, a notion of property-owner responsibility marks the point at which the *incomplete* privilege of private necessity becomes *complete*, such that no compensation is owed by the trespasser.

#### IV. THE UUD REVISITED

We have already suggested how the law of trespass and private necessity might inform our understanding of the UUD. In this part, we render those suggestions more concrete.

##### A. UUD and Compensation; Legal or Equitable

As we noted in Part II, the rules of international law that address a state's use of military force to ward off an imminent threat of harm, though relatively straightforward when applied to the paradigm case of self-defense, are murkier when applied to a threat that is not attributable to the state against whom force is being used, and is not the result of a breach of that state's due diligence obligations. It is possible that, in the latter case, like the standard case, the use of proportionate force is justified as an act of self-defense and thus does not give rise to state responsibility. Alternatively, it is possible that such a use of force occurs in circumstances that preclude wrongfulness under ARSIWA Article 25's necessity provisions. We cannot rule out either interpretation of international law as unavailable. Yet, the law of private necessity suggests an alternative interpretation that is at least as plausible.

According to this interpretation, for those cases in which the threatened state can rely on the UUD as a justification for using force in the territorial state, the threatened state has done something that is permissible or justified, all things considered, yet in the process has chosen to violate the territorial state's sovereignty, and on that basis owes something to the territorial

state. In the language of ARSIWA Article 25, the threatened state, while acting in pursuit of its legitimate self-interest, deliberately chose a course of conduct that “seriously impair[ed] an essential interest” of the territorial state. At its core, the idea of private necessity as an “incomplete” privilege reflects the thought that an actor who intentionally enters another’s property out of necessity, but without permission, cannot simply walk away without acknowledging the temporary appropriation of the other’s property or the receipt of a benefit from being able to use the plaintiff’s property. The UUD can be understood to rest on the same idea. For such cases, international law, like private law, can simultaneously recognize the importance of the threatened state’s need to fend off an imminent attack *and* that the threatened state’s actions come with strings attached.

On the basis of an analogue to the doctrine of private necessity, one can thus cogently construe international law to hold that a threatened state that acts under the authority and within the confines of the UUD is legally responsible to provide reparations to the territorial state for violating that state’s right to exclude others from its territory. (Even if adopted, this rule would be subject to an important qualification elaborated in the next section.) This would be the international-law analogue to the rule of *Vincent*.

As we have noted previously, while the territorial state enjoys a prima facie legal right to compensation for material harm caused by a UUD attack, it may also be entitled to additional compensation as a matter of equity. As evidenced by its recognition in the Restatement of the Law of Restitution and Unjust Enrichment, the claim of a possessor in a private necessity case to compensation for the benefit conferred on the unpermitted, necessitous entrant is understood to be a claim grounded in law. In other words, a claimant such as the dock owner in *Vincent* can, on this understanding of private necessity, claim a legal right to restitution, however properly measured. Yet it is also true that, in Anglo-American law at least, certain forms of restitution have historical links to the discretionary form of justice that at one time characterized the domain of the English equity courts.<sup>262</sup> ARSIWA Article 27 recognizes a legal obligation of compensation for “material loss” outside the framework of state responsibility and reparations for wrongful conduct.<sup>263</sup> ILC commentary to ARSIWA does not specify what “material loss” encompasses. However, in the private law context, entry onto private property is considered the predicate injury for a claim of trespass. This suggests that entry, and certainly personal injury or property damage resulting from entry, might be treated as “material loss.” At a minimum, the private necessity analogue supports the notion that a state that

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262. See, e.g., Terrence F. Kiely, *Damages, Equity, and Restitution – Illinois Remedial Options*, 24 DEPAUL L. REV. 274, 300 (1975) (characterizing the action seeking restitution as “one of the several historical mainstays of equity jurisprudence”); PETER BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION 4–5 (1985); Warren A. Seavey, *Problems in Restitution*, 7 OKLA. L. REV. 257, 257 (1954).

263. ARSIWA, *supra* note 30, art. 27.

takes advantage of the UUD ordinarily incurs a moral or equitable obligation to compensate the territorial state for the “trespass” itself.<sup>264</sup>

*B. Due Diligence and the Special Case of “Unwilling” States*

Guided by the doctrine of private necessity, we have suggested that, for uses of military force permitted under the UUD, the threatened state owes a legal duty of reparation or at least an equitable obligation of compensation. As noted, however, this conclusion comes with an important qualification—a qualification that brings us to the question of whether and how to distinguish the “unable” and “unwilling” prongs of the UUD.

In discussing private necessity, we noted a kind of necessity case that warrants distinct treatment—namely, one in which the possessor whose land has been entered was at fault for denying the entrant the opportunity to avoid the harm caused by the entry. Are there comparable conditions under which a territorial state forfeits or otherwise loses its claim to compensation? We believe that there are. A useful way to identify these, we will now suggest, is to begin—but not end—with a reconsideration of state’s due diligence obligations.

Recall from Part I that a state bears, under international law, a due diligence obligation to take steps to prevent the realization of threats to other states emanating from private actors in the state’s territory. A breach of the due diligence duty carries with it the duty to make reparations to another state that suffers harm as a result. Given the resemblance between the idea of breaching a duty of due diligence and the idea of acting negligently (that is, at fault), one might suppose that the same due diligence standard that governs what a territorial state must do to protect other states from harm at the hands of nonstate actors provides the basis for a UUD analogue to cases of private necessity in which the possessor who is responsible for generating the necessity loses her entitlement to compensation from the actor who, out of necessity, enters her property without permission.

If the due diligence duty is going to be treated as an analogue to the private law concept of contributory fault, however, this transposition must be handled with care. As we noted in Part I, while there is a broad consensus that a duty of due diligence exists, there are significant ambiguities about its scope and application, especially in the context of preventing terrorist

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264. Primarily in the context of harms resulting from the migration from one state to another of pollutants and other hazardous substances, international law recognizes that the state in which the substances are generated or released has an obligation to take reasonable steps to mitigate or ameliorate the harm caused to another state by their transmission even if the state has not violated any of its international law obligations and thus bears no state responsibility for the harm. This duty to mitigate can in turn give rise to compensatory payments made in fulfillment of an equitable rather than strictly legal duty. Attila Tanzi, *Liability for Lawful Acts*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Anne Peters & Rüdger Wolfrum eds., 2013). This feature of international law, although applicable primarily in this one context, attests to the possibility of other instances in which it recognizes equitable compensatory obligations.



threats. While the first two conditions of notice and capacity, as stipulated by the ICJ, can be rendered in a reasonably determinate manner, the final condition of a duty to act diligently remains open and malleable. Thus, in cases in which there is no notice of a terrorist threat to another state, or no capacity to address it, there cannot be a violation of any international-law duty on the part of the government of the state to police its territory, and no question of “contributory fault” that would offset any reparations owed by the UUD-invoking state. That would be similar enough to the private law analogy.

But what happens where there is notice and capacity, yet the state fails to act? If we were to rely on the due diligence paradigm, the determination of unwillingness for this class of cases would turn on whether the state failed to act diligently. And that condition, absent additional guidance from authoritative sources, can be interpreted narrowly or broadly.

For present purposes—namely, assessing the comparative responsibility of the territorial state to determine whether any compensation is owed by the threatened state—we shall argue in favor of a narrow interpretation. Indeed, a number of considerations warrant the adoption in the international law context of a conception of territorial state fault that errs on the side of entitling it to reparation or compensation. This conception in turn provides a plausibly limited articulation of what it means for a state to be “unwilling” to deal with terrorists in its midst who pose a threat of imminent harm to another state.

First, just as a trespasser’s incursion onto another’s property is an injury simply by virtue of the intentional boundary-crossing—a violation of right that renders the right and rightholder less secure—a threatened state’s use of force under the UUD causes genuine injury to the rights of the territorial state even apart from any tangible harm that the attack entails for both the threatening nonstate actors and, potentially, innocents in their vicinity. Such an injury might also generate domestic insecurity: the territorial state’s government might be seen by its own population as weak, or to have secretly cooperated with the threatened state, or otherwise be held responsible for a military action against persons within its borders. Absent state responsibility for the threat on the part of the threatened state, denial of compensation to the territorial state seems only to add insult to injury.

Second, as we have seen, a government might decline to address threats emanating from its territory for many reasons, including sometimes delicate calculations of domestic politics. For example, it might have to deal with political unrest, assuage opponents, and avoid the escalation of violence. Though the threatened state should still be allowed to defend itself against the threat of the nonstate actor, it is not clear that a territorial state acting in furtherance of legitimate domestic policies should be denied compensation under these circumstances. Even if the government’s failure to address threats emanating from its territory violates international law’s due dili-

gence requirement and thus leaves it vulnerable to a claim for reparations to a state later victimized by an attack, it does not follow that the territorial state has behaved so as to forfeit its basic right of territorial sovereignty. (There may be, in other words, an asymmetry between what it takes to fulfill the due diligence requirement and what it takes to be deemed “unwilling” to deal with a terrorist threat to other states.) In this setting, domestic political considerations function as a kind of excuse. And respect for national sovereignty entails a certain degree of deference to claims by territorial states to have good excuses, grounded in domestic policy considerations, for failing to fulfill their international law obligations with respect to the prevention of terrorism. Excused wrongs are still wrongs, but they are wrongs that carry less culpability and thus should carry fewer negative consequences for those who commit them.

It seems likely that the law of private necessity would recognize an analogue to this excuse. For example, suppose a dock owner negligently fails to build her dock in a location at which it would have been just as usable, and no more expensive to build, but would not have been vulnerable to being damaged by a boat tied to it during a storm. But suppose also the dock owner had a good excuse for this negligence—for example, she was focused on caring for a parent with a serious illness and thus could not devote sufficient time to studying alternative locations for the dock before building it. A court might well conclude that the lack of culpability, while not defeating the fact that the dock owner acted negligently, should not deprive the dock owner of her claim to compensation from the boat owner.

Third, practical considerations favor allowing territorial states compensation in all but the most extreme cases. Even if UUD attacks are regularly reviewed by suitably disinterested institutions, the accurate adjudication of cases raising close questions as to why exactly a state did not fulfill its obligations to preempt threats to others will be very difficult. The second-guessing of political decisions is a tricky business to begin with: this is why, for example, in domestic law official decisions, actions and policies that constitute “discretionary functions” are categorically excluded from serving as a basis for tort liability.<sup>265</sup> Securing witnesses and other evidence that would permit a confident judgment as to why a state did not take certain measures will likewise be difficult. Accordingly, the idea of setting a standard for compensation that turns on judgments as to whether a territorial state did “enough” to fulfill its due diligence obligations invites a kind of inquiry that tribunals are poorly equipped to undertake.

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265. See, e.g., *Childers v. United States*, 40 F.3d 973 (9th Cir. 1994) (holding the discretionary function exception to the Federal Tort Claims Act protected the decisions of the National Park Service relating to the treatment of unmaintained trails that indirectly led to a child's death); see generally Harold J. Krent, *Preserving Discretion Without Sacrificing Deterrence: Federal Governmental Liability in Tort*, 38 UCLA L. REV. 871 (1991); Osborne M. Reynolds, Jr., *The Discretionary Function Exception of the Federal Tort Claims Act: Time For Reconsideration*, 42 OKLA. L. REV. 459 (1989).

While this argument casts doubt on the administrability of the due diligence standard more broadly, note that in the UUD context, the likelihood of an objective review process is minimal to begin with. Recall that one of the concerns that critics mount against the UUD is its self-judging nature: it is the threatened state, rather than any independent review body, that makes the determination whether the territorial state was unable or unwilling to police the threat. The self-judging exercise will in all likelihood be self-serving. And under such circumstances, it would be prudent to raise the cost of action for the threatened state.

A final related reason is that, as critics of the UUD have emphasized, for the foreseeable future the political and economic dynamic between territorial state and threatened state is likely to be one of weak versus strong states, and poor versus wealthy states.<sup>266</sup> As a matter of distributive justice (whether the relevant distributions concern both power and wealth), the scales arguably should be tipped in favor of territorial states. To be clear, our rationale for demanding compensation here is not grounded in a direct appeal to distributive justice. Rather, our claim is that it is legitimate to consider the practical, political realities of which states are likely to invoke the UUD in determining the conditions under which compensation is owed.

For all these reasons, it seems appropriate to deny compensation—to treat as instances of genuine *unwillingness* on the part of the territorial state—only in those cases in which the territorial state displays something akin to deliberate indifference to its legal obligation to take measures to prevent its territory from being used as a base for terrorist activities. In the UUD context, this is how a failure of “due diligence” should be defined.

How should all these considerations be applied to real-life cases? We believe that most instances of UUD attacks merit compensation to the territorial state. To take an extreme example, we believe that even if, as some reports have suggested,<sup>267</sup> the Pakistani government knew of Osama Bin Laden’s presence in its territory but chose not to apprehend him (thus breaching its obligation to the United States as well as defying the call by the Security Council to cooperate with the efforts to apprehend Bin Laden<sup>268</sup>), compensation was still owed to Pakistan for harm caused to it by the U.S. assault on Bin Laden’s compound in Abbottabad. This would especially be the case if Pakistan had proven itself an otherwise-reliable ally of

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266. See, e.g., Chachko & Deeks, *supra* note 8; Julian Borger, *Latin Americans fear precedent set by legal justification for Syria intervention*, GUARDIAN (Apr. 2, 2019), <https://www.theguardian.com/world/2019/apr/02/latin-americans-fear-precedent-set-by-legal-justification-for-syria-intervention> [<https://perma.cc/23H8-AYVV>].

267. See, e.g., Carlotta Gall, *What Pakistan Knew About Bin Laden*, N.Y. TIMES (Mar. 19, 2014), <https://www.nytimes.com/2014/03/23/magazine/what-pakistan-knew-about-bin-laden.html> [<https://perma.cc/C4VN-3N4P>].

268. S.C. Res. 1267 (Oct. 15, 1999).

the United States in the war against al-Qaeda.<sup>269</sup> It was also unclear who or how high up the chain of command in Pakistan was aware of Bin Laden's presence (and possibly, was ready to tip him off about a pending American attack),<sup>270</sup> and whether Pakistan as a whole, at least as a political-moral matter, should be held responsible for having failed to act.<sup>271</sup> The government of Pakistan, meanwhile, has met much criticism for its security cooperation with the United States (and vice versa),<sup>272</sup> and had an array of security interests that did not align with those of the United States.<sup>273</sup> Finally, though a considerable regional power, and an ostensible partner of the United States, power and wealth disparities clearly tip the scale in favor of the United States, and thus for its obligation to make reparations.

Our sentiment would be different if it were shown that the government of Pakistan not only knew of Bin Laden's presence in Pakistan, but also were sympathetic to the latter's war against the United States. Such sympathy may fall below legal attribution of responsibility, but favors loss of any right to compensation.

To sum up, on our rendering, the unable/unwilling distinction is best interpreted as turning on notions of territorial state responsibility. When a territorial state can properly be deemed to have behaved in a highly irresponsible manner—a manner significantly more culpable than mere negligence—it loses the entitlement it otherwise would enjoy to compensation from the threatened state for material harm (other than to the sources of the threat) resulting from the violation of its sovereignty. A state's failure to exercise due diligence to deal with a terrorist threat generates state responsibility for a realization of that threat. But the UUD is not about responsibility for realized threats; it concerns whether a territorial state can justifiably

269. See generally K. ALAN KRONSTADT, CONG. RSCH. SERV., IF11270, PAKISTAN-U.S. RELATIONS (2019); TOUQIR HUSSAIN, U.S.-PAKISTAN ENGAGEMENT: THE WAR ON TERRORISM AND BEYOND, U.S. INST. PEACE SPECIAL REPORT 5–6 (2005) (“Pakistan has cooperated with the United States in a number of ways, by granting logistics facilities, sharing intelligence, and capturing and handing over al-Qaida terrorists. Says Christine Fair in her book, *The Counterterrorism Coalitions: Cooperation with Pakistan and India*, U.S. officials acknowledge that ‘Pakistan has provided more support, captured more terrorists, and committed more troops than any other nation in the GCTF (Global Counterterrorism Force).’ Additionally, Pakistan has sealed off its western border and has made two naval bases, three air force bases, and its airspace available to the U.S. military.”).

270. Pakistan's Ambassador to the U.S. at the time claimed, “[t]o this day, there is no solid evidence of Pakistanis at the highest level of government knowing about bin Laden being in Pakistan — though there have been widespread suspicions.” See Haqqani, *supra* note 174.

271. See Galli, *supra* note 170.

272. See HUSSAIN, *supra* note 269, at 8 (“Criticism provoked by his alignment with the United States and suspicions that his reforms are at the behest of the United States have also weakened Musharraf. Indeed, the strongest resistance to him comes from the Islamists, whose tolerance toward him has already been stretched to the limit by his cooperation in the war on terrorism. He is afraid to test it any further, as he is expending most of his political capital on complying with the U.S. war on terrorism and securing his own survival, both personal and political.”)

273. See, e.g., Editorial, *Pakistan, the Endlessly Troublesome Ally*, N.Y. TIMES (Jan. 5, 2018), <https://www.nytimes.com/2018/01/05/opinion/pakistan-the-endlessly-troublesome-ally.html> [<https://perma.cc/K6ZK-VJSP>]; ‘We must reject being made scapegoats for US policy failures’, DAWN (Aug. 22, 2017), <https://www.dawn.com/news/1353189> [<https://perma.cc/DH39-LYUQ>].

seek reparations when a target state acts unilaterally to neutralize the threat. Under the UUD, a territorial state's lack of due diligence can render it vulnerable to the use of force in its territory by the threatened state. But it does not, by itself, forfeit the state's claim to compensation for such a use of force.

To the foregoing analysis, one might object that we have not so much succeeded in giving an account or interpretation of the unable/unwilling distinction, but instead have surreptitiously imported judgments that turn other considerations under the cover of that distinction.<sup>274</sup> This objection is not compelling. As we pointed out in Part II, as a matter of ordinary usage, the distinction between inability and unwillingness is hardly crisp. In particular, it is neither uncommon nor awkward to use "inability" to cover cases in which an actor is literally capable of undertaking an action, yet declines to do so. In other words, the unable/unwilling distinction, in contexts such as this one, is a normative inquiry into responsibility, not a matter of natural science.

What's needed, then, is a normative framework that can give content to the distinction while still reflecting the core intuition that cases of "unwillingness" turn on a certain kind of choice that is lacking in cases of "inability." We have invoked the private necessity framework because it helps to isolate this content, albeit indirectly. It does so indirectly because the initial focus of private necessity analysis concerns why a particular justification for the use of force by a threatened state—namely, the need to protect itself from imminent harm coming from a source within but not attributable to the territorial state—does *not* immunize the threatened state from an obligation to compensate for damage done to the territorial state. As we have explained, however, this rule of obligation-to-compensate is a default rule: the territorial state can lose its claim when it is itself responsible, in certain ways, for the threatened state's predicament.

The basis for this responsibility is NOT attribution of the terrorists' actions to the territorial state—if that were the basis, there would be no need to invoke the UUD doctrine. Instead it is the territorial state's having culpably failed to take appropriate steps to prevent the terrorists from posing a threat of imminent harm to the threatened state. A failure to act, without adequate reason for that failure, denotes a failure that is *chosen* in the requisite sense. It is thus plausibly described as an instance of a state being "unwilling" to do something rather than "unable" to do it, such that certain legal consequences flow that would not flow if the state had adequate reasons for failing to act. In the latter case, the state can justifiably claim that it was "unable" to do what the territorial state hoped it would do. Someone who breaks her promise to meet a friend for a drink in order to deal with a genuine emergency will say that she was "unable" to live up to her promise rather than merely unwilling. The same is true for a territorial state that has

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274. Thanks to Oren Bar-Gill for pressing this objection.

good domestic political reasons to refrain from dealing with a threat that is posed to another state from within its borders.

### C. *Compensation, Prices, and Perverse Effects*

We have identified the circumstances under which a threatened state owes compensation to a territorial state even when the threatened state's use of force within the territorial state is justified by the UUD. We have yet to specify, however, the nature of the compensation owed. For what sorts of losses can the territorial state claim compensation?

In private-law cases in which a defendant can invoke the privilege of private necessity but nonetheless faces liability, the liability is for the violation of the right itself, as well as for physical damage to the plaintiff's property.<sup>275</sup> However, ARSIWA Article 27 states that, in cases of necessity (and other circumstances precluding wrongfulness), there can only be recovery for "material harm." In the UUD context, the territorial state is thus entitled, at a minimum, to compensation for damage to its territory apart from damage to resources, facilities, and equipment being used or stored by the non-state actors who posed the threat to the threatened state. In short, a UUD attack that generates collateral damage generates liability for that damage (unless the territorial state is culpably responsible for the threat and hence has forfeited its claim to compensation).

In principle, this obligation should include any losses suffered by bystanders who reside in the territorial state. This is the case, we believe, even though, under general international humanitarian law, no such compensation would be owed if the attack were otherwise lawful.<sup>276</sup> General international humanitarian law applies in conditions of ongoing armed conflict.<sup>277</sup> In the UUD case, our assumption is that there is no international armed conflict between the two states, and that any legitimate attack in self-defense must be restricted to the nonstate actor who is the source of the threat. The claim of necessity might justify the invasion of the territory, and possibly related harms; but if our claim that reparations are still owed is valid, those reparations must include any and all harm that is not suffered by the actual source of the threat.

Any discussion of an obligation to compensate invites two related worries. First, it is always possible that the existence of such an obligation in practice has the effect of inviting actors to mistake a genuine legal obligation for a mere price or tax. Second, and relatedly, there is a worry that a duty to

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275. See *Vincent*, 124 N.W. at 222; JULES L. COLEMAN, RISKS AND WRONGS 292–96 (1992).

276. See Paola Gaeta, *Are Victims of Serious Violations of International Humanitarian Law Entitled to Compensation?*, in INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW 305–07 (Orna Ben-Naftali ed., 2011); Emanuela-Chiara Gillard, *Reparations for Violations of International Humanitarian Law*, 85 INT. REV. RED CROSS 529, 551 (2003).

277. Emily Crawford, *The Temporal and Geographic Reach of International Humanitarian Law*, in THE OXFORD GUIDE TO INTERNATIONAL HUMANITARIAN LAW 57 (Ben Saul & Dapo Akande eds., 2020).

compensate, precisely by putting a price on certain state conduct, will have the perverse effect of encouraging states with ample resources to invoke the UUD more frequently than they might otherwise.

While these concerns are real, neither warrants an outright rejection of the obligation to compensate for all cases of inability (as opposed to unwillingness). It seems highly unlikely that a duty to compensate will change in any meaningful way the decisional calculus of a threatened state deciding whether to take advantage of the UUD. Immediate security interests, resources spent on planning and executing attacks, ongoing security cooperation with the territorial state and others, long-term international relationships, domestic political support or opposition, and global reputation—are all considerations much more significant than any duty to make reparations to the territorial state if a UUD attack is conducted. A more optimistic view might be that the duty to pay reparations will encourage threatened states to forego UUD attacks with expected modest marginal benefits, or at least that UUD attacks would be more carefully planned and executed so as to minimize collateral harm beyond harm to authorized targets.

Whether duties to compensate morph into “prices,” thereby undermining the primary duties whose breach generates the duty to compensate, depends in part on how payments are conceptualized by participants in the relevant practice. It will thus certainly be important for state officials and jurists, including international law tribunals, to convey clearly that payments owed are compensatory obligations. In the domestic private law context, certain legal rules can help to reinforce a proper understanding of the nature of compensatory payments. For example, where there is evidence that a given defendant has in fact regarded the plaintiff’s rights as a mere cost of doing business, the defendant may be subjected to a punitive damages award.

## CONCLUSION

This Article has two aspirations, one immediate, one more remote. Its immediate agenda is to make progress on a difficult question of international law—the question of what sort of legal authority states enjoy to use force in other states to fend off potential attacks by nonstate actors. We have assumed for purposes of analysis that there is a version of UUD that is legally valid, such that certain uses of force against threatening nonstate actors located in another state is legally permissible. We have nonetheless argued that the best legal justification for such an attack is necessity, and that, in keeping with private law’s incomplete privilege of private necessity, there is legal responsibility, such that reparations are presumptively owed by the threatened state to the territorial state. (Equitable compensation may also be owed for the violation of sovereignty.) Finally, we have argued that it is vital

to distinguish between UUD cases involving inability, on the one hand, and those involving unwillingness, on the other, and have suggested a justiciable standard for gauging what constitutes unwillingness rather than inability. When that legal standard is satisfied—when the territorial state was genuinely unwilling to address the threat to the threatened state—the presumptive case for reparations (or equitable compensation) disappears.

Our other agenda has been to attempt to demonstrate the scholarly and practical value of cross-pollination between the fields of private law and international law. In this instance, we have harnessed the common law of tort and restitution, developed and refined over centuries within a relatively stable and coherent system of Anglo-American common law, to help unpack and organize matters that, to date, have been less fully articulated in international law. The idea, for example, that the very same act can be a matter of self-defense as to one person and a matter of private necessity as to another is an idea that the common law has developed but is less developed in international law. No doubt in other instances it will be international law that helps the private lawyer grapple with a conundrum in her field.

The synergies between these two fields probably have been appreciated since ancient times. Still, modern conditions tend to promote specialization and, with it, the siloing of different legal fields. While the elaborateness of our own analysis indicates that, at times at least, it will take some effort to isolate the lessons that each field holds for the other, we think this is a promising path for lawyers and scholars alike.