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

POSTDOCTORAL THESIS PROJECT – A SKETCH

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A. Abstract

The notion of the "unwilling or unable state" has recently lived through a renaissance in international law and international relations discourse. This revival has been initiated by the increasing significance of threats stemming from non-state actors acting from the territory of states that fail to prevent their terrorist endeavors. This term is however by no means a novelty. It has been a paradigm of US foreign policy for a long time and numerous other states have appropriated it rising to the challenge of terrorist attacks. Beyond the context of self-defense it has been utilized as an argumentative pattern to justify multilateral operations without UN mandate within states which fail to prevent grave human rights violations within their territory. In contrast to the frequent employment of this conception stands its poor incorporation into written legal sources. The only international treaty using the exact wording “unwilling or unable” with regard to states is the Rome Statute of the International Criminal Court.\(^1\) A similar terminology is echoed in the 1951 Convention Relating to the Status of Refugees.\(^2\) Beyond that it is merely found in soft law documents addressing questions of the so-called “Responsibility to Protect” (R2P)\(^3\) whose normative quality is still disputed.\(^4\)

Despite recent proclamations of an emerging legal standard of “unwilling or unable states” in different contexts I submit that international law has since its foundation addressed the “unwillingness” and “incapacity” of states normatively. This is the fundamental hypothesis of my project. States that are unwilling to conform to international law or lack the capacity to fulfil certain positive obligations challenge international law. The international legal order is built around the concept of an abstract entity “state”. This entity is sovereign in juridical terms, equal with other states, a bearer of international rights and duties and in general assumed to be willing and able to comply with international obligations. States, however, have always violated international norms. Furthermore the ideal of a state that unites international legal sovereignty with effective statehood, hence the doctrinal foundation of international law, has yet to be achieved in reality.\(^5\) This cleavage between the “world as it is” and its legal construction stands at the heart of “unwilling or unable states” that disrupt categories of international law. Simultaneously international law is a tool to shape social reality. It therefore cannot ignore the empirical truth of states acting in contradiction to its normative postulates as well as states with deficient structures of internal authority that prevent them from compliance with its international norms. And international law has never done so.

However, to date no comprehensive account and evaluation of these specific rules can be found in contemporary scholarship, which leaves this phenomenon insufficiently analyzed. Furthermore it has yet to be examined whether specific but cross-cutting normative schemes with regard to the “unwilling” and the “unable” state can be deduced from the existing international legal norms.

My research project is intended to fill this gap.

I will analyze whether and how rules of international law address questions of a state’s “unwillingness” and “incapacity” in different substantive contexts. My objective will be to determine whether common normative patterns surface or, on the contrary, a fragmented landscape manifests. Simultaneously, I will disentangle the notion of the “unwilling or unable state” and its usage within the current debate thereby unraveling the motivations and agendas of the relevant discourse participants. Based on my findings I will go beyond a mere de lege lata perspective, critically evaluate the existing rules and identify considerations which should be included in policy decisions. My analytical perspective will be internal to the system of law, however I will also make use of insights from philosophy and predominantly the social sciences, especially theories of international relations, as heuristic and auxiliary means.

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\(^1\) Art. 17 [37 ILM (1998), 999].
\(^2\) Art. 1 (A) (2) (189 UNTS 137).
\(^5\) Krasner, 1999; 2013.
This project is needed for several reasons:

First of all, a comprehensive account of the “unwilling or unable state” cannot currently be found in legal or political scholarship. However, a broad consensus exists that states that are unwilling to or incapable of fulfilling obligations of international law pose the most ardent threat to the stability of the international legal order and sustainable peace. Understanding the “law as it stands” is an indispensable requirement for evaluating its ability to serve its main purpose – the facilitation of peace – in light of the social phenomenon of a state’s unwillingness and incapacity. Contemporary scholarship has so far concentrated on “unwilling or unable states” as a mere problem of the use of force. However, these phenomena permeate various other substantive areas of international law. I posit that only a comprehensive approach will yield conclusions regarding the existence or non-existence of common normative patterns governing unwillingness and inability. If certain coherent principles or rules surfaced, they could possibly be employed in areas where the normative schemes to deal with “unwilling or unable states” seem to be underdeveloped compared to others.

Secondly, discussants within the different substantive threads of legal discourse employ the notion of “unwilling or unable” following specific but in most cases obscured objectives. It is mainly utilized to facilitate a change of established international norms protecting state sovereignty. Obviously a frequent usage of notions may induce a subtle and largely unnoticed shift of the law. This might prove dangerous especially when the foundations of the international legal order are at stake. State stigmatizations like “unwilling or unable” have always been used in legal discourse to pave the way to a relativization of the sovereign equality of states which is the key element of the “Westphalian” legal order. An analysis of the “law as it stands” and its limits will be a first step towards dissecting the present discourse, and unveiling its deficiencies and biases. There is a pressing need for a discourse about the discourse. I propose that arguments actually purporting a change of the law are sold as mere descriptions of the state de lege lata.

Thirdly, I submit that the problem of “unwilling or unable states” is real and urgent and has to be dealt with by law effectively, which otherwise would lose its normative force. But any endeavors to initiate a change of existing rules demand a critical evaluation and have to be based on a rigorous insight into the situation de lege lata. Sensible policy recommendations require the complementation of these legal findings with insights from the social sciences. However, whilst an interdisciplinary view is essential, at the same time it is necessary to uphold the unique features as well as the relative autonomy of law. In this respect my research project shall contribute to the “empowerment” of international law to effectively address the obstacle of non-ideal states.
B. The Research Program: The Five Steps of Investigation
My research agenda comprises five steps:

First of all, I will illustrate the concept of the “unwilling”, the “unable” and the “unwilling or unable state” as it is employed within the debate. Superficially these terms appear to be merely descriptive but they entail normative content. Their paradoxical character is generated by their “anthropomorphism”: they imply that a state possesses a certain will and physical capability both features of human beings. This “anthropomorphization” is a conceptual strategy to grasp the complex entity “state” and serves heuristic purposes particularly in the legal discipline. At the same time anthropomorphisms seem to create the illusion that the state is a closed entity – a “black box” – and distract from the fact that state action – just as the willingness and capacity of states – is a result of a complex network of human activities and decisions. Numerous unresolved questions of international law particularly connected with the idea of the “unwilling or unable state” find their basis in and are even aggravated by this discrepancy as I shall evidence. Thereupon I will present my understanding of “unwillingness” and “inability” and develop a precise working definition for these “real world” phenomena. Here I will particularly dissect in how far “unwillingness” and “inability” are interrelated and in how far they are to be seen as separate questions. Simultaneously I will identify basic principles of international law which these contingencies touch upon. Thereby I will substantiate my thesis that “unwilling or unable states” disrupt patterns of international law.

In a second step I will focus on seven issue areas in which the problems connected with “unwilling or unable states” have become most visible and have already been addressed normatively. These thematic threads involve the use of force, the jurisdiction of the ICC, environmental law, social human rights, refugee law, international investment law and – focusing on the secondary level of norms as a cross-sectional matter – principles guiding state responsibility. My objective at this point will be to identify the “law as it stands” while taking the specific volatility as well as the open texture of international law into account. Since rules of international law are per se indeterminate and constantly (re-)constructed by certain actors the endeavour to determine them will necessarily entail a critical reflection on the dynamics of international law.

The third complex of investigation will address the core problem flowing from the incorporation of the “inability” and “incapacity” of states into legal norms: namely the absence of a final instance with determinative authority on the international plane. Since the assessment of unwillingness and inability is in most cases decentralized it is significant to examine comparatively how different competent bodies fill these concepts with substance and which criteria guide their application to specific cases.

The fourth step of my analysis will identify which consequences the incorporation of a state’s unwillingness and incapacity into specific legal rules engenders. My particular focus will be here to establish and systematize the normative implications flowing from a state’s unwillingness and incapacity for the state itself on the one hand and for other states and international actors on the other. This will lead to one of two possible results: certain common structures will surface, or, to the contrary, the identifiable rules will not display a normatively coherent picture but merely a fragmented landscape. Both results will have academic as well as practical significance.

Within the fifth step I will examine which considerations and rationales should be guiding for policy decisions with regard to “unwilling or unable states” in light of my findings. Here I will assume a de lege ferenda perspective.

C. Spotlight on Step II: Relevant Issue Areas
The following paragraphs shall very rudimentarily highlight the specific modes in which the problem of the “unwilling” or “unable” state surfaces within respective substantive issue areas and sketch which normative questions it raises.
Use of Force: Self-Defense/R2P and Humanitarian Intervention/Collective Security

International law obliges states to effectively control their territory and to prevent its misuse by other actors for activities which are harmful to other states and to prevent human rights violations within their territory. States which do not fulfill these obligations pose a threat firstly to other states since they potentially become “harbouring states” for terrorist actors, secondly to the realization of human rights, and ultimately to international peace and human security as such. In view of their highly dangerous potential, “unwilling or unable states” are currently at the focal point of debates concerning the right to self-defense and R2P/humanitarian intervention. The primary crystalizing sentiment therein appears to be the idea that unwillingness and inability of states has normative implications, relativizes the protective veil of state sovereignty and lowers the threshold for the legal exercise of the use of force.\(^6\)

Within the context of Art. 51 UNC, it is argued that international law allows the infringement of the territorial sovereignty of “unwilling or unable states” in the course of operations – including targeted killings – which neutralize attacks of non-state actors de lege lata.

Unwillingness and inability are furthermore essential elements of the R2P concept since it rests on the idea that state sovereignty finds its limits in the protection of human security.\(^7\) Whilst the Outcome Document – the most influential source of R2P – stresses the primary responsibility of states for ensuring human security, it acknowledges a “residual responsibility” of the broader community of states.\(^8\)

Both discursive threads touch upon the core of the collective security system and raise questions regarding the legality of unilateral, unauthorized operations by states in cases of the Security Council’s inactivity.

Jurisdiction of the International Criminal Court

Within the Rome-Statute unwillingness and inability are questions of the complementary nature of the ICC jurisdiction. The admissibility of a case before the ICC may be challenged by the defendant on the basis that a state with jurisdiction to adjudicate has prosecuted or is prosecuting the case at hand.\(^9\) A case, however, remains admissible if the ICC comes to the conclusion that the state having jurisdiction is unwilling or unable to prosecute “genuinely”. An analysis of the respective jurisprudence of the ICC is highly relevant for my research project for several reasons: First of all, the notion of “unwillingness or inability” is included in a primary source of international law. Dissecting how these terms are made operational by the Court will allow findings as to the viability of “unwillingness or inability” as an integral element of legal norms. Secondly, while in all other issue areas the assessment of inability or unwillingness of states is decentralized, in the ICC constellation the rare case is given that an international institution has the authority to make a final determination. It will therefore be particularly interesting to identify the methods employed by the Court. Thirdly, recent case law indicates that the ICC considers aspects of due process within the examination of a state’s ability to prosecute “genuinely”.\(^10\) This seems to indicate that the standard of “unwillingness or inability” is utilized as a trigger to implement certain legal standards. Fourthly, states refer cases to the ICC by claiming to be unable to prosecute. It is doubtful whether such self-referrals discharge a state’s duty to prosecute.\(^11\) In this regard it is especially important to identify the level of scrutiny the Court applies in examining a state’s self-assessed inability. Fifthly, the principle of complementarity and the admissibility of self-referrals might be an emanation of a “residual responsibility” of the international community for the fulfillment of certain obligations.


\(^7\) General Assembly Resolution A/RES/60/1 (“World Summit Outcome Document” – 2005).

\(^8\) This “residual responsibility” is activated “when a particular state is clearly either unwilling or unable to fulfill its responsibility to protect”; “when a particular state [...] is itself the actual perpetrator of crimes or atrocities” and “where people living outside a particular state are directly threatened by actions taking place there.”

\(^9\) Art. 17 para. 1 lit. a, b ICC Statute.


\(^11\) van der Wilt, 2015.
Environmental Law

One of the doctrinal homes of the *sic utere non laedas* rule – no harm shall be done to states by and from the territory of others – is environmental law. This obligation requires state conduct that accords to a standard of due diligence or reasonableness\textsuperscript{12} which is possibly limited by a minimal standard that state conduct may not fall short of. A state violates this duty if it fails to undertake (objectively) appropriate measures which would prevent injurious events and minimize possible risks as far as possible. However, the appropriateness of measures undertaken depends on numerous factors which exemplify that the no-harm rule incorporates elements of a state’s (in)capacity: These include the economic power of the state which is obliged to act, the effectiveness of control in a certain part of the state’s territory and the remotesness of the area that the activities of non-state actors stem from. All these considerations are weighed against the nature of the obligation, the significance of the interest that is to be protected, as well as the foreseeability of the damage incurred.\textsuperscript{13} If a state has been diligent in regulating and controlling the harmful activity, yet transboundary damage still occurs, it will not be liable. Since this proves dissatisfying when a state engages in ultra-hazardous activities, international environmental law has adjusted the general principles of state responsibility: Either it renounces the requirement of a violation of international law – thereby establishing liability regimes for “injurious consequences of acts not prohibited by international law” – or it abolishes the due diligence standard by introducing strict liability regime or it combines both.\textsuperscript{14} These liability regimes have particular relevance for the unwilling or incapable state. First of all, their purpose is to allocate risks of loss due to harm resulting from lawful economic or other activities fairly. They aim at steering state behavior by economic means. A state which is unwilling to minimize risks stemming from dangerous activities of non-state actors by diligent supervision should suppress these from the very beginning since it will bear the economic burden should these risk realize. A strict liability regime sanctions both the unwilling as well as the incapable state if it engages in ultra-hazardous activities or omits to prevent such activities by non-state actors within its territory should these activities prove to be injurious to other states or individuals. Hence it sets an incentive for a wide-ranging exercise of territorial control of non-state actors. However, the idea that an incapable state is liable seems to contradict the principle that responsibility requires the possibility to act otherwise. An incapable state might refrain from suppressing non-state actor activities not by a “conscious” and free decision but be rather forced to passivity by its insufficient state infrastructure. Taking these considerations as a starting point I will analyze the rationale behind imposing a strict liability on unwilling or incapable states in more depth and detect whether common normative structures, possibly principles, can be deduced from it that potentially could be made operational in other contexts.

Social Human Rights

Human rights entail duties to respect, protect and fulfil. A unique feature of social human rights is the principle of their incremental realization.\textsuperscript{15} According to Art. 2 para. 1 of the International Covenant of Economic, Social and Cultural Rights (ICESCR) the contracting parties are obliged to undertake “steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.” The idea of “progressive achievement” rests on the concept of an ongoing process of development which is determined by norms that are derived from and adjusted proportionally to a state’s capacity.\textsuperscript{16} The standard to assess whether a state has taken steps to the maximum of its available resources is one of adequacy and reasonableness. While certain core obligations exist which bind states irrespective of their resources,\textsuperscript{17} even their non-fulfillment may be justified to a certain extent by deficits in state capacity. A closer analysis of General Comments, Communications and Views of the Committee of Economic, Social and Cultural Rights (CESCR) will enlighten the question of incapacity since it broadly applies the concept of resources.

\textsuperscript{12} Crawford, 2013.
\textsuperscript{13} Cf. Dupuy/Hoss, 2006.
\textsuperscript{14} Kiss/Shelton, 2007.
\textsuperscript{15} Young, 2008; Sepúlveda, 2003.
\textsuperscript{16} Sepúlveda, 2003.
\textsuperscript{17} Young, 2008.
Refugee Law and Migration

Unwillingness and inability are at the core of international principles guiding the protection of refugees. The Convention relating to the Status of Refugees applies the term refugee to an asylum seeker who is “owing to a wellfounded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, […] outside the country of his nationality and […] unable or, owing to such fear, […] unwilling to avail himself of the protection of that country.” The terms “unwilling” and “unable” refer here to the individual and not to the state. However, persecution of an individual by a state for special grounds necessarily implies its unwillingness to protect her or him. A merely passively behaving state of origin that is unwilling or unable to grant protection against persecution by non-state actors like insurgents likewise entitles a refugee to protection. Hence, in general a failure of state protection is a prerequisite for determining whether an individual is at risk of being persecuted. The counterpart to the “unwilling or unable asylum seeker” is the “unwilling or unable state.” Unwillingness gains particular importance in the ongoing debates on the influx of refugees since many states have adopted deterrence policies (non-entrée) to prevent refugees from accessing protection. Incapacity as interpreted by national courts refers to situations of civil war, anarchy or breakdown of law and order, as well as ineffectiveness of the state infrastructure. It is disputed whether incapacity is given in cases in which a state has a functioning government but nevertheless proves to be unable to protect a specific individual. Some national courts introduced a formalistic and intensely criticized due diligence standard in this respect. If a state has a system of domestic protection and is generally “reasonably” willing and able to employ, a refugee status is denied. This reasoning might hint at a necessity to distinguish between general and specific inability in a certain case which could possibly be a relevant consideration in other contexts.

International Investment Law

Key elements of bilateral investment treaties are contingent clauses encompassing the standards of “fair and equitable treatment” as well as “full protection and security”. Gateways to a normative operationalization of a state’s incapacity within the former is the notion of “legitimate expectations”, within the latter the normative concept of “due diligence”. The landscape of arbitral awards dealing with discrepancies in state capacities displays a prima facie scattered picture whose closer analysis will be fruitful for the overall research goal of this project.

Principles of State Responsibility

Questions of unwillingness and incapacity are of particular relevance with regard to secondary rules governing state responsibility. In the first instance, unwillingness and incapacity become operational within primary obligations which determine questions of fault or blameworthiness. On the one hand incapacity may eradicate the wrongfulness of an omission, on the other incapacity to fulfil one obligation might lead to the emergence of other duties (e.g. the duty to request assistance). The major playing field of inability on the secondary level are the grounds which preclude wrongfulness of a violation of international law, especially “necessity” and force majeure.

Beyond these sub-aspects unwillingness or inability of states challenge fundamentals of the state responsibility system as such. An epiphenomenon of a passive state is the increased international relevance of non-state actors. While an omission to intervene in activities of non-state actors may lead to a state’s genuine responsibility for its own wrongdoing de lege lata, the state will not be directly responsible for the activities of non-state actors. However, some argue in view of the threat to international peace that “unwilling or unable states” pose for a reintroduction of the long overcome “state complicity”-concept: According to this scheme a state’s passivity would make it complicit in e.g. terrorist activities of non-state actors, the terrorist attack itself would then be the relevant wrongful state conduct. Others suggest to turn to a

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19 Hathaway/Foster, 2014, 305.
20 See Hathaway/Foster, 2014, 292 et seq.
22 Art. 25 ILC Articles. See also Article XXI GATT/Article XIV GATS bis. On the question of financial incapacity Dolzer, 1989.
causation-based responsibility model which would put considerations of attribution aside. At this point I will assess whether certain principles developed in the environmental context are transferable to the problem of transboundary terrorist activities of non-state actors.

Although principles of state responsibility imply that the incapable state generally does no wrong, the necessity that certain state obligations are fulfilled – e.g. effective control of territory – remains. Once again a “residual” or “complementary responsibility” of other states or the international community appears to be legally tangible. However, in certain areas international law seems to reorient its focus from addressing “unwilling or unable states” or the international community towards obliging individuals that take advantage of a state’s passivity or even step into its role and fulfil essential state task. The unwillingness or inability of states raises questions as to the role of individuals.

D. Methodology
The starting point of my research will be the identification of international law de lege lata and its systematization. I will approach this question from an internal legal perspective applying genuinely legal methods being well-aware of the limitations of this disciplinary approach.

In General
In accordance with the generally accepted methodological approach to international law I will refer to the formal sources of international law – treaty law, customary international law and general principles of international law – while taking informal sources as indicators of a certain opinio iuris into account and employing them as auxiliary devices in the process of norm interpretation. I will identify relevant rules, determine their substance, detect normative patterns and structures and display them in a systematic manner.

My research project does, however only focus on the “law as it stands” but intends to evaluate the primary discourse about given norms and their valid interpretations critically from an internal but secondary perspective (discourse about discourse). This meta-analysis will include the following aspects: I will identify the relevant actors participating in the debate, dissect their claims, contextualize them into different strands of legal thought and unveil their motivations and agendas. I submit that in many instances the relevant actors mask arguments that are in fact directed at a change of law as statements de lege lata.

Going beyond pure legal methodology I will complement my investigation by directly taking recourse to insights of neighbouring disciplines. I do not aim to implement a truly integrated interdisciplinary approach which would weld concepts and methods of different disciplines. My perspective will remain internal to law whose autonomy should be preserved. I will use non-legal data and external findings on the one hand as heuristic devices in order to contextualize my legal research problem into the “world as it is” which will possibly serve as an inspiration for legal arguments. On the other hand I will employ neighbouring disciplines as auxiliary means for developing arguments where conventional legal methodology and reasoning reaches its limits. Here I will firstly consider problem-relevant additional information and arguments generated by other disciplines and make use of the conceptual frameworks they provide to evaluate this information. Secondly, I will analyze whether these concepts and arguments can sensibly be incorporated into the legal realm. Thirdly, I will process them through the legal lens, establish why they constitute legally valid concepts and arguments thereby transforming them into legal terms.

24 Proulx, 2013.
25 See generally contributions in Noortmann/Reinisch/Ryngaert (eds.), 2015.
26 In this context theories on global governance might give beneficial insights, Züm, 2005; Rosenau/Czempiel (eds.), 1992; Barnett/Sikkink, 2010.
28 Huutoniemi et al., 2010.
29 Klabbers, 2005.
30 See Taekema/van Klink, 2011.
31 v. Arnauld, 2015, p. 76.
In Particular

An analysis of the problem of anthropomorphisms in legal doctrine would be incomplete without taking into account psychological, anthropological, linguistic, political and sociological scholarship and particularly International Relations theory. General theories of punishment also employed by criminal law might prove helpful to enlighten the idea of a state’s “will”, its correlation with “awareness”, “intention”, “negligence” and culpa as well as the concept of “omission” itself. Philosophy is also of the utmost importance in order to grasp the interrelatedness of “ability” and an “obligation to act”.

Most importantly I will consult social sciences, especially International Relations theories, in the course of my analysis. Heuristically, social science scholarship will become relevant in order to illustrate the social reality of “unwilling or unable states”. Here I will take recourse to literature on failed, failing and dysfunctional states. Furthermore social science studies will be significant for identifying state practice. The external perspective of the social science discipline will also potentially facilitate an internal critique of the “law as it stands” and the discourse constituting it.

Beyond that international relations scholarship will serve as auxiliary means where I will not be able to solve questions solely within the system of law, and where the application of legal theory and methodology will produce insufficient answers: This will concern first of all the emergence of new customary law. Secondly, arguing that a certain interpretation would contravene the very purpose of the law which is to shape reality – as frequently employed within legal discourse – is only sensible if it is understood how law works in practice. This is not satisfactorily explained by the legal discipline alone. An internal critique of the jurisgenerative discourse of international law is only possible if insights from neighbouring disciplines are taken into account. My research project will conclude by displaying certain rationales that from my point of view should guide decisions of actors who have the power to politically shape international relations. Here I will not limit myself to a point of view internal to law but incorporate to a certain extent also external views on possible de lege ferenda developments.

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32 Häfelin, 1959.
33 Boyer, 1996.
E. Research Project Visualization

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G. Unwillingness and (In)capacity of States – Who determines?
H. The "Unwilling or Unable" Formula – A Deconstruction
   I. International Law and "Unwilling or Unable States" – A Policy Perspective

G. Preliminary Biography

Rotberg, Robert I.  


Sepúlveda, Magdalena  


Thürer, Daniel  


