Disentangling the Unwilling or Unable Standard for Foreign Intervention

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International lawyers have long been troubled by terrorist threats located within the sovereign territory of third-party states, and how to justify unilateral intervention against them. Recent scholarship has focused on the so-called "unwilling or unable standard" – a controversial theory that permits intervention when host states are unwilling or unable to prevent their territory from being used as a launching pad for an unlawful attack.

Little attention has been paid to whether the two prongs of the standard – unwilling or unable – are justified by the same underlying theory. The following essay suggests that they are not and that different doctrinal standards apply to each. States that are *unwilling* to address a burgeoning terrorist threat within their territory are culpable for their own deliberate inaction – a form of recklessness or negligence. This culpability provides a normative basis for the infringement of their sovereignty caused by the foreign intervention.

However, states that are *unable* to address a terrorist threat do not display the same culpability and therefore the same underlying theory cannot provide the justification for this half of the doctrine. Indeed, it may be the case that intervention against such non-culpable states is one of the very rare situations in international law that produces a bona fide conflict of rights. In normal conflicts, one side is unjustified (the aggressor) and the other side is justified in responding in self-defense (the victim). But in a true conflict of rights, both sides might have equal rights against each other and the law is agnostic between them. Might intervention against non-culpable states represent one such conflict of rights? The follow Essay critically examines the possibility that states *unable* to stop terrorist attacks might have a right of response even though other states also have a right of intervention – two seemingly incompatible rights.