

**Actor-pluralism, the ‘turn to responsibility’ and the *jus ad bellum*:
‘Unwilling or unable’ in context**

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With the increasing (although by no means uniquely modern) phenomenon of un-attributable NSA cross-border violence, a purely inter-state-rights based approach to Article 51 of the UN Charter is not (if ever indeed it was) sustainable. The *jus ad bellum* does, and should, reflect broader shifts in general international law. This article argues that (i) the ever increasing but nevertheless long-standing diversity of actors in modern international law is accommodated within a pluralistic conception of the UN Charter; (ii) the increasingly recognised shift in international law from ‘sovereignty as right’ to ‘sovereignty as responsibility’ is contextually relevant in interpreting the right to use force in self-defence; and that (iii) together, these broader shifts in general international law, as reflected in the *jus ad bellum*, support and inform the legal basis of a victim state’s right to use defensive force in a foreign host state’s territory in response to un-attributable armed attacks by NSAs, both via the ‘unwilling or unable’ doctrine.

Self-defence; Unwilling or Unable; Actor-pluralism; Sovereignty as Responsibility; Non-State Actors

*Is [the state] willing to prevent evil, but not able? Then [it] is not omnipotent. Is [the state] able, but not willing? Then [it] is malevolent. Is [the state] both able and willing? Then whence cometh evil?*¹

There has been much written on the evolution of the international legal order – from one which exclusively addresses and protects state interests to one which addresses non-state actors (NSAs)² and balances (or increasingly prioritises) important human interests against state interests.³ The recurring themes of these contributions are the increasing pluralism of

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¹ Original quote articulates the ‘problem of evil’ and is attributed to Epicurus in David Hume, *Dialogues Concerning Natural Religion* (1779), D.10.25, available at <http://www.davidhume.org/texts/dnr.html>.

² See Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford University Press, 2005); Antonio Cassese ‘States: Rise and Decline of the Primary Subjects of the International Community’ in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press, 2012); and Anthea Roberts and Sandesh Sivakumaran, ‘Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law’ (2012) 37 *Yale Journal of International Law* 107.

³ See Ruti Teitel, *Humanity’s Law* (Oxford University Press, 2011); Anne Peters, ‘Humanity as the A and Ω of Sovereignty’ (2003) 20 *European Journal of International Law* 513; Johan D Van der Vyver, ‘Sovereignty and Human Rights in Constitutional and International Law’ (1991) 5 *Emory International Law Review* 5 321; and Michael Reisman, ‘Sovereignty and Human Rights in Contemporary International Law’ (1990) *American*

actors and rights holders / obligation bearers in the international legal order⁴ and the ever brightening spotlight on human rights and human security (conceptualised in part in terms of ‘sovereignty as responsibility’⁵). Their focus, however, has tended to be in respect of the development of human rights law and international criminal justice. Where these themes inform discussions on the *jus ad bellum*, they have done so principally in respect of humanitarian intervention and the ‘Responsibility to Protect’ (R2P).⁶ But these shifts in international law also influence (and are influenced by) debates regarding the right to use force in self-defence. For instance, to what extent does the UN Charter, and Articles 2(4) and 51 in particular, accommodate the increasing plurality of actors in the international legal order? And must individual rights to life and physical integrity – particularly in their positive conception (imposing an obligation on states to protect individuals within their jurisdiction) – give way to a third party state’s right to territorial integrity? These are some of the questions at stake in *jus ad bellum* debates about a victim state’s⁷ right to use force in self-defence in response to un-attributable armed attacks by NSAs launched from a foreign host state’s⁸ territory.

With the increasing (although by no means uniquely modern) phenomenon of un-attributable NSA cross-border violence, a purely inter-state-rights based approach to Article 51 of the UN Charter is not (if ever indeed it was) sustainable. The *jus ad bellum* does, and should, reflect broader shifts in general international law. This article argues that (i) the ever increasing but nevertheless long-standing diversity of actors in modern international law is accommodated within a pluralistic conception of the UN Charter; (ii) the increasingly recognised shift in international law from ‘sovereignty as right’ to ‘sovereignty as responsibility’ is contextually relevant in interpreting the right to use force in self-defence; and that (iii) together, a pluralistic conception of the UN Charter, and the ‘turn to responsibility’ in international law, support and inform the legal basis of a victim state’s right to use defensive force in a foreign host state’s territory in response to un-attributable armed attacks by NSAs.

By way of introduction, this article will first give an account of a classical inter-state-rights based approach to Article 51 of the UN Charter (and its interaction with Article 2(4)) and the difficulties that arise under such an approach (section I), before turning to the modern contexts of actor-pluralism in the international legal order (section II) and ‘sovereignty as responsibility’ (section III) within which Articles 2(4) and 51 operate. Informed by this international legal context, section IV will lay out alternative interpretive approaches to self-defence, as an independent right (IV.ii) or a responsive right (IV.iii), each permitting the use

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⁴ See Kate Parlett, *The Individual in the International Legal System; Continuity and Change in International Law* (Cambridge University Press, 2010); Paul Berman, *The Globalisation of International Law* (Ashgate, 2005); Robert McCorquodale, ‘An Inclusive International Legal System’ (2004) 17 *Leiden Journal of International Law* 477; and Gunther Teubner, *Global Law without a State* (Dartmouth, 1997).

⁵ For an early account, see Francis M Deng (ed), *Sovereignty as Responsibility: Conflict Management in Africa* (Brookings Institution Press, 1996); Francis M Deng, ‘Frontiers of Sovereignty: A Framework of Protection, Assistance, and Development for the Internally Displaced’ (1995) 8 *Leiden Journal of International Law* 249.

⁶ See, for example, Philip Alston and Euan Macdonald (eds), *Human Rights, Intervention, and the Use of Force* (Oxford University Press, 2008); Jutta Brunnée and Stephen J Toope, ‘The Responsibility to Protect and the Use of Force: Building Legality?’ (2010) 2 *Global Responsibility to Protect* 191; Jennifer M Welsh, ‘From Right to Responsibility: Humanitarian Intervention and International Society’ (2002) 8 *Global Governance* 503; and Report of the International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect* (2001).

⁷ ‘Victim state’ will be the term used throughout this article to describe the state in whose territory (and against whose inhabitants) a cross-border armed attack is launched by NSAs.

⁸ ‘Host state’ will be the term used throughout this article to describe the state from whose territory NSAs launch an armed attack, and in whose territory defensive force is used in response to the NSA armed attack.

of defensive force in a host state's territory in response to un-attributable armed attacks by NSAs by way of the now familiar doctrine of 'unwilling or unable.'⁹

For present purposes, the 'unwilling or unable' doctrine is understood as the basis for a victim state's use of defensive force against (and only against) NSAs operating from a host state's territory, in response to un-attributable cross-border armed attacks by those NSAs, when the host state is unwilling or unable to prevent its territory from being used by NSAs to the detriment of the victim state's security interests (manifested in the form of an armed attack by NSAs against that victim state and those subject to its jurisdiction¹⁰). The doctrine responds to the requirement that a use of force in self-defence be 'necessary' as a matter of customary international law.¹¹

I. A purely inter-state and responsive reading of the *jus ad bellum*

The Article 2(4) UN Charter prohibition on inter-state force suggests a classical conception of international law in which states are the exclusive actors. This is because the prohibition is directed *at* states, and prohibits force *between* states – and is, to that extent, 'state-centric', apparently leaving little room to accommodate a pluralistic approach to the international legal order or the actors that operate within it. In its formulation of the prohibition on the use of force, Article 2(4) can also be read as articulating a rights-based conception of state sovereignty – in the form of a right to territorial integrity and political independence (read by some commentators as combining in a right to territorial inviolability¹²), protected by a broad prohibition.

The possibility for a state to use force in self-defence in another state's territory has generally been understood as a responsive measure.¹³ On this understanding of the UN Charter, there are two necessary elements of a right to use force in self-defence. First, the state in whose territory defensive force is used must have been responsible for a prior breach of Article 2(4) – its right to territorial integrity or inviolability is breached responsively (in the sense that the defensive force used is a form of countermeasure).¹⁴ Secondly, there must have been an armed attack (which is the trigger for the right to use force in self-defence under Article 51 of the UN Charter). And a purely inter-state-rights based reading of the prohibition on the use of force evidently coloured the responsive understanding of Article 51 in the decades following adoption of the UN Charter. If the UN Charter is understood in purely inter-state terms, such that it does not admit NSAs into the *jus ad bellum* narrative, these two necessary elements of lawful self-defence become entirely co-extensive. The result, of course, is that where there is no prior breach of Article 2(4) by the state in whose

⁹ For detailed discussions of 'unwilling or unable' in reference to self-defence, see Kimberley Trapp, 'Back to Basics: Necessity, Proportionality, and the Right of Self-Defence against Non-State Terrorist Actors' (2007) 56 *International and Comparative Law Quarterly* 141; and Ashley Deeks, 'Toward a Normative Framework for Extraterritorial Self-Defense' (2012) 52 *Virginia Journal of International Law* 483.

¹⁰ This article is principally addressing the right to use force in self-defence and the 'unwilling or unable' doctrine in the context of cross-border NSA armed attacks which imperil human life. As a result, the phrase 'subject to its jurisdiction' will be used to designate individuals within a victim state's own territory whose lives are threatened by cross-border NSA violence, in order to highlight that such individuals are owed positive human rights obligations by the victim state, as discussed in section III below.

¹¹ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (merits) [1986] ICJ Reports 14, para 176.

¹² Lassa Oppenheim, *International Law: A Treatise* (Hersch Lauterpacht (ed), David MacKay, 7th ed 1952) vol II, 154.

¹³ See Roberto Ago, *Eighth Report on State Responsibility – The Internationally Wrongful Act of the State, Source of International Responsibility*, UN Doc A/CN.4/318/Add.5-7 (1980) 15, para 4 (and accompanying footnotes).

¹⁴ *Ibid.*

territory defensive force is used (in the very particular form of a wrongful ‘armed attack’ by *that state*), there is no right of self-defence. While nothing in the language of the UN Charter limits ‘armed attack’ to attacks carried out by states,¹⁵ many commentators remain committed to such a reading of the interaction between Articles 2(4) and 51.¹⁶

Such an account, however, fails to address an issue of great contemporary importance in international law: how does the *jus ad bellum* respond to the realities of a world in which there are both states and NSAs – particularly when NSAs have the capacity to launch attacks rivalling that of states? If the interaction between Articles 2(4) and 51 only contemplates state actors, such that the right to territorial integrity is qualified *if and only if* the state in whose territory defensive force is used is the author of a particular type of Article 2(4) breach (in the form of an armed attack), then either (i) states cannot defend themselves and individuals subject to their jurisdiction against armed attacks by NSAs through force in a foreign host state’s territory without consent; or (ii) a host state’s failure to prevent its territory from being used as a base of NSA operations is grounds for attributing cross-border attacks by those NSAs to the host state.

Neither of these options is satisfactory. The suggestion that the UN Charter requires a state (as a matter of legal obligation) to sit idly by while persons subject to its jurisdiction are attacked from across a border by NSAs is wildly unrealistic – the UN Charter is *not* a Suicide Pact,¹⁷ and requiring such passivity is hardly consistent with the reading of the UN Charter as protecting the ‘sovereignty of peoples.’¹⁸ It is also inconsistent with a careful reading of the UN Charter *travaux préparatoires*, the International Court of Justice (ICJ)’s case law, and modern state practice.¹⁹ This article will further argue that such a reading of the UN Charter fails to reflect broader shifts in international law: in particular, the increasing actor-pluralism of the international legal order and conceptions of sovereignty as responsibility, each as explored below. Such a reading of the UN Charter does, however, reflect the socio-legal context within which Articles 2(4) and 51 were interpreted in the decades following the conference in San Francisco.²⁰ But interpretations that reflect a particular legal context need to evolve with that context, and so it is with the UN Charter.²¹

The second approach tries to have it both ways – it acknowledges and addresses the danger posed by NSAs, while remaining committed to an inter-state-rights based approach to the interaction between Articles 2(4) and 51. The legal device relied on to achieve this is to

¹⁵ See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (advisory opinion) [2004] ICJ Reports 135, separate opinion of Judge Higgins, para 33; Kimberley Trapp, ‘Self-Defence in Response to Armed Attacks by Non-State Actors’ in Marc Weller (ed), *Oxford Handbook on the Use of Force* (Oxford University Press, 2015).

¹⁶ This author has, elsewhere, accepted the long advanced ‘responsive’ account of the interaction between Articles 2(4) and 51 of the UN Charter (in Kimberley Trapp, ‘The Use of Force against Terrorists: A Reply to Christian J. Tams’ (2009) 20 *European Journal of International Law* 1049), but nevertheless argued that the UN Charter addresses armed attacks by NSAs via the ‘unwilling or unable’ doctrine. This article represents further reflection on that approach, in addition to exploring a reading of Article 51 as a right that is independent of a prior Article 2(4) breach.

¹⁷ See Deputy Secretary-General, ‘International Community Must Address Challenges to UN Charter Principles’, Asian Security Conference, New Delhi, UN Doc DSG/SM/212 (27 January, 2004).

¹⁸ Kofi Annan, ‘Two Concepts of Sovereignty’ (1999) *The Economist* (‘[s]tate sovereignty, in its most basic sense, is being redefined – not least by the forces of globalisation and international co-operation. States are now widely understood to be instruments at the service of their peoples, and not vice versa’).

¹⁹ This article will not explore these inconsistencies, which have been dealt with in some detail elsewhere. In particular, the case for the ‘unwilling or unable’ doctrine, as reflecting state practice and *opinio juris*, has been set out in Trapp (n 9); Kimberley Trapp, *State Responsibility for International Terrorism* (Oxford University Press, 2011) § 2.2.3; and Trapp (n 15).

²⁰ See Christian Tams, ‘The Use of Force against Terrorists’ (2009) 20 *European Journal of International Law* 359, 362-371.

²¹ See n 83 – n 85 and accompanying text.

argue that the rules of attribution have shifted in favour of a standard of complicity, at least in the terrorism or NSA use of force context.²² The result is rather elegant in legal terms: the armed attack launched by NSAs from a host state's territory is attributable thereto, and the use of defensive force in that state's territory by the victim state is therefore responsive to an armed attack committed by the very state whose territorial integrity is breached for defensive purposes. This approach remains committed to an inter-state reading of Article 2(4) and a responsive approach to Article 51, in that NSA conduct is not addressed on its own terms – the mechanism of attribution effectively ‘disappears’ NSAs from the legal analysis of the interaction between Articles 2(4) and 51. Such an argument, however, does unnecessary violence to both the rules of attribution as articulated by the International Law Commission (ILC),²³ and the relationship between law and fact,²⁴ all in the name of legal coherence with an inter-state-rights based approach to the *jus ad bellum* that no longer reflects the nature of the international legal system within which the UN Charter operates (as explored in sections II and III below). Such an approach also fails to address the circumstances in which a state is willing but not able to prevent its territory from being used as a base of NSA activities, with diligent efforts limited by capacity which cannot be characterised as complicity.

II. Actor-pluralism in the UN Charter

While the UN Charter was negotiated in the immediate aftermath of a global inter-state conflict, it nevertheless can (and does) accommodate the increasing diversity of actors in the evolving international legal order. Indeed, in the 21st century, both the General Assembly and the Security Council have moved past addressing threats to international peace and security as though states are the exclusive actors – attending to threats emanating from NSAs on their own terms. This section will therefore argue that the UN Charter is no longer, if ever it strictly was, exclusively state-centric.

i. The broader ‘actor-pluralism’ of the UN Charter collective security context

Chapter VII of the UN Charter provides the window through which a collective security framework designed in the aftermath of a global inter-state conflict might address NSA threats *directly*. It is true that the Security Council's broad powers in regard to ‘any threat to the peace, breach of the peace, or act of aggression’ under Article 39 and Chapter VII were

²² See Tams (n 20).

²³ See Article 8, Commentary to Part Two, Chapter I, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, in Report of the International Law Commission on the work of its fifty-third session, UN Doc A/56/10 (2001) 31 (‘ILC Articles on State Responsibility’). In particular, complicity as a basis of attribution (at least in the state responsibility context) has been rejected expressly by the ICJ in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (judgment) [2007] ICJ Reports 43, para 432, and implicitly by the Court long before that in *United States Diplomatic and Consular Staff in Tehran (United States of America v Islamic Republic of Iran)* (‘*Tehran Hostages*’) (judgment) [1980] ICJ Reports 3. The Court noted in *Tehran Hostages* that the failure of the Iranian Government to take any steps to prevent the seizure of and to protect the US Embassy was due to more than mere negligence or lack of appropriate means (para 63). The failure to act contained a measure of advertence and deliberateness, particularly given evidence that Iran had protected the US Embassy in the past (paras 14 and 64) and that Ayatollah Khomeini had compelled the revolutionaries to hand over other hostages (para 21) or to leave other seized Embassies (para 65). In the circumstances, Iran's conduct could certainly have been characterised as complicity, but the Court only held that the hostage situation was attributable to Iran when Khomeini had adopted the conduct and set conditions for its perpetuation, implicitly rejecting complicity as a basis of attribution.

²⁴ See Trapp (n 19) 61. For further discussion, see James Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2014) §5.4.2.

originally conceptualised in keeping with the centrality of the state in international relations – threats were expected to emanate from states, even if it was understood that they might result from a state’s relationship with NSAs. For instance, proposals in San Francisco regarding the scope of Chapter VII powers, while highlighting that NSAs might pose a threat insofar as they are supported or tolerated by states,²⁵ and thereby recognising that states are not the only actors capable of threatening international peace and security, nevertheless viewed NSAs as derivative threats – capable of acting on the international stage in virtue of the action or inaction of states. Similarly, the ‘Definition of Aggression’ adopted by the UN General Assembly²⁶ for the purposes of guiding the Security Council in the exercise of its Chapter VII powers²⁷ considers NSAs as capable of being a threat to international peace and security (i.e., capable of engaging in acts of aggression) insofar as their conduct is attributable to a state.²⁸ Indeed, in the decades following the adoption of the ‘Definition of Aggression,’ the Security Council principally addressed NSA threats to international peace and security through the prism of state obligations to prevent their activities, eliminate their weapons supplies and exercise control over their territories.²⁹

All this said, Chapter VII, along with the rest of the UN Charter, was drafted with a view to dynamic application.³⁰ A number of states, even while expressing concern over the breadth of the Security Council’s powers and the balance of power between its permanent members and the General Assembly, accepted the need for flexibility in defining the scope of those powers to ensure the future relevance of the collective security system.³¹ The Czechoslovakian (as it then was) government expressed this approach to Security Council powers well: ‘the new Organization should possess the widest powers and should retain sufficient flexibility to be capable of organic growth and of mastering any situation that may arise.’³²

Much has been written on the evolution of the Security Council’s use of its Chapter VII powers.³³ In one aspect, and broadly speaking, that evolution has tracked the increasingly independent operation of NSAs and their impact on international peace and security. The Council today, in its exercise of Chapter VII powers, is not unduly restrained by the Westphalian view of the international legal order which may have prevailed in 1945. In the 21st century, the collective security apparatus of Chapter VII more than accommodates the multiplicity of actors within the international legal system – and does so whether or not NSA capacity is tied to their relationship with one or more states. On numerous occasions,

²⁵ See Doc 2, G/14(b) (1 May 1945) 3 United Nations Conference on International Organization Documents (UNCIO) 469 (Czechoslovakia). See also Doc 2, G/14(k) (5 May 1945) 3 UNCIO 538 (the Philippines); and Doc. 2, G/14(r) (5 May, 1945) 3 UNCIO 578 (Republic of Bolivia).

²⁶ GA Resolution 3314 (1974) Annex.

²⁷ See Special Committee on the Question of Defining Aggression, Seventh Session, UN Doc A/AC.134/SR.110-113 (18 July 1974) 39 (UK).

²⁸ See Art 3(g), UN Definition of Aggression, GA Resolution 3314 (1974) Annex.

²⁹ See, for example, SC Resolution 748 (1992) (in respect of Libya and terrorist groups); SC Resolution 820 (1993) (in respect of weapons destined for Bosnian Serb forces); SC Resolution 864 (1993) (in respect of weapons destined for UNITA through Angolan territory); and SC Resolution 1267 (1999) (in respect of Taliban controlled territory and Bin Laden).

³⁰ See n 83 – n 87 and accompanying text.

³¹ See, for example, Doc 2, G/7 (d)(1) (31 October 1944) 3 UNCIO 189 (Venezuela) 190-191 and 203-205; Doc. 2, G/7(j), and 3 UNCIO 306 (1 May 1945) 313 (the Netherlands).

³² Doc 2, G/14(b) (n 25) (Czechoslovakia).

³³ See Vera Gowlland-Debbas, ‘Security Council Enforcement Action and Issues of State Responsibility’ (1994) 43 *International and Comparative Law Quarterly* 55; Stefan Talmon, ‘The Security Council as World Legislature’ (2005) *American Journal of International Law* 175; and Vaughan Lowe, Adam Roberts, Jennifer Welsh and Dominik Zaum (eds) *The United Nations Security Council and War: The Evolution of Thought and Practice Since 1945* (Oxford University Press, 2010).

the Council has directly addressed the activities of armed groups, terrorist organisations, and individual terrorists –including without tying the threat posed by such NSAs to the action or inaction of a state.³⁴

ii. *The limited ‘state-centricity’ of the jus ad bellum provisions of the UN Charter*

While Articles 2(4) and 51 of the UN Charter have long been read to reflect an international legal order in which states are the principal (even exclusive) actors, such a legal order no longer exists. Interpretations of the UN Charter prohibition on the use of force and right to use force in self-defence must account for subsequent agreement between the parties and subsequent practice,³⁵ and must be responsive to the evolving nature of threats to international peace and security and the international legal system generally.³⁶ Indeed, the subsequent agreement and practice of states will evidently inform and reflect this evolution, including the modern context of actor-pluralism generally and the Security Council’s recognition of NSAs as a threat to international peace and security specifically.

(a) *Article 51 right to use force in self-defence*

Article 51 of the UN Charter does not exclude NSAs, even if it very evidently does not address them expressly. Nothing in the language of Article 51 suggests that uses of force that rise to the level of ‘armed attack’ can only be carried out by states, and the negotiating history of the UN Charter does not support interpreting ‘armed attack’ as ‘armed attack by a state.’³⁷ Indeed, an approach to a state’s right of defence which admits and addresses the risk posed by NSAs is significantly more in keeping with pre-Charter practice than one which requires the attributability of NSA conduct or excludes NSAs entirely. In the pre-Charter era (or at least pre-Kellogg Briand Pact), there was of course no legal reason for states to invoke self-defence as a justification for a use of force in another state’s territory (because such force was not prohibited). Nevertheless, in the context of otherwise peaceful relations, states felt compelled to justify incursions into other states’ territories in response to cross-border attacks by NSAs, if not in the legal sense, then certainly in a diplomatic sense, ‘to avoid their conduct being characterised as “crude expansionism.”’³⁸

With the increase in NSA insurgencies and cross-border terrorism in the late 20th and early 21st centuries, it is clear that this earlier appreciation of the role NSAs might play in threatening international peace and security, to which a response would be necessary, has re-emerged. In the last 20 years, states have not infrequently invoked the right to use force in self-defence in response to cross-border armed attacks by NSAs, many such invocations broadly supported by the international community.³⁹ While there is no doubt that in the decades following the adoption of the UN Charter, the interpretation of Article 51 was somewhat straight-jacketed by a Westphalian state-centric approach to the international legal

³⁴ See, for example, SC Resolution 1493 (2003) (imposing a cease-fire on all parties to the conflict in the eastern part of the DRC); SC Resolution 1509 (2003) (demanding all parties to the Liberia conflict cease using of child soldiers and all human rights violations and atrocities); SC Resolution 1701 (2006) (calling on Hizbollah to cease all attacks); SC Resolution 1863 (2009) (calling on the parties to the conflict in Somalia to cease hostilities); SC Resolution 2071 (2012) (calling upon Malian rebel groups to cut off all ties to terrorist organizations); and SC Resolution 2178 (2014) (demanding that all foreign terrorist fighters disarm and cease all terrorist acts).

³⁵ Article 31(3) Vienna Convention on the Law of Treaties, 22 May 1969, 1155 UNTS 331 (‘VCLT’).

³⁶ See n 83 – n 85 and accompanying text.

³⁷ See Trapp (n 15).

³⁸ See Ago (n 13) 38, para 55.

³⁹ See n 106 and accompanying text.

order, state practice (in responding with defensive force to armed attacks by NSAs) reflects the actor-pluralism of the international legal order that prevails today.⁴⁰

(b) *Article 2(4) prohibition on the use for force*

The prohibition on the use of force in Article 2(4) is directed *at* states, and prohibits force *between* states: to that extent it is ‘state-centric’. It does not, on its face, accommodate the pluralism of actors operating within the international legal system. In particular, Article 2(4) does not directly prohibit the use of force *by* NSAs, nor does it speak to uses of force by states *against* NSAs. To say so, however, need not be by way of signalling the ‘death’ of Article 2(4),⁴¹ but is merely to acknowledge that the UN Charter is a treaty addressing itself to the conduct of ‘international relations’,⁴² and that the prohibition was framed in the aftermath of a global inter-state conflict. While Thomas Franck’s concern, famously expressed in 1970, over the demise of Article 2(4) in light of the rise of state support for foreign NSA insurgencies⁴³ may well have underestimated the capacity for treaty based law to be read in light of an increasingly pluralistic world order, he is not alone in focusing on the restrictions on self-defence imposed by a purely inter-state reading of the interaction between Articles 2(4) and 51. Such a reading is commonly (although, as argued in section I above, should not be) the basis for arguments regarding attributability as a *sine qua non* for the use of defensive force in foreign territory in response to armed attacks by NSAs.⁴⁴

This particular ‘state-centricity’ of the UN Charter prohibition on the use of force, however, is not the whole story. States commenting on the Dumbarton Oaks proposals were already looking beyond the WWII model of invading national armies towards a more nuanced approach to the different ways in which states might affect international peace and security. In particular, several states called attention to the possibility of ‘[state] support to armed bands formed in [its] territory which have invaded the territory of another state, or refusal, notwithstanding the request of the invaded state, to take in its own territory all the measures in its power to deprive these bands of all assistance or protection.’⁴⁵

It is therefore not surprising that – as a strict matter of treaty interpretation – Article 2(4) does not ignore the possibility that states might use force against the territorial integrity or political independence of other states *through* NSAs. Indeed, this is the way in which Article 2(4) has been interpreted by the UN General Assembly. In its Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, adopted by consensus, the General Assembly proclaimed 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.⁴⁶

⁴⁰ See n 19 and n 107.

⁴¹ Thomas M Franck, ‘Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States’ (1970) 64 *American Journal of International Law* 809.

⁴² The *travaux préparatoires* of the UN Charter suggest that that states understood ‘international relations’, the context within which the Article 2(4) prohibition operates, as nothing more than ‘inter-state relations.’ See generally 3 UNCTAD i.

⁴³ Franck (n 41).

⁴⁴ See n 13 and n 22.

⁴⁵ Doc 2, G/14(b) (1 May 1945), n 25 (Czechoslovakia).

⁴⁶ UN Doc A/RES/25/2625 (24 October 1970), para 1 (‘Declaration on Friendly Relations’). The ICJ has similarly interpreted the prohibition in Article 2(4) as one which extends to a state’s military support for NSAs.

This duty was one of several enumerated as incorporated in the broad prohibition on the use of force set out in Article 2(4). Of interest, the UN Declaration on Friendly Relations recognised that both action (organising, instigating, assisting or participating in the use of force by NSAs) and *inaction* (host state acquiescence in, or deliberate failure to prevent, NSA cross-border uses of force) can breach the prohibition on the use of force in international relations. In so doing, the General Assembly highlighted that the UN Charter should not be read as adopting a purely inter-state approach to the *jus ad bellum*. Rather, in at least this one aspect, Article 2(4) addresses a plurality of actors, in particular NSAs that might engage in ‘acts of civil strife or terrorist acts in another State.’

While Article 2(4) of the UN Charter is not so pluralistic in its approach as to directly prohibit NSAs from using force, it does allow for piercing the statehood veil, looking through to the relationship between states and NSAs (whether one of active support or passive complicity), and recognises that NSA violence can affect international peace and security. In so doing, it reinforces the centrality of the state in international law (by viewing the activities of NSAs through the prism of their relationship with states), while embracing conceptions of sovereignty that emphasise responsibility (in affirming a state’s responsibility to exercise control throughout its territory), as discussed further in section III below.

III. The ‘turn to responsibility’

*Is [the state] willing to prevent evil, but not able? Then [it] is not omnipotent. Is [it] able, but not willing? Then [it] is malevolent.*⁴⁷

The 19th century positivist notion of sovereignty as ‘exclusive authority over discrete parcels of territory’⁴⁸ was understood principally in terms of legal competence or right.⁴⁹ ‘Authority’ in this sense was *actualisable* at the state’s discretion – rather than a factual account of the control or ‘authority’ a state *actually* exercised over its territory. Given that sovereignty was framed in terms of exclusive rights coupled with broad discretion, it acted as a cloak, obscuring from international scrutiny whether (and how) authority was exercised within its folds. For all intents and purposes, a sovereign state was omnipotent – at least presumptively so in the sense that it was impermissible to peek beneath the cloak of formal sovereign equality and question a state’s *capacity* to exercise its exclusive authority (except in the context of title to territory). Nor would much have hung on the answer, had such enquiries been entertained: international law in the 19th Century had very little to say about the manner in which states ought to exercise their sovereignty or exclusive territorial authority.

Such an account of sovereignty very evidently did not survive into the 20th Century, as it is incompatible with an increasingly inter-dependent and globalised international legal order (with its cross-border flow of goods and people, making national borders permeable – both in fact and in some cases in law), particularly one which legally protects human security and dignity.⁵⁰ These developments do not of course signal the end of a system of

Nicaragua (n 11), para 228. On the Court’s distinction between military support and financial support, and its failure to appreciate that the UN Declaration on Friendly Relations also includes inaction (acquiescence) in its enumeration of duties resulting from the prohibition in Article 2(4), see Trapp (n 19), § 2.1.2.

⁴⁷ See n 1.

⁴⁸ Daniel Bethlehem, ‘The End of Geography: The Changing Nature of the International System and the Challenge to International Law’ (2014) 25 *European Journal of International Law* 9.

⁴⁹ See Alex Mills, ‘Rethinking Jurisdiction in International Law’ (2014) 84 *British Yearbook of International Law* 187.

⁵⁰ See Louis Henkin, ‘The Mythology of Sovereignty’ (1992) *Proceedings of the Annual Conference of Canadian Council on International Law*; ‘Away with the ‘S’ Word!’, March-May 1993 *ASIL Newsletter*;

international law based on sovereign territorial units⁵¹ and the birth of John Lennon's 'Imagine[d]' world.⁵² But they have shifted the modern narrative of sovereignty, which is now as much about responsibilities as it is about rights, and concerns itself with questions of *whether* and *how* exclusive territorial authority is exercised in the interests of the people which it serves.⁵³

An account of sovereignty that speaks to both rights and associated responsibilities has long been accepted in the human rights context. In the *jus ad bellum* context, a rights-based conception of sovereignty has been more enduring – but not without caveat. For instance, the Declaration on Friendly Relations, in defining 'sovereign equality,' stresses both the rights inherent in full sovereignty and the duty to comply with international obligations.⁵⁴ And there has been a serious movement to incorporate the 'turn to responsibility' into the *jus ad bellum* narrative in at least one aspect – through the General Assembly's endorsement of the R2P concept.⁵⁵ While the R2P doctrine is widely understood to be political, exercisable only through the collective security apparatus of the UN, and is tied very closely to the developments in conceptions of sovereignty that flow from the human rights framework, it is nevertheless an example of broader shifts in international law reflected in a particular Charter context. This article argues that there are features of this 'turn to responsibility' that are also relevant in the broader *jus ad bellum* context, most particularly as regard the right to use force in self-defence. For present purposes, there are three elements of this 'turn to responsibility' in international law, each as explored below, which form part of the modern legal landscape within which the UN Charter operates and which informs state practice.

i. Responsibility to prevent internal harm

The conception of sovereignty articulated in the now famous Report of the International Commission on Intervention and State Sovereignty (ICISS),⁵⁶ from 2001, is closely tied to UN membership. In particular, the Commission viewed ratification of the UN Charter not as a transfer of sovereignty from a state to an international organisation, but rather as requiring a re-characterisation of sovereignty, from sovereignty as control to 'sovereignty as responsibility' – in fulfilment of the UN mission to promote the interests and welfare of people within Member States ('We the peoples of the United Nations').⁵⁷

This re-characterisation of sovereignty draws on modern human rights law (as an articulation of that UN mission), which pairs rights (protected by negative obligations

International Law: Politics, Law and Functions (1989-IV) 216 *Receuil des cours* 24. See also Hisashi Owada, 'Human Security and International Law' in Ulrich Fastenrath, Rudolf Geiger, Daniel-Erasmus Khan, Andreas Paulus, Sabine von Schorlemer and Christoph Vedder (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press, 2011).

⁵¹ See Bethlehem (n 48).

⁵² 'Imagine there are no countries; It isn't hard to do; Nothing to kill or die for; And no religion too; Imagine all the people; Living life in peace [...]', John Lennon, *Imagine*, Apple Records, release date 11 October 1971.

⁵³ Annan (n18).

⁵⁴ Declaration on Friendly Relations (n 46).

⁵⁵ See UN General Assembly Resolution A/RES/60/1 (2005), adopting the 2005 World Summit Outcome including the responsibility to protect (paras 138 and 139); UN General Assembly A/RES/63/308 (2009), noting the UN Secretary General's report and resolving to continue considering the 'responsibility to protect'. See, further, Louise Arbour, 'The Responsibility to Protect as a Duty of Care in International Law and Practice' (2008) 34 *Review of International Studies* 445; Jutta Brunnée and Stephen J. Toope, 'Norms, Institutions and UN Reform: The Responsibility to Protect' (2006) 2 *Journal of International Law and International Relations* 121; and Carsten Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (2007) *American Journal of International Law* 99.

⁵⁶ Report of the ICISS (n 6).

⁵⁷ *Ibid.*, paras 2.12 and 2.14.

imposed on states) with correlative positive duties. States not only have an obligation to respect rights, but to ensure respect for those rights. As regards the right to life and physical integrity, embodied in all international and regional human rights instrument, individuals are entitled to expect that the state that exercises jurisdiction over them will not be the source of any existential threat, but equally that the state of jurisdiction will do everything within its capacity to protect them from any such existential threat, whatever its source.⁵⁸ This is a feature of the territorial state's 'responsibility to protect'⁵⁹ – by which it is bound to ensure respect for the right to life of those threatened by attack, while respecting the right to life of others (it being understood that it is not a breach to take the life of X, if X is mortally threatening the life of Y, and lethal force is necessary for the purposes of protecting Y).⁶⁰

The legal obligation (responsibility) to prevent internal harm is connected to the *jus ad bellum* by ICISS in the following manner: 'the Charter's strong bias against military intervention is not to be regarded as absolute when decisive action is required on human protection grounds.'⁶¹ While ICISS was contemplating force in the territory of the state that had failed to meet the responsibilities of human protection inherent in sovereignty, the idea that military force may be required in territory *outside* the state seeking to meet those same responsibilities is part of the modern legal landscape, as clearly set out in the ICJ's *Wall* advisory opinion:

The fact remains that Israel has to face numerous indiscriminate and deadly acts of violence against its civilian population. It has the right, and indeed the duty, to respond in order to protect the life of its citizens. The measures taken are bound nonetheless to remain in conformity with applicable international law.⁶²

While the *Wall* opinion was very evidently not addressing an inter-state context in which Article 2(4) is applicable, recognition of the obligation to protect those subject to Israel's jurisdiction against armed attacks by NSAs, as a feature of the 'turn to responsibility' within the human rights framework, also forms part of the legal context within which the *jus ad bellum* provisions of the UN Charter operate.

⁵⁸ See, for example, *Report on Terrorism and Human Rights* [2002] IACmHR, OEA/Ser.L/V/II.116, Doc 5 rev. 1 corr., para 87; *Osman v United Kingdom* [1998] ECtHR (Grand Chamber), application no. 23452/94, paras 115-6; UN Human Rights Committee General Comment No. 6 (1982), para 3; Organisation for Security and Co-operation in Europe, *Countering Terrorism, Protecting Human Rights* (2007, OSCE) 100-1.

⁵⁹ Report of the ICISS (n 6), para 2.22.

⁶⁰ See, for example, IACHR (n 58), para 87; OSCE (n 58) 107; Article 2(2)(a) of the European Convention on Human Rights.

⁶¹ Report of the ICISS (n 6), para 2.27.

⁶² *Wall* (n 15) para 141. Such an account is consistent with very early conceptions of self-defence – which was understood not only as a right, but as a duty – and one owed to persons subject to the state's jurisdiction. See Henry Wheaton, *Elements of International Law* (Little Brown and Co., 6th edn 1857), 86. See also Emer de Vattel, *The Law of Nations* (Richard Kapossy and Béla Whatmore (eds), Liberty Fund, 2008 (1758)), Book III, Section III, §35, 487, in which he characterises self-defence as 'not only the right but the duty of a nation, and one of her most sacred duties'.

ii. Responsibility to prevent external harm

While the ‘turn to responsibility’ in sovereignty terms is strongly tied to international human rights law (as discussed above), there have long been accounts of sovereignty that balanced the rights associated therewith against responsibilities to those *beyond the state’s territorial borders*. In his famous 1928 *Island of Palmas* arbitral judgment, Max Huber had this to say on the matter:

Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a State. *This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war*, together with the rights which each State may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the State cannot fulfil this duty. *Territorial sovereignty cannot limit itself to its negative side, i.e. to excluding the activities of other States; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian.*⁶³

Huber’s account focused on two aspects of state sovereignty – on the one hand, the role it plays in facilitating mutual co-existence,⁶⁴ and, on the other, a conception of state sovereignty which serves human interests and activities.

In regard to the first aspect, Huber’s conception of sovereignty as entailing a duty to protect the rights of other states is perhaps truer today than when articulated over eighty years ago. States have long had a responsibility to prevent their territory from being used as a base of NSA violence against other states,⁶⁵ and that responsibility has emerged as central to the international legal order in the post-9/11 world through Security Council resolutions⁶⁶ and treaty practice. For instance, there are a dozen multi-lateral terrorism suppression conventions, widely ratified, which oblige states to prevent trans-national terrorism from within their territories.⁶⁷ While the obligation to act is territorially limited, it also prioritises international co-operation.⁶⁸ Prevention efforts are thereby tied to a particular state’s territory (over which the territorial state will have ‘exclusive authority’⁶⁹), but the co-operative feature of the obligation recognises that the trans-national nature of terrorist conduct poses a challenge for a legal system committed to geographically limited authority.

The other aspect of Huber’s conception of state sovereignty, which suggests that sovereignty serves the interests (and activities) of those subject to it, is also increasingly part

⁶³ *Island of Palmas Case (Netherlands/US)* [1928] II RIAA, 839, emphasis added.

⁶⁴ See James Crawford, *Brownlie’s Principles of Public International Law* (Oxford University Press, 8th edn 2012) 447 (‘[i]f States are sovereign and equal, sovereignty ‘is in a major aspect a relation to other States...defined by law’).

⁶⁵ This is a long standing obligation of customary international law. See Trapp (n 19) 64.

⁶⁶ In particular, see SC Resolution 1373 (2001) para 2(b).

⁶⁷ See, for example, Article 15(a), Terrorist Bombing Convention, 15 December 1997, UN Doc A/RES/52/164 (1997). For a full list of multi-lateral counter-terrorism treaties, each of which has an obligation to prevent framed in identical terms to the Terrorist Bombing Convention, see https://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2_en.xml.

⁶⁸ For example, Article 15 of the Terrorist Bombing Convention (n 67) requires states to ‘cooperate in the prevention of the offences set forth in article 2, particularly [...] prevent[ing] and counter[ing] preparations in their respective territories for the commission of those offences within or outside their territories’ (emphasis added).

⁶⁹ See n 48.

of the modern discourse in international law. As Kofi Annan has stated: ‘[w]hen we read the Charter today, we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them.’⁷⁰ In one aspect of the *jus ad bellum* – that regarding the contested right to humanitarian intervention – Annan is understood to mean that a state’s sovereignty (and concomitant right to territorial integrity) should not, for its own sake, shield a state so as to provide it with the (legal and physical) space within which to violate individual rights to life and physical integrity. Given the devastating trans-national capabilities of groups of NSAs, and the ‘turn to responsibility’ both within and beyond a state’s territorial borders, the same should be said of the *jus ad bellum* self-defence context. Which is to say that a state’s territorial integrity should not act, *for its own sake*, to shield NSAs so as to provide them with the (legal and physical) space within which to violate individual rights to life and physical integrity, even if those threatened are across a border.⁷¹ Very naturally, as is the case in regard to the conception of ‘sovereignty as responsibility’ in the context of R2P, the territorial (and host) state has primary responsibility to ensure that its territory is not a base from which the rights of individuals (across a border) are attacked. It is for these reasons, as discussed further below, that a use of force in self-defence in the host state’s territory is a measure of last resort.

iii. Capacity

The modern narrative of sovereignty discussed above, which is as much about responsibilities as it is about rights, concerns itself with questions of *whether* and *how* exclusive territorial authority is exercised. These concerns, as they pertain to the responsibility to prevent both internal and external harm, are not only a question of fact. They are also a question of legal obligation. States are under an obligation to both develop relevant capacity, and to use developed capacity to prevent harm within and across their borders.⁷² Both obligations are obligations of conduct⁷³ – which is to say they are subject to a due diligence standard.

An account of sovereignty that requires an evaluation of state capacity should, of course, account for the variable resources of states. While it is not true that some states are more sovereign than others, it is certainly true that some states are better able to meet the responsibilities of sovereignty than others. Owada therefore quite rightly argues that conceptualising sovereignty in terms of responsibility ‘places the emphasis on capacity building [...] and collaboration.’⁷⁴ As regards at least the capacity to prevent trans-national terrorism by NSAs, and following the 9/11 terrorist attacks, the broader UN apparatus has engaged in a ‘capacity building blitz’ the likes of which the international community has not before seen.⁷⁵ States are being afforded every opportunity to develop their counter-terrorism capacities, with a view to assisting states in preventing their territories from being used as bases of trans-national terrorism.⁷⁶

This said, most of the UN capacity building aid relates to developing an institutional capacity to prevent international terrorism. States with limited human and financial resources and trouble maintaining control over parts of their territory (whether because of its distance from central government or its inhospitable terrain) will still have difficulty in putting

⁷⁰ Annan (n 18).

⁷¹ See Teitel (n 3) 219, arguing that increasingly the compromise or suspension of Westphalian norms (including that of territorial integrity) are tolerated where humanity rights are at stake.

⁷² See Trapp (n 19), pp 64-75.

⁷³ See *ibid*, 64.

⁷⁴ Owada (n 47).

⁷⁵ See in general CA Ward, ‘Building Capacity to Combat International Terrorism: The Role of the United Nations Security Council’ (2003) 8 *Journal of Conflict and Security Law* 289.

⁷⁶ See Trapp (n 19), §3.1.3.(ii).

institutional capacity to effective use in preventing NSAs from using their territories as a base of activities. The High Level Panel Report noted in particular that ‘[b]ecause United Nations-facilitated assistance is limited to technical support, states seeking operational support for counter-terrorism activities have no alternative but to seek bilateral assistance.’⁷⁷

iv. The ‘turn to responsibility’ and ‘unwilling or unable’

The ‘turn to responsibility’ in international law, and its implications for conceptions of sovereignty as set out above, dovetails precisely with the ‘unwilling or unable’ doctrine as applied in both the R2P and self-defence contexts (the latter of which is explored further in section IV below). In particular, ‘sovereignty as responsibility’ articulates a version of sovereignty which incorporates a host state’s obligation to prevent assaults against human life and dignity perpetrated on (section III.i above) and from (section III.ii above) its territory. In so doing, it of course contemplates the possibility that states will fail to live up to their sovereign responsibilities, whether because of complicity with the NSAs perpetrating such assaults, or a lack of capacity (and failure or refusal to ‘seek bilateral assistance’) to address NSA activities.⁷⁸

In response to such failures, the ‘unwilling or unable’ doctrine permits targeted responses to protect human life, but does so on different terms in the R2P context (requiring the Security Council to act on behalf of the international community under Article 25 of the UN Charter⁷⁹) than it does in the self-defence context (in which a unilateral response is permissible). This is principally because, in the self-defence context, the obligation to protect life and physical integrity is owed directly by the victim state to those within its jurisdiction (rather than by the international community, thereby implicating the Security Council’s responsibility to act on its behalf).⁸⁰

As discussed further below, the ‘unwilling or unable’ doctrine in the self-defence context effectively incorporates the three features of ‘sovereignty as responsibility’ – it provides legal cover (if necessary) when the victim state meets its human rights obligations to those subject to its jurisdiction (protecting them against existential threats emanating from NSAs operating from a host state’s territory), and responds to the host state’s failure to meet its own sovereign responsibilities (through its breach of the obligation to prevent external harm), based on an evaluation of that state’s capacity to so prevent and any opportunities for co-operative efforts in this regard.

IV. Self-defence in the context of actor-pluralism and the ‘turn to responsibility’

The object and purpose of the United Nations Charter was not merely to respond to threats to international peace and security as those were understood in the immediate aftermath of a global inter-state conflict, but to establish the framework through which peace and security could be maintained into the future – whatever form threats thereto might take. Such an object and purpose clearly requires adaptability. Indeed, a ‘living tree’ approach to the UN

⁷⁷ Report of the High Level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility, UN Doc A/59/565 (2004) para 154.

⁷⁸ Report of the ICISS (n 6) para 2.29 (‘the responsibility to protect acknowledges that the primary responsibility in this regard rests with the state concerned, and that it is only if the state is *unable or unwilling* to fulfill this responsibility [...] that it becomes the responsibility of the international community to act in its place. In many cases, the state will seek to acquit its responsibility in full and active partnership with representatives of the international community. Thus the “responsibility to protect” is more of a linking concept that bridges the divide between intervention and sovereignty’, emphasis added).

⁷⁹ UN Doc A/RES/60/1 (24 October 2005) paras 138-39.

⁸⁰ Article 25 UN Charter.

Charter, which makes of it a flexible instrument capable of addressing new challenges and adapting to the changing nature of the international legal order within which it operates, was called for in its earliest drafting stages. President Roosevelt expressed the need to ensure the dynamism of the UN Charter thusly: ‘[l]ike the Constitution of the United States itself, the Charter of the United Nations must not be static and inflexible, but must be adaptable to the changing conditions of progress – social, economic, and political – all over the world.’⁸¹ Similarly, John Foster Dulles, in an address to the San Francisco Conference, shared his belief that ‘future generations will thank us for what we do in adopting simple phrases and allowing them to evolve as the state of the world, and the factual interdependence of the world, makes it necessary and appropriate that [they] should evolve.’⁸²

Consistently with the view of those participating in the San Francisco conference on behalf of the US, academic commentators have long viewed the UN Charter as a constitutional treaty, which calls for an evolutionary interpretation in order that it continues to fulfil its object and purpose in a changing world.⁸³ The ICJ has similarly applied an evolutionary approach to the UN Charter’s predecessor, holding that ‘an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation,’⁸⁴ and applied an interpretive approach which ‘make[s] allowance for, among other things, developments in international law’ in respect of treaties of ‘continuing duration’ (of which the UN Charter must surely be first in the class).⁸⁵

This ‘evolutionary interpretive approach’ to the UN Charter is herein adopted, and this article argues that President Roosevelt’s exhortation is particularly relevant in the self-defence context. In adopting an evolutionary interpretation of the *jus ad bellum* provisions of the UN Charter, there are two possible approaches to Article 51: either the right to use force in self-defence under Article 51 continues to be understood as a responsive right (not unlike a countermeasure, as discussed in section I above), permitting an otherwise prohibited use of force in the host state’s territory in response to its prior breach of Article 2(4); or the right to use force in self-defence is understood as an inherent and independent (rather than responsive) right – operating on its own terms and in some respects independently from Article 2(4). In either case, the modern legal context of actor-pluralism and the ‘turn to responsibility’ within which the UN Charter operates informs the interpretation of Article 51 via the ‘unwilling or unable’ doctrine. This section will first set out the case for the ‘independent’ vs ‘responsive’ approaches to Article 51 generally, before exploring each as interpreted in light of the modern international legal context within which the UN Charter operates.

i. Independent or responsive?

The history of self-defence as a legal justification for a use of force in foreign territory leading up to adoption of the UN Charter suggests that self-defence was understood as an independent right, inherent in state sovereignty. The first broad prohibition on the use of force, as set out in the 1928 Kellogg-Briand Pact, made no mention of the right to use force in

⁸¹ 3 UNCIO 74.

⁸² 10 UNCIO 271.

⁸³ See CF Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge University Press, 2nd edn 2005) 24 and ff.; Dapo Akande, ‘International Organizations’ in MD Evans, *International Law* (Oxford University Press, 4th edn 2014) 259-260. On an evolutionary interpretation of the UN Charter, see more generally Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (Oxford University Press, 2014) 37 and 129-132.

⁸⁴ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (advisory opinion) [1971] ICJ Reports 16, para 53.

⁸⁵ *Navigational and Related Rights (Costa Rica v Nicaragua)* (judgment) [2009] ICJ Reports 243, para 66.

self-defence. Textually, the prohibition of force and the right of self-defence (which was understood to survive ratification) existed independently. Indeed, the US note in respect of the draft Pact, which invited no objection from the fourteen states to which it was disseminated,⁸⁶ read in relevant part that nothing in the draft anti-war treaty ‘which restricts or impairs in any way the right of self-defence. That right is *inherent* in every sovereign state and is implicit in every treaty.’⁸⁷ It is of interest to note that such an approach to self-defence, which views the right as inherent in sovereignty, rather than responsive to prior wrongdoing, is consistent with the very earliest writing on the subject. Grotius considered that the ‘right of self-defence [...] arises directly and immediately from the care of our own preservation, which nature recommends to everyone, *and not from the injustice or crime of the aggressor*’.⁸⁸ While clearly the modern right of self-defence is to be distinguished from its natural law foundations of a right to self-preservation,⁸⁹ the point nevertheless remains relevant – the right of defence was perceived from the perspective of the victim state, not that of the aggressor. Such an account does not require a responsive relationship between prohibited force and exception. Similarly, in its first iteration in the UN Charter *travaux préparatoires*, Article 51 was framed in terms of regional and collective protection⁹⁰ – the view point from which the right of defence was perceived was, therefore, again that of the victim state (and regional security), not the state in whose territory defensive force was used.

Nevertheless, long standing academic opinion approaches Article 51 as a responsive right, in the sense that the right of self-defence can only be exercised against a state in response to that state’s prior breach of Article 2(4).⁹¹ As argued in section I above, this approach was informed by a purely inter-state-rights based reading of Article 2(4): given that the Charter narrative did not expressly admit of NSAs, and the rights of sovereignty (in particular to territorial integrity) were not yet conceptualised as associated with responsibilities, the only prior breach of 2(4) that could trigger Article 51 rights would be an ‘armed attack’ by the state in whose territory defensive force was used.

This was also the ILC’s initial approach to self-defence as a circumstance precluding wrongfulness – it is the approach Ago took in his Eight Report,⁹² and Crawford did not challenge the responsive relationship between Articles 2(4) and 51 of the UN Charter in his Second Report.⁹³ In Ago’s draft of the ILC Articles on State Responsibility, adopted on first reading, self-defence was a circumstance precluding wrongfulness in respect of (and only in respect of) a breach of Article 2(4) of the UN Charter. Of particular relevance for present

⁸⁶ See Ian Brownlie, ‘The Use of Force in Self-Defence’ (1961) 37 *British Yearbook of International Law* 186, 206-207.

⁸⁷ Emphasis added. Further Correspondence with Government of the United States Respecting the United States Proposal for the Renunciation of War, 1928, http://avalon.law.yale.edu/20th_century/kbbr.asp.

⁸⁸ Emphasis added. Hugo Grotius, *The Rights of War and Peace* (Richard Tuck (ed), Liberty Fund, 2005 (1625)), Book II, Chapter 1, para III.

⁸⁹ For accounts of the right of self-preservation (often tied to the plea of ‘necessity’), see William Edward Hall, *A Treatise on International Law* (Clarendon Press, 8th edn 1924) 322 and ff; Henry Wheaton, *Elements of International Law* (Stevens, 6th edn 1929), vol I, 150 and ff. For a stinging rejection of self-preservation as a legal principle, see Georg Schwarzenberger, ‘The Fundamental Principles of International Law’ (1955-I) 87 *Recueil des Cours* 343.

⁹⁰ See *Foreign Relations of the United States* (1945), vol I, 662-4, 674, 719.

⁹¹ See Alf Ross, *A Textbook in International Law* (Longmans & Green, 1947) 244; Hans Kelsen, *Principles of International Law* (Holt, Rinehart, 2nd edn 1952); Derek W Bowett, *Self-Defence in International Law* (Manchester University Press, 1958) 9.

⁹² Ago (n 13) 53-54, para 88.

⁹³ James Crawford, ‘Second Report on State Responsibility’, UN Doc A/CN.4/498 and Add.1-4 (1999) 74, para 296 (the commentary goes on to stress that the preclusive effect of article 34 does not entitle the state acting in self-defence to violate the rights of third states. In this respect self-defence is subject to the same limitation as countermeasures).

purposes, Ago regarded self-defence as a circumstance precluding the wrongfulness of an Article 2(4) breach precisely because the state against which defensive force was used had committed a specific type of internationally wrongful act: ‘armed aggression, the use of force in an attack against the State in question.’⁹⁴

Ago’s Eight Report therefore characterised the wrongfulness preclusion of self-defence as deriving from the responsive nature of the breach (as is the case for countermeasures), to be distinguished from a circumstance by way of which the breach of innocent third party rights might be justified or excused in the interests of protecting human life or other essential interests (as is the case in respect of necessity or distress).⁹⁵ In framing self-defence as a responsive right in the context of state responsibility, Ago did not rely on the *travaux préparatoires* of the UN Charter or state practice, but rather on the understanding of the ‘most highly qualified publicists’⁹⁶ – which understanding was of course framed within the context of a state-centric international legal order that recognised the rights (and not responsibilities) inherent in sovereignty.

Crawford, on the other hand, did not consider that the relationship between Articles 2(4) and 51 of the UN Charter is a matter for the secondary rules. Instead, he accepted the view put forward by a number of states in the Sixth Committee⁹⁷ that:

A State exercising its inherent right of self-defence as referred to in Article 51 of the Charter is not, even potentially, in breach of Article 2, paragraph 4, and if the only effect of self-defence as a circumstance precluding wrongfulness is so to provide, then it should be deleted [...].⁹⁸

As a result, self-defence in the ILC Articles as adopted on second reading only precludes the wrongfulness of breaches of other (non-Article 2(4)) international obligations, for instance treaties of amity,⁹⁹ which might be occasioned by a use of force in self-defence. Crawford nevertheless discussed the UN Charter framework in his Second Report, and his approach to Article 2(4) does make it rather surprising that he accepted uncritically the responsive nature of the relationship between Articles 2(4) and 51 – such that self-defence can only be employed in an Article 2(4) breaching state’s territory. If self-defence is not (‘even potentially’) in breach of Article 2(4), then the prohibition must be read as incorporating the exception within its terms: it is therefore prohibited to use *non-defensive* force against the territorial integrity or political independence of any state or in any other matter inconsistent

⁹⁴ Ago (n 13) 15, para 4.

⁹⁵ Ibid

⁹⁶ Ago notes that ‘[m]ost learned writers agree that, in so far as it is permissible to speak of self-defence in international law as well, the action taken in self-defence must have been preceded by an international wrong committed, or at least planned, by the subject against which this action is taken’, and cites to a range of commentators, including Bowett and Kelsen. Ago (n 13) 53, para 88. Ago does acknowledge that some commentators, ‘mostly from the English-speaking world, speak of “self-defence” to indicate the circumstances in which a form of conduct occurs that is designed to ward off a danger, a threat emanating, in many cases, not from the State against which the particular conduct is adopted but from individuals or groups that are private, or at any rate are unrelated to the organization of that State.’ But as these approaches do not accord with the responsive approach he has adopted to the interaction between Articles 2(4) and 51 of the UN Charter, he discards these contributions as unhelpful and confused. Ago (n 13) 61-62, para 106.

⁹⁷ UN Doc A/C.6/35/SR.51 (Ethiopia) 12, para 46; UN Doc A/C.6.35/SR.55, 4, para 12 (Spain), p12, para 45 (Hungary); and UN Doc A/C.6/35/SR.57, 11, para 42 (Byelorussian Soviet Socialist Republic). See also UN Doc A/C.6/35/SR.53, 8, para 30 (Mongolia), discussing the position of other delegations (although ultimately accepting that self-defence could legitimately be a circumstance precluding wrongfulness).

⁹⁸ Crawford (n 93) 74, para 298.

⁹⁹ See, for example, *Nicaragua* (n 11); *Oil Platforms (Islamic Republic of Iran v United States of America)* (judgment) [2003] ICJ Reports 161.

with the Purposes of the UN Charter. If defensive force is carved out of the Article 2(4) prohibition entirely, it is not clear why a prior breach of Article 2(4) by the state in whose territory defensive force is used is considered a necessary pre-condition.

All this said, it can credibly be argued that a responsive relationship between Articles 2(4) and 51 is a matter of logical implication, and there is certainly something compelling in the view that the UN Charter is a complete system, setting out prohibitions with limited exceptions – and that the integrity of an absolute prohibition on the use of force requires that the UN Charter system be closed in nature (in the sense that the exception be tied to the prohibition).¹⁰⁰ Of course, the UN Charter does admit breaches of a state's territorial integrity that are not tied to its prior breach of Article 2(4) – in particular the Security Council can rely on Chapter VII powers to respond to a threat to the peace that is neither the result of a state's breach of Article 2(4) nor, indeed, any internationally wrongful act at all. But the breadth of the collective security exception need not (and should not) inform the breadth of the unilateral exception. More importantly, even if the approach to Article 51 needs to ensure the complete or closed nature of the Charter system, that system must nevertheless be situated within and responsive to the broader international legal framework (which has moved well beyond the post WWII context of state-centricity and a rights-based conception of sovereignty).

The pre-Charter understanding of self-defence suggests that it should be approached as an independent right, which operates on its own terms (in particular the requirement of an 'armed attack'), and this approach is not contradicted by the treatment of self-defence within the UN Charter *travaux préparatoires*. But the logic of the UN Charter system as a whole, and overwhelming academic commentary, suggests that self-defence must be understood as a responsive right. While this author has accepted the responsive nature of the right in prior writing,¹⁰¹ this article appreciates the case for characterising it as an independent right (an approach that need not affect the closed or complete nature of the UN Charter system, as will be explored below), and leaves open the issue of characterisation. Instead, this section will explore each interpretive approach and the way in which it reflects the modern international legal system – in particular its increasing actor-pluralism and conceptions of 'sovereignty as responsibility' – via the now familiar doctrine of 'unwilling or unable.'

ii. *Self-defence as an inherent and independent right akin to 'necessity'*

While the ILC (and Ago in particular) viewed self-defence as a responsive circumstance precluding wrongfulness (like a countermeasure), Ago understood well the concerns articulated in section I above regarding NSAs and their capacity to threaten human life from across borders.¹⁰² The reason these concerns did not steer Ago away from a responsive approach to Article 51 is that he left open the possibility, supported by pre-Charter state practice and *opinio juris*, that 'necessity' as a circumstance precluding wrongfulness might provide victim states with legal cover when they acted in breach of Article 2(4) (as long as their use of force did not rise to the level of the *jus cogens* prohibited aggression) to protect those subject to their jurisdiction from cross-border NSA violence.¹⁰³ Ago summarised the

¹⁰⁰ Report of the Rapporteur, Subcommittee I/1/A, 6 UNCIO Doc 723, 699 ('[t]he provisions of the Charter, are in this case as in any other legal instrument, indivisible. They are equally valid and operative. The rights, duties, privileges, and obligations of the Organization as such and its members match with one another and complement one another. Each of the rights, duties, privileges, and obligations are construed and are to be understood in function of the others').

¹⁰¹ See n 16.

¹⁰² See Ago (n 13) 39, para 56.

¹⁰³ Ago (n 13) 40-41, para 58 and 44, para 66.

relevant state practice as follows:

The common feature of these cases is, first of all, the existence of a grave and imminent danger to the State, to some of its nationals or simply to people, a danger of which the territory of the foreign State is either the theatre or the place of origin, and which the foreign State in question has a duty to avert by its own action but which its unwillingness or inability to act allows to continue. Another common feature 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.¹⁰⁴

Ago quite rightly expressed concern regarding the possibility that general international law might permit exceptions to the Article 2(4) prohibition on the use of force that are not contemplated by the Charter – not least because of the impact such admission would have on the integrity of the prohibition and the completeness of the UN Charter framework.¹⁰⁵ Nevertheless, Ago's narrow, responsive and state-centric approach to Article 51 virtually demanded that he accept the Charter be open to general circumstances precluding wrongfulness (in the form of 'necessity'), lest the UN Charter render states incapable of responding to existential threats to individuals subject to their jurisdiction. Sharing Ago's concerns with the integrity of the UN system, the interpretation of Article 51 proposed below a) reflects state practice and the modern international legal context of actor-pluralism and 'sovereignty as responsibility' within which the UN Charter operates; and b) draws inspiration from the ILC's work on circumstances precluding wrongfulness; while remaining committed to an absolute prohibition on the use of force which admits only the one – Charter based – unilateral exception.

(a) State practice and international legal context

States invoking the right to use force in self-defence in response to cross-border armed attacks by NSAs have emphasised their right to protect the life and physical integrity of individuals subject to their jurisdiction.¹⁰⁶ Furthermore, in setting out the legal basis for Article 51 measures in the context of armed attacks launched by NSAs, states have not relied on a characterisation of the host state's conduct as a breach of Article 2(4)¹⁰⁷ – suggesting that they do not consider such a breach to be a necessary element of the self-defence calculus, and implicitly rejecting a responsive reading of the *jus ad bellum* provisions of the UN Charter. Such invocations reflect an understanding of Article 51 as an independent right, one which operates on its own terms (in particular, the requirement of an 'armed attack'), and independently of Article 2(4). This approach to Article 51 will perhaps be most important in the context of a host state that is unable to prevent its territory from being used as a base of NSA operations (because it does not have the capacity of doing so) and is politically not in a

¹⁰⁴ Ibid, 39, para 56.

¹⁰⁵ Ibid, 41, para 59.

¹⁰⁶ See, for example, Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc S/2001/946; Identical letters dated 12 July 2006 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc A/60/937 – S/2006/515, 2; Letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council, UN Doc S/2014/691, 2; and Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, UN Doc S/2014/695.

¹⁰⁷ See, for example, documents cited in (n 106).

position to accept any offers of assistance because those offers pose a greater threat to sovereignty than a foreign state's targeted use of force against NSAs within its borders. In such circumstances the host state would not be acting in breach of Article 2(4), and yet the threat posed by NSAs operating from its territory persists for the victim state.

As an independent right, Article 51 is well situated within the context of a UN Charter which accommodates and addresses the plurality of actors that threaten international peace and security and conceptions of sovereignty as responsibility (particularly in its human rights guise imposing positive obligations on states to ensure respect for the right to life and physical integrity of those subject to their jurisdiction). In particular, as an independent right, Article 51 responds to the threat posed by NSAs, in that it requires an 'armed attack' as its trigger, but without reference to the source of the armed attack (which source is otherwise restricted to states via one version of the responsive approach). And as a right that is evaluated on its own terms, without reference to Article 2(4), Article 51 can also be interpreted consistently with conceptions of 'sovereignty as responsibility' – states can meet their obligations to protect the rights to life and physical integrity of those subject to their jurisdiction with defensive force *if necessary*.

(b) '*Necessity*' and Article 51

As an independent UN Charter right, self-defence would operate much in the same way as the circumstance precluding wrongfulness of necessity¹⁰⁸ in the state responsibility context, albeit with additional conditions particular to the *jus ad bellum* context. 'Necessity' as a circumstance precluding wrongfulness has several features that distinguish it from a responsive circumstance precluding wrongfulness (like countermeasures). The relevant measure (in breach of the measure-adopting state's international obligations) need not be in response to an internationally wrongful act, as long as it is the *only way* to safeguard an *essential interest* (including 'preserving the very existence of the state and its people in time of public emergency, or ensuring the safety of a civilian population').¹⁰⁹

These features of necessity are precisely what underlie the 'unwilling or unable' doctrine as it would apply to self-defence (as an independent right) in the modern international legal context. The 'essential interest' at stake represents a legal obligation inherent in 'sovereignty as responsibility' – that is the victim (and measure adopting) state's obligation to 'ensure the safety of [its] civilian population.' Furthermore, states can rely on self-defence as an independent right via the 'unwilling or unable' doctrine to justify measures adopted in an *innocent* third state's territory (for instance in cases where the host state's failure to prevent its territory from being used as a base of NSA armed attacks is not an internationally wrongful act owing to the exercise of due diligence, within its capacity). This will be the case, however, only when the measure (defensive force) is *necessary* in order to respond to the grave and imminent peril to a local population – 'unwilling or unable' requires that defensive force be a last resort, or the 'only way' to respond to the relevant peril.¹¹⁰ Finally, the peril against which the adopted measure is safeguarding has to be both

¹⁰⁸ Article 25, ILC Articles on State Responsibility (n 23), reads: Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

- (a) is the only means for the State to safeguard an essential interest against a grave and imminent peril; and
- (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or the international community as a whole.

¹⁰⁹ Commentary to Article 25, ILC Articles on State Responsibility (n 23) para 14.

¹¹⁰ See Trapp (n 9).

‘objectively established and not merely apprehended as possible’¹¹¹ – and in the Article 51 context, that peril must take the particular form of an ‘armed attack.’

In exploring these features of ‘necessity’ as a circumstance precluding wrongfulness, the Commentary to the ILC Articles on State Responsibility expressly considers the 1837 *Caroline* incident – involving a use of force in a host state’s territory in response to attacks carried out by NSAs operating from that state.¹¹² While the *Caroline* incident occurred long before international law absolutely prohibited the use of force in international relations, both Ago and Crawford, as endorsed by the ILC in its adoption of the Commentary, nevertheless suggest that it is relevant practice in respect of ‘necessity’ as a circumstance precluding wrongfulness.¹¹³

This article accepts that the practice is relevant in evaluating the right to use force in a host state’s territory in response to un-attributable armed attacks by NSAs operating from that state – but not under the guise of ‘necessity’ in the state responsibility context. There is no need and there are good policy reasons to avoid opening the Charter to customary international law circumstances precluding wrongfulness to accommodate this practice. The right to use force in self-defence, read as an independent right evaluated on its own terms (which requires an ‘armed attack’ against a UN Member State *tout court*), more than accounts for the *Caroline* incident and similar subsequent practice.¹¹⁴ It does so, via the ‘unwilling or unable’ doctrine, in a manner that is very much in keeping with the spirit of necessity as a circumstance precluding wrongfulness – but remains committed to the UN Charter as a complete system.

iii. Self-defence as a responsive right

As examined in the previous section, one way of responding to the threat to international peace and security (and, indeed, individual state’s security) posed by NSAs, which accounts for the shifts in international law discussed in sections II and III above, is to understand the right to use force in self-defence in response to cross-border attacks by NSAs as an independent right which operates on its own terms, not unlike ‘necessity’ in the state responsibility context.

This said, academic commitment to a responsive reading of Article 51 remains strong, whether for the sake of symmetry or for the purposes of protecting the UN Charter framework as a complete (and closed) system. Hitherto, the understanding of self-defence as a responsive right has been informed by an inter-state-rights based approach to the UN Charter. But the view of the international legal order on which this understanding of the interaction between Articles 2(4) and 51 rests is one which no longer reflects positive law. This article has argued that the UN Charter is not as state-centric as this classical understanding of the interaction between Articles 2(4) and 51 might suggest, and that sovereignty is increasingly understood in terms of responsibility – including a state’s responsibility to protect those within its jurisdiction and to prevent its territory from being used as a base for activities that are harmful to human security across the border. Even if the characterisation of Article 51 as a responsive right is accepted, post-Charter evolution of the international legal system calls for a new approach to the nature of the responsive interaction. In particular, accepting that both a prior breach of Article 2(4) by the host state, and an ‘armed attack’ (in accordance with Article 51), are necessary conditions for the lawful use of defensive force under the responsive approach, then the modern international legal context of actor-pluralism and the ‘turn to responsibility’ within which the Charter operates suggests the disaggregation of these two conditions. The prior breach of Article 2(4) and the armed attack

¹¹¹ Commentary to Art 25, ILC Articles on State Responsibility (n 23), para 15.

trigger for self-defence need not be co-extensive, in particular where the armed attack is launched by NSAs.¹¹⁵

This reading of the interaction between Articles 2(4) and 51 of the UN Charter (i) focuses on the role of states in creating or maintaining the environment for international peace and security while nevertheless addressing a plurality of actors within the international legal order; and (ii) reflects that the signposts of sovereignty – territorial integrity and political independence – entail both rights and obligations (responsibilities). In so doing, it dovetails precisely with the ‘unwilling or unable’ doctrine. If a state is either unwilling to prevent its territory from being used as a base for NSAs, or unable to do so and unwilling to co-operate by accepting assistance (thereby ‘acquiescing’), it is acting in breach of Article 2(4) of the UN Charter.¹¹⁶ In keeping with the responsive approach to the interaction between Articles 2(4) and 51, a state that breaches Article 2(4) is not entitled to claim the protection of Article 2(4) – and its unwillingness or inability to prevent cross-border armed attacks by NSAs from its territories accounts for the necessity of a use of defensive force in response to those armed attacks. The ‘unwilling or unable’ doctrine as applied in a responsive self-defence context is also informed by the ‘turn to responsibility,’ particularly as regards the host state’s obligation to prevent external harm (failure in which constitutes its breach of Article 2(4)), and the victim state’s obligation to protect the life and physical integrity of those subject to its jurisdiction. Indeed, in all cases where the doctrine has been relied on as a basis for the use of force in a host state’s territory (whether expressly or implicitly), in response to cross-border armed attacks by NSAs, the armed attacks were directed at the local population within the victim state’s territory.¹¹⁷

iv. Strict conditions to which ‘unwilling or unable’ is subject

However the right to use force in self-defence in response to armed attacks by NSAs is characterised, its exercise must be scrupulously compliant with the *jus ad bellum* restrictions of necessity (inherent in the ‘unwilling or unable’ doctrine) and proportionality, international humanitarian law protections of civilian populations and, if applicable, human rights protection of the right to life and physical integrity.¹¹⁸ Operations that have as their aim the protection of innocent life on one side of the border should not sacrifice innocent life on the other side.¹¹⁹ Nevertheless, and assuming an exercise of self-defence in the host state’s

¹¹² Ibid, para 5. For a detailed account of the incident, see Robert Y Jennings, ‘The Caroline and McLeod Cases’ (1938) 32 *American Journal of International Law* 82.

¹¹³ Ago (n 13) 39, para 57; Crawford (n 93) 70, para 280.

¹¹⁴ Ago (n 13) 39-10, para 57.

¹¹⁵ The two conditions for lawful self-defence on a responsive understanding of Article 51 (a prior breach of Article 2(4) and an ‘armed attack’), will of course remain co-extensive in two cases. Firstly, where the state in which defensive force is used has itself launched the armed attack, and secondly, where the armed attack by NSAs is attributable to the host state (in whose territory defensive force is used against the NSAs) on the basis of Article 3(g) of the Definition of Aggression or Article 8 of the ILC Articles on State Responsibility. This article simply argues that the conditions of prior breach of Article 2(4) and armed attack *need not* be co-extensive in all circumstances.

¹¹⁶ Declaration on Friendly Relations (n 46).

¹¹⁷ See n 106. While the ‘unwilling or unable’ doctrine might also serve to justify a use of defensive force in a host state’s territory, against NSAs operating from that state’s territory, some of whom have either occupied the victim state’s uninhabited territory, or have attacked cultural heritage, this article is focused on the situation reflected in the state practice, which is to say the situation in which NSA attacks imperil human life on the other side of the border.

¹¹⁸ These obligations are referred to as obligations of ‘total restraint’ in the ICJ’s *Legality of the Threat or Use of Nuclear Weapons* (advisory opinion) [1996] ICJ Reports 226, para 30. See further Crawford (n 93) 75, para 302.

¹¹⁹ See Teitel (n 3) 103 (arguing that ‘the very justice of the counterterror war would be on the line if these rules

territory amounts to an exercise of jurisdiction triggering human rights obligations,¹²⁰ it is not a breach of the right to life to harm or even kill those who pose a mortal danger to others, provided the action is necessary to protect prospective victims.¹²¹ The fact that there is a border between NSAs posing an existential threat, and prospective victims, does not change that human rights calculus.

V. Conclusions and policy considerations

This article has argued that the right to use force in self-defence in a foreign host state's territory, in response to un-attributable armed attacks by NSAs operating from the host State's territory, is not merely established as a matter of state practice¹²² – it should also be understood as an instantiation of broader shifts in the international legal system. These shifts, most particularly as regards the increasing actor-pluralism of the international legal order generally and the UN Charter in particular, and the 'turn to responsibility' in sovereignty terms, are reflected in the 'unwilling or unable' doctrine as it informs the exercise of the right of self-defence under Article 51. None of this is to say, however, that 'unwilling or unable' in the self-defence context is without controversy.¹²³

Concerns remain as to the practical application of the doctrine. For instance, its successful application relies on the victim state's determination of the host state's capacity to prevent its territory from being used as a base of NSA operations. While a state's capacity to exercise control within its territory is, as argued in section III.iii above, a legitimate matter of international concern within the modern legal context of actor-pluralism and the 'turn to responsibility' – the dangers of auto-determination, well-rehearsed in other international legal contexts,¹²⁴ are particularly troublesome in regard to the *jus ad bellum*. These dangers, however, are already accepted on an inter-state reading of Article 51. They call for careful attention to the conditions for the applicability of the 'unwilling or unable' doctrine¹²⁵ and a concerted effort by the international community to invoke the responsibility of those states

and protections were flouted').

¹²⁰ Whether the use of force in self-defence is indeed an exercise of jurisdiction for the purposes of triggering human rights obligations will depend very much on the nature of the defensive operation. A purely aerial assault is unlikely to amount to jurisdiction on the basis of *Banković and others v Belgium and others* [2001] ECtHR (Grand Chamber), application no. 52207/99, paras 59-82. A defensive operation which involves boots on the ground in the host state's territory may well amount to jurisdiction as a trigger for human rights obligations if it involves sufficient control over territory. See *Al-Skeini and others v United Kingdom* [2011] ECtHR (Grand Chamber), application no. 55721/07, paras 109-150.

¹²¹ The right to life of those who are not the source of the existential threat is more difficult. International courts and human rights bodies have held that the right to life must be read in light of the *lex specialis* international humanitarian law. See, for example, *Nuclear Weapons* (n 118) paras 24–25; Human Rights Committee *General Comment 31* (2004) para 11. This is to say that indiscriminate attacks (those which disproportionately affect civilians who are not the source of the armed attack and therefore cannot be the objective of the defensive operation) are prohibited, but proportionate collateral damage is not, as a matter of legal analysis, a breach of the right to life.

¹²² See n 19.

¹²³ Most vocally, see Kevin Jon Heller's numerous *Opinio Juris* blog postings, including: <http://opiniojuris.org/2011/09/17/the-unwilling-or-unable-standard-for-self-defense-against-non-state-actors/>; <http://opiniojuris.org/2011/12/15/ashley-deeks-failure-to-defend-the-unwilling-or-unable-test/>; <http://opiniojuris.org/2015/02/17/unable-unwilling-test-unstoppable-scholarly-imagination/>; <http://opiniojuris.org/2015/03/06/the-seemingly-inexorable-march-of-unwilling-or-unable-through-the-academy/>; <http://opiniojuris.org/2014/12/13/attacks-isis-syria-justify-unwilling-unable-test/>.

¹²⁴ See René Provost (ed), *State Responsibility in International Law* (Ashgate, 2002), xv (arguing in the state responsibility context that 'the right of States unilaterally to assess a breach by another State and to validate what would otherwise be an illegal act has the potential of significantly destabilising international relations').

¹²⁵ See Deeks (n 9).

which rely on the doctrine in ‘ritual incantation’¹²⁶ – without legal basis. That said, as with ‘necessity’ as a circumstance precluding wrongfulness, concerns regarding the potential for abuse are not a sound basis for rejecting a doctrine which has support in state practice and is consistent (or even required) by the modern context within which the UN Charter operates.¹²⁷

It also bears contemplating the consequences of strict adherence to an inter-state-rights based conception of the *jus ad bellum* – one which fails to respond to the increasingly dangerous capabilities of NSAs. Without ‘unwilling or unable’ as a feature of the UN Charter landscape, states are unable to protect individuals subject to their jurisdiction against cross-border armed attacks by NSAs. The result of such restrictions is not that states will sit idly by while their inhabitants are attacked. The result of such restrictions is that states will increasingly ignore the UN Charter framework – and that framework can only withstand so much before it breaks and descends into irrelevance.¹²⁸ An adaptive approach to the *jus ad bellum*, one which accounts for actor-pluralism and the ‘turn to responsibility’ as argued for in this article, ensures the continued relevance and viability of the UN Charter as the constitution of the international legal order.

¹²⁶ See Christine Gray, *International Law and Use of Force* (Oxford University Press, 3rd edn 2008) 119 (using the expression to refer to invocations of the right to use force in self-defence more generally).

¹²⁷ See Ago (n 13) 48, para 73.

¹²⁸ Making a similar point in reference to UN Security Council inaction (had the Council been exclusively empowered to use force under the Charter regime), see JD Ohlin, ‘The Doctrine of Legitimate Defense’ (2015) 91 *International Legal Studies* 119.