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Restorative Justice and the Gandhian Tradition

Gandhi Award Comments

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I am honored to receive this award.¹ However, although my name is on it, I receive it for the field of restorative justice and the promise it holds, and the many people contributing to it, and especially my former students who are involved in the field.

This fall, 2013, is a significant season for me: I’m honored to receive this award - and on India’s national holiday celebrating his birthday! It is also my first semester in many years that I have not taught; I’m moving into semi-retirement. Finally, it is the 50th anniversary of the March on Washington, and also my departure, as a 19-year-old sophomore-to-be, for Atlanta to enter Morehouse College, an historically African American college, from which I graduated in 1966. Recently, on the actual day of this anniversary, I had the opportunity to talk with Dr. Vincent Harding who was a significant influence on my decision to go to Morehouse and my resulting commitment to justice.

As a Mennonite, I grew up in a family and tradition of nonviolence and peacemaking, and knew something of Gandhi. But it was at Morehouse, during the civil rights movement, that I engaged more deeply. So my understanding of the Gandhian tradition was mediated through the work of Dr. King, Dr. Harding, my professors and the civil rights activists with whom I came in contact.

After finishing graduate school, I went on to teach at Talladega College, another historically Black college in Alabama, and there became active in criminal justice. All of this is part of the mix that led me into restorative justice.

The occasion of this award has given me the impetus to reflect on the points of resonance between restorative justice and the Gandhian tradition, and to have conversations with some of my friends about this. I especially want to thank my restorative lawyer friend Sujatha Baliga for her help.

¹ Howard Zehr was awarded the Local Peace Award from the Mahatma Gandhi Center for Global Nonviolence at James Madison University in May of 2013. Zehr is considered by many as the "grandfather" and early pioneer of restorative justice. Zehr authored a widely read book, Changing Lenses: Restorative Justice for Our Times and helped to establish the Zehr Institute for Restorative Justice at Eastern Mennonite University.
Many, and not only those working in the “peacemaking criminology” tradition, have noted that the criminal justice system is based on, and enforced by, violence or the threat of it. Political scientists often note that the essence of the modern state is the “legitimate monopoly of violence,” and criminal justice is how this monopoly of violence is enacted and expressed: “You’ve harmed us, so we’ll harm you.”

Criminologists Quinney & Wildeman, in *The Problem of Punishment*, put it like this:

> From its earliest beginnings in the 18th C Enlightenment, the primary focus of criminology has been on retribution, punishment and vengeance in the cause of maintaining an existing social order.

> Historically, the focal concerns of western criminology have not centered on the themes of personal peace and social justice... We have had a reactionary criminology of violence and repression in defense of an existing social order rather than a criminology of peace, justice & liberation.

> The historical drift in criminological theory has been that if crime is violence and wrecks violence on our fellows and our social relations, then the effort to understand and control crime must also be violence & repressive ... (p. 40)

With that background, I’ll explore the Gandhian tradition through three terms associated with it.

*Ahimsa* is often translated “nonviolence,” but shouldn’t be articulated as a negative. It is a term of positive action grounded in a worldview of respect for one another and a vision of how we live together.

Likewise, restorative justice is grounded on the value of respect. Restorative justice is not just nonviolent but involves a positive act of caring for one another and our needs and our relationships. I often articulate the underlying values of restorative justice as the three R’s – respect, responsibility, relationships.

In my faith tradition, the vision is expressed in what I call the “shalom triangle”: We are called to live in right relationships with each other, the Creator and the Creation. But regardless of faith tradition, by the nature of the human condition, we are all inevitably embedded in a web of relationships in which our actions affect, and are affected by, others. Both Gandhian and restorative justice approaches articulate a vision of respectful relationships in which the dignity and needs of each person are recognized.

Respectful relationships imply a responsibility for our actions and for each other. This goes beyond passive responsibility, as when we accept a judgment that we have done something wrong. Rather, it calls for what John Braithwaite and others have called “active” responsibility to put things right, an approach to justice as promoting a better future. Thus the three R’s – respect, responsibility, relationship - are intertwined, like a triple helix.

*Swaraj* connotes a kind of self-rule. The Gandhian tradition is a movement for self-governance, personally and socially. Similarly, restorative justice argues that individuals and communities have the potential and
resources to govern themselves and in its practices, encourages both individuals and communities to call upon their best selves. In practice, this is often seen in the power of circle processes that are being used here at James Madison University. Restorative justice is about developing individuals’ and communities’ ability to be self-governing.

Satyayraha is often translated as “nonviolent resistance” but more accurately is “truth force” or action from truth; again, it is a positive, not a negative. Restorative justice also represents an active movement toward truth-telling and truth-seeking. While the legal system often discourages a holistic telling of the truth, restorative justice encourages it. In fact, restorative justice could be, should be, a nonviolent, truth-seeking challenge to the prison-industrial complex that drives our criminal justice system. I will end with three quotes or paraphrases attributed to Gandhi:

“An eye for eye makes the whole world blind.” This is a powerful reminder of the dangers of revenge and retribution.

“Be the change you wish to see.” This is often attributed to Gandhi but it isn’t clear whether he actually said quite this, however. The closest quote I could find is this:

“If we could change ourselves, the tendencies in the world would also change. As a man changes his own nature, so does the attitude of the world change towards him. … We need not wait to see what others do.”

We see those happening in restorative justice conferences and circles. Restorative justice asks us to be this change – to live it, practice it – as practitioners and also as participants. Some say we are called to approach restorative justice as a way of life.

“That action alone is just which does not harm either party to a dispute.”

Here is a direct challenge to the prevailing criminology of violence.

Thank you for the honor but again, let’s envision this award not so much as an acknowledgement of me personally, but of the field of restorative justice and the potential it has for transforming lives and communities, a potential that you are glimpsing here at JMU.

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Responsibility for Peacemaking in the Context of Structural Violence

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“They cry Peace, Peace, but there is no peace.” Jeremiah’s complaint resounds loudly in a period in which many of the most intractable social conflicts are products not just of prejudice, malice, or misunderstanding, but also of the normal operations of structurally violent systems. This essay begins by outlining and modifying the theory of structural violence originally presented by Johan Galtung. It goes on to describe several types of conflict-generating systems, including the capitalist economy that produces crime and mass incarceration and the neo-empire that produces terrorism and the “war on terror.” Finally, it inquires into the responsibility of would-be conflict resolvers for system transformation, stressing the need for new forms of conflict resolution theory and practice, and suggesting several processes that might help to satisfy this need.

Structural Violence as a Problem for Peacemakers

In a recent book, I suggested that the field of conflict resolution has experienced three “waves” of praxis, each of which continues to influence thinking and practice among would-be peacemakers. In the first wave, conflict was thought of primarily as a clash of interests that could be managed or resolved through warfare, power-based negotiation, or various forms of alternative dispute resolution. Conflict resolvers of the second wave pictured serious conflict as a product of unsatisfied human needs, arguing that basic needs for identity, belonging, security, and development could be satisfied only by collaborative processes that produced significant changes in intergroup relationships. The third wave of praxis, which is now gaining momentum, sees conflict emanating from violent social systems that, so far from being

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3 Resolving Structural Conflicts: How Violent Systems Can Be Transformed (Abingdon and New York: Routledge, 2017), 36–44, 53 et seq. The publisher’s permission to use material from the book in this essay is gratefully acknowledged.
“dysfunctional,” produce bitter intergroup strife as a predictable feature of their normal operations. Which forms of peacemaking are appropriate to deal with structural conflicts is a disputed issue, but the peacemaker’s responsibility in such cases seems clear: it is to assist conflicting parties to replace or restructure the violence-producing system.

The theoretical progenitor of the third wave was the Norwegian peace theorist, polymath, and gadfly Johan Galtung. Almost fifty years ago, Galtung published an article in *The Journal of Peace Research* that introduced the idea of structural violence to the conflict studies field. *Structural* violence, he stated, is force or influence exerted in accordance with patterned social arrangements that prevent people from realizing their human potential and satisfying basic developmental needs.4 Unlike *direct* violence, which involves one person acting to harm another, it is indirect and may or may not involve people acting deliberately. If I withhold food from you intending to starve you to death, that is direct violence. If the system of food production delivers food only to those who can afford to pay for it, and you starve because you can’t afford the price, that violence is structural. In both cases, “individuals may be killed or mutilated . . . hit or hurt . . . and manipulated by means of stick or carrot strategies.” But, where structural violence takes place, “The violence is built into the structure and shows up as unequal power and consequently as unequal life chances.”5 Of course, this sort of violence need not take a form as dramatic as the physical starvation of one of the system’s “bottom dogs.” Stressing the difference between human potentiality and actuality means that preventing a child from going to school or a woman from working out of the home should also be considered violent, at least where these restrictions are avoidable.

There are three primary reasons for expanding the usual common sense definition of violence to include structural components. The first is that it renders visible forms of destruction which many people in relatively static societies consider natural, hence invisible:

In a static society, personal violence will be registered, whereas structural violence may be seen as about as natural as the air around us. Conversely, in a highly dynamic society, personal violence may be seen as wrong and harmful, but still somehow congruent with the order of things, whereas structural violence becomes apparent because it stands out like an enormous rock in a creek, impeding the free flow, creating all kinds of eddies and turbulences.6

Second, the concept provides a corrective to a common view that the first parties in conflict to resort to direct violence are breakers of the peace, when, as to them, the apparent peace is often *already* violent. (One thinks of

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terrorist attacks in the West, which local residents consider virtually unprovoked breaches of the peace, but which are often done to retaliate for attacks by Western forces in other regions.) Conflict begins with an “avoidable insult to human needs,” not with one’s response to the insult. In fact, a reciprocal causal relationship between direct violence and structural violence exists in which each form tends to provoke or generate the other. Third and finally, “an extended concept of violence leads to an extended concept of peace.” If the absence of direct violence, at least for the time being, can be considered peace in a negative sense, the absence of structural violence and the replacement of abusive or exploitative relationships by valued, mutually rewarding relationships should be considered “positive peace.”

Although Johan Galtung’s detractors joked that the activist scholar had redefined violence to include everything he did not like, his definition of structural violence is coherent enough. His theory makes it clear that the systems which administer and provoke violence can be political and cultural as well as socioeconomic, but it puts considerably more emphasis on the unequal distribution of socioeconomic power than do many other approaches. Under capitalism, he notes, the distribution of resources, including income, education, and medical services, is grossly unequal, with “rank dimensions . . . tied together in the social structure.”

In other words, as Karl Marx had said, society is sharply divided into classes: Marxist criticism of capitalist society emphasizes how power to decide over the surplus from the production process is reserved for the owners of the means of production, who then can buy themselves into top positions on all other rank dimensions because money is highly convertible in a capitalist society – if you have money to convert, that is.

Galtung then goes on to cite, apparently with approval, the liberal critique that “socialist” (i.e., Stalinized) systems also concentrate economic power in a few hands, thus opening the door to structural violence from non-capitalist regimes as well. His dislike of vertically ranked systems clearly extends to those whose advocates declare themselves to be leftists. Even so, his social vision, departing from the generally accepted assumption that the capitalist ‘free market’ is the final stage of socioeconomic development, owes a great deal to Marxist and post-Marxist traditions of critical analysis.

Galtung’s passion for social equality eventually produced a famous exchange of views between the Norwegian polymath and an equally acute and energetic British colleague, Kenneth E. Boulding. In 1977, Boulding produced “Twelve Friendly Quarrels With Johan Galtung,” an essay that, as Galtung pointed out in a reply published a decade later (“Only One Quarrel With Kenneth Boulding”), boils down to a single large disagreement over the necessity of transforming elitist social structures. Essentially accusing

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7 Ibid., 183.
8 Ibid., 171. Galtung does not discuss socialist alternatives to Stalinism, either Trotskyist, Bukharinist, or anarcho-syndicalist, perhaps because of his deep commitment to Gandhian nonviolence and the values of social democracy.
Galtung of being a Marxist without portfolio, Boulding criticized his insistence that violence is deeply related to social inequality and cannot be reduced significantly without eliminating exploitation and repression. On the contrary, Boulding maintained, since violence and poverty (or powerlessness) derive from different sources, equalizing social positions will not necessarily have the potent peacemaking effects predicted by Galtung. His own perspective, which he termed “evolutionary,” suggested that society is developing autonomously, in accordance with entropic laws, in the direction of “human betterment.” The implication (distantly reminiscent of Burke’s objections to the French Revolution) was that deliberate attempts to restructure social institutions are likely to interfere with this natural process. In his reply, Galtung insisted that greater social and political equality is not just one long-term goal, among many. It is a *sine qua non* for the resolution of structural conflicts and the creation of positive peace.

Of course, this exchange left many questions unanswered. A less sweeping critique of Galtung's approach might have noted that, despite some intriguing speculation about the relationship between structural and direct violence, his essay did not clearly indicate the conditions under which the former is likely to produce the latter, or vice versa. When (if ever) will an unjust or oppressive social system produce violent rebellion? When (if ever) will the spread of personal violence generate violent repression? Adding the social-structural dimension to psychologically based theories such as human needs, relative deprivation, and historical trauma brings the answers to such questions closer, but still leaves a large area indeterminate and subject to influence by multiple variables. For this reason, some analysts (including Galtung himself in later works) have employed psycho-political notions like Paolo Freire’s theory of “conscientization” to explain why passive victims of social injustice sometimes – but far from always – become active resisters or rebels.

In addition, Galtung offered two important concepts that help explain how one form of violence can be converted into the other: *nested systems* and *cultural violence*. To illustrate nested systems, consider the prison, which one can describe as a violence-generating system based on structural inequality and the non-satisfaction of human needs. Even before going behind bars, most prison inmates-to-be already live in an “iron cage”: a society organized so as to make it difficult, if not impossible, for the poor, people of color, and members of other marginalized groups living in certain communities to get a decent education, hold a remunerative job, feel safe and at peace with others, or enjoy a satisfying family life. We know that poverty and income inequality gestate crime, and that crime gestates prisons. Prisons, in turn, recycle prisoners,

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sending them impoverished and stigmatized into structurally violent environments that insure that a substantial majority of them will be arrested again within three years.  

This situation illustrates the fact that social systems almost never exist in isolation; to use Galtung’s metaphor, they are nested like “Chinese boxes.” Each system may form part of a larger structure, a tendency that becomes more pronounced as the social world (including structures of domination) becomes more interconnected on a global scale. As a result, the inequalities associated with structural violence appear and are aggravated at all levels from the local to the national, regional, and international.

Within these nested systems, Galtung points out, structural violence and direct violence “crossbreed.” Repressive structures generate rebellion, crime, and self-destructive behaviors such as suicide and substance abuse, while rebellious acts incubate repressive institutions and punitive norms. To illustrate how this crossbreeding occurs, the theorist introduces a third element of the conflict triangle, cultural violence, defined as “those aspects of culture . . . that can be used to justify or legitimize direct or structural violence.” The cultural products that he considers especially potent in this regard are religion, ideology, language, art, science, and cosmology, although he might also have noted the peculiar importance in today’s world of narrative forms, including the graphic arts (films, videogames, images and stories shared on social media), as well as the subconscious imagery explored by psychoanalysts like Freud, Jung, and Lacan. Like Pierre Bourdieu, who sees “symbolic violence” as authority’s most effective tool, Galtung stresses the extent to which cultural conditioning maintains the oppressive structures that end by provoking and delivering violence:

The culture preaches, teaches, admonishes, eggs on, and dulls us into seeing exploitation and/or repression as normal and natural, or into not seeing them (particularly not exploitation) at all. Then come the eruptions, the efforts to use direct violence to get out of the structural iron cage . . . and counter-violence to keep the cage intact.

12 U.S. Department of Justice, Special Report: Multistate Criminal History Patterns of Prisoners Released in 30 States (September 2015).


14 Galtung, “Cultural Violence,” op. cit. at 291. Of course, cultural violence can also be considered structural, since culture is patterned and institutionalized. See, for example, John R. Hall, “Cultural Meanings and Cultural Structures in Historical Explanation,” History and Theory, 39:3 (Oct. 2000), 331-347.

Other commentators, noting that cultural ideas and practices tend to lag behind changes in the system of production, consider deep-rooted socioeconomic shifts the primary causal factor. But the causes can flow in any direction once the triangle – an integrated violent system – has been established. Moreover, Galtung’s theory points to the fact that the generation and crossbreeding of violent conflict can take place in a wide variety of social systems. The family, school, workplace, religious community, nation, and empire – all can become sites and producers of direct, structural, and cultural violence. This is especially likely to happen under certain conditions, which will be described differently, of course, by those challenging the system and those defending it. What are those conditions? And, what sorts of violent system do they produce?

The Varieties of Violent Systems

From the perspective of those challenging a sociopolitical system they deem oppressive, violence erupts when:

(a) a system marked by a seriously unequal and inequitable distribution of wealth, power, or honor

(b) fails to satisfy the basic needs or legitimate expectations of disadvantaged groups at a time when:

(c) these groups have become strongly convinced of the legitimacy of their basic needs and expectations, and

(d) systemic injustice has become manifest to them despite the ideological and cultural weapons usually employed to justify or disguise it.

From the perspective of the system’s defenders or deniers, on the other hand, violence is likely to erupt when:

(a) groups alienated and embittered by their failure to succeed in society and/or their self-destructive ideas and lifestyles

(b) are manipulated by ambitious leaders to believe that their unrealistic expectations are just and reasonable and that

(c) relevant sociopolitical systems are rigged to favor others and exploit or oppress them, notwithstanding that:

16 An example of this disagreement is the difference of opinion between Marxists and Weberians over the role of religion in the development of European capitalism. Max Weber thought considered the “worldly asceticism” of the early Protestant Reformers, the Calvinists in particular, an essential part of the explanation of why capitalism developed in the West rather than the East. Marxists insist that capitalist relations of production developed in Europe earlier than Weber thought, and that Protestant ethics were more an effect of this transformation than a cause. See Anthony Giddens, “Introduction” to Weber, *op. cit.*, vii et seq.
These conflicting perspectives draw attention to a number of important, still unanswered questions about the resolution of structural conflicts. The theory of structural violence seems to assume that the existence and character of relevant social systems is a matter of common knowledge. But the system’s role in generating conflict may itself be a major subject of contention between the parties. Although all parties to intense conflicts personalize their enemy to some extent, the rebels tend to be determinist \textit{vis a vis} the system. That is, they blame an unjust social order, and those representing or profiting it, for failing to satisfy the legitimate needs and expectations of less favored groups.\textsuperscript{17} The system’s defenders, on the other hand, tend to attribute such groups’ misfortunes to their failure to meet legitimate standards. That is, they tend to be voluntarist \textit{vis a vis} disfavored groups. A classic example is their tendency to blame a high rate of unemployment on unemployed people’s personal or collective failings (laziness, indiscipline, unwillingness to stay in school, disrupted families, etc.), rather than seeing it as a product of late capitalist structural features and a \textit{cause} of personal or cultural problems.\textsuperscript{18}

How, indeed, is the conflict-causing system to be identified and defined? The existence and functions of social systems are not self-evident; they are matters of inference to be determined by interpreting events and people’s behavior. The parties to a serious social conflict may therefore agree that its sources are to some degree systemic, but still disagree strongly about the nature and dynamics of the system. Such disagreements (a form of what Oliver Ramsbotham calls “radical disagreement”) are fairly common.\textsuperscript{19} To many libertarians, the state is the culprit responsible for much human misery, whereas others tend to focus on the system’s socioeconomic or cultural dimensions. Many left-leaning analysts, when asked what system is responsible for violence in Africa or the Middle East, would immediately respond, “capitalist imperialism,” while many on the right would name “militant Islam” or “tribalized politics.” How should a would-be peacemaker approach radical differences of this sort, which involve conflicting narratives as well as clashes of philosophy and political values?

Before suggesting answers to this question, it may be useful to note the range and major types of systems that tend to produce radical disagreements.\textsuperscript{20}

\textsuperscript{20} Although protracted conflicts can themselves be analyzed as “dynamical systems,” as Peter T. Coleman does in works like \textit{The Five Percent: Finding Solutions to Seemingly Impossible Conflicts}
Legal and political systems define de jure and de facto constitutions that distribute legitimacy, authority, and influence among groups incorporated in a body politic. Socioeconomic systems define modes of production that distribute property, economic roles, and privileges among groups incorporated in an economic market. Cultural systems define modes of discourse and behavioral norms that distribute social roles, status, and access to the means of communication among groups incorporated in a cultural network. A trend noted by social analysts since Hegel is that these systems tend to become increasingly integrated as history takes its course. Disagreements about the causal primacy of this systemic type or that persist, as do arguments about the relationship between social structure and individual agency. Clearly, “nesting” is too simple and straightforward a metaphor to describe complex inter-system relationships. For example, structural integration, which tends toward the creation of a single global system, does not mean the elimination of contradictions; it may actually intensify key contradictions. Even so, an adequate analysis of any social system must take into account its political, cultural, and socioeconomic dimensions and determinants.

Consider, for example, the U.S. legal/political system, one of whose manifestations is the incarceration of about 1.5 million Americans, a higher percentage of the population per capita than any other nation on earth. The essential role of the socioeconomic system in producing this violence can hardly be doubted in light of more than fifty years of research concluding that crime rates (rates of violent crime in particular) rise predictably with increased unemployment, lower income levels, the economic decline of neighborhoods, and growing income and wealth inequality. The authors of the pioneering U.S. Crime Commission report, “The Challenge of Crime in a Free Society” (1965), put the matter simply: “Warring on poverty, inadequate housing and unemployment, is warring on crime.” A more recent transnational study

See, e.g., my discussion of Anthony Giddens’ perspective in Resolving Structural Conflicts, op.cit. at 12-13, 63-65.


The same study shows almost four million people “under the control” of the U.S. corrections system.


“Warring on poverty, inadequate housing and unemployment, is warring on crime.”
extends the same analysis globally, but puts special emphasis in the correlation of overall economic growth, income inequality, and violent crime:

Both economic growth and income inequality are robust determinants of violent crime rates. Furthermore, even after controlling for country-specific effects (including systematic measurement error), there is clear evidence that violent crime is self-perpetuating. These variables (economic growth, inequality, and past crime rates) worked well for homicides and remarkably well for robbery rates. Their sign and statistical significance survived the addition of other explanatory variables, including measures of crime deterrence, illicit drug activities, demographic characteristics, and cultural traits.26

It is not only crime that increases with the growth of social inequality, but also a wide variety of violent intergroup conflicts, including ethno-national, racial, and religious struggles. As a recent study by Ravi Kanbur for the International Peace Academy puts it, “Theory and evidence support the view that it is the between-group dimension of inequality that is crucial. Given structural cleavages such as caste, religion, ethnicity, race and region, if income disparities align with these splits they exacerbate tension and conflict.”27 This finding has important implications for the connection of crime with the operations of the cultural system, as we will see in a moment.

Given the relatively clear connections between poverty, inequality, and crime outlined above, one might expect conflict specialists to seek to resolve the conflict between lawbreakers and authorities by helping the parties discover how to eliminate these conditions. The difficulty, however, is that that poverty and inequality have persisted and even deepened (along with “precarity,” the mode of existence one step removed from poverty in which vast numbers of working people currently find themselves), notwithstanding more then eighty years of strenuous effort to mitigate them by creating capitalist welfare states. To some analysts, this persistence suggests that economic misery is systemically generated – a product of globalizing capitalism at its current stage of development. If so, elimination of the problem will very likely require some sort of large-scale system transformation.28 This is not a

26 Pablo Fajnzylber, et al., “What Causes Violent Crime?” European Economic Review 46 (2002), 1323-1357 at 1349. Cf. Elliott Currie, op. cit., at 120: “Countries where there is a wide gap between rich and poor routinely show higher levels of violent crime . . . . Societies with weak ‘safety nets’ for the poor and economically insecure are more likely than others at a comparable level of development to be wracked by violence.”


prospect most analysts view with pleasure or even resigned acceptance. For a number of reasons, including the ideological legacy of the Cold War, the unevenness of economic development, and the dizzying pace of technological change, conflict specialists (among others) tend to avert their gaze from the systemic socioeconomic causes of poverty and crime. Instead, they are likely to conceive of clashes between criminals and authorities as grounded primarily in racial, ethnic, and cultural attitudes. The result is a tendency to classify conflicts between ‘the police’ and ‘the community’ as identity-group struggles rather than as products of the class structure.

This classification (dating back to the Kerner Commission’s 1968 Report on U.S. racial disorders) leads quite naturally to the multiplication of academic studies, intergroup dialogues, and government-funded projects designed to improve police-community relations. These efforts have produced a number of reform programs, some of which have apparently had a favorable impact on police-community relations. Nevertheless, it seems clear that the continuing state of war between authorities and lawbreakers in many communities will continue until the conflict’s systemic socioeconomic causes have also been identified and removed. As Elliott Currie puts it the updated 2013 edition of Crime and Punishment in America:

Today, as in the 1990s, the United States is distinguished by its unusually high levels of poverty, its wide spread of income inequality, and its relatively weak and hesitant provision of social benefits to the vulnerable. The key difference is that these problems have worsened since the first edition of this book, and that has a great deal to do with why America’s cities remain the most violent in the advanced industrial world.

These words resound with particular force: “America’s cities remain the most violent in the advanced industrial world.” People lacking a systemic framework for interpreting this reality are unable to understand that, where crime and punishment are concerned, the fundamental problem is neither bad criminals nor bad cops, but a social system that has turned large urban areas into war zones. In a war zone, one is not surprised to learn that soldiers frequently abuse their power and brutalize civilians, or that armed civilians consider soldiers their enemy and fair game for retaliation. In most discussions of the crime/punishment syndrome, however, the extent to which all the actors in the drama play roles scripted by the economic structure as well as by cultural attitudes is downplayed or even ignored. Furthermore, those averse to system analysis often reduce the cultural system to a set of racially biased

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31 Elliott Currie, op. cit., 223.
thoughts and behaviors rather than seeing racism as part of a discursive structure linking ideas about “us” and “them” to praxes involving the family, work, the nation, and religious or ethical values. The result of this habit of thought is to obscure the links between the cultural and socioeconomic systems.

Clearly, in important respects, the clash between police and communities in many Western nations is also a racial or ethnic identity group struggle. Reliable statistics in the U.S. and U.K. show that a disproportionately high number of people of color are arrested, convicted, and imprisoned for crime and suffer its effects as victims. There is no longer much doubt that police and prosecutors focus particularly intense attention on ethnic and racial ghettos, that racial profiling takes place as a matter of course, and that many criminal laws and institutions are designed to treat people of color more harshly than whites. But, Elliott Currie is surely right to insist that the underlying reality is an overlap between economic deprivation and race. “Being poor in America means being at the bottom of an exceptionally harsh system of inequality; being black greatly increases the chances of being impoverished and, therefore, trapped at the lower end of the social ladder.” Empirical studies show a particularly sharp correlation between extreme poverty and crime, with the result that extremely poor white neighborhoods “suffered more violence than somewhat less poor, but still deprived black communities. And they suffered almost twice the violent crime rates of black neighborhoods characterized by ‘low’ poverty.”

Pierre Bourdieu and Johan Galtung explain this by noting that in many societies, direct violence, such as police brutality against minorities, is visible and outrageous, while structural violence seems so ‘natural’ as to be virtually invisible. But, this seems a bit facile. As Galtung’s theory suggests, structural, cultural, and direct violence produce each other. Moreover, the violence attributable to class structure is not really invisible. When people lose their jobs or their homes because of business failures or relocations, when some under-employed people turn to drugs, alcohol, or criminal activities, or when whole neighborhoods or regions are depressed by economic reversals, these


33 A commonly cited example is the law punishing the sale and possession of crack cocaine more severely than the sale and possession of powdered cocaine. But there is also a vast differential in the enforcement of laws against street crime and “white collar” crime. See D.O. Friedrichs, Trusted Criminals: White-Collar Crime in Contemporary Society, 4th Ed. (Boston: Wadsworth, 2009). See also the well-researched senior honors thesis by Joseph P. Martinez, “Unpunished Criminals: The Social Acceptability of White Collar Crimes in America.” (Ypsilanti, MI: Eastern Michigan University, 2014).

http://commons.emich.edu/cgi/viewcontent.cgi?article=1381&context=honors

34 Elliott Currie, op. cit., 122, 126.

effects are quite visible.

In fact, what disappears from view in such cases is the connection between these violent effects and their systemic causes. The sufferers and their neighbors have learned not to view the business closure or the depressed neighborhood as an avoidable insult to their basic needs produced by a profit-driven system. The messages delivered constantly and in multifarious ways by cultural agencies ranging from the school and church to news shows and television dramas are that business trends (and catastrophes) are as mysterious and uncontrollable as the weather; that the ‘free market’ system is basically beneficent and healthy, although it occasionally needs tweaking; that, in any case, there is no conceivably better alternative system; and that individuals are ultimately morally responsible for their own economic destiny. These networked beliefs serve as a particularly dramatic illustration of the integration of the socioeconomic and deep-cultural systems, which collaborate to shift the attention of both in-groups and protest groups away from systemic defects and toward the personal level of analysis. All parties are invited to participate in the mode of thought and behavior that I have elsewhere termed “partisan moralism” – a propensity to personalize struggles by classifying warring parties either as innocent or culpable, as ‘good guys’ or ‘bad guys.’ “Parties who earn the positive label are thought of as well-intentioned, rational actors defending themselves against unjustified aggression, while those branded wrongdoers are considered malicious or deluded fanatics with a natural bent toward cruelty and violence.”

Partisan moralism is particularly evident in attempts to rally support for efforts by powerful nation-states to impose their will on other states or on dissident groups such as those named as enemies in the so-called “war on terror.” This highly personalized, Manichean form of nationalist ideology distracts attention from another violence-generating system – a globalized structure of production and power that some analysts term neo-imperialism.

It may help, to begin with, to distinguish neo-imperialism from globalization per se. Globalization is a multi-faceted, self-engendering process involving the rapid multiplication and proliferation of transnational contacts and relationships of all sorts. It takes place when diverse peoples visit or trade with each other, learn each other’s songs, contract each other’s diseases, or marry each other’s children. Neo-imperialism is globalization promoted, shaped, and ultimately limited by elites driven to expand their own commercial infrastructure and values, modes of research and communication, and basic principles of government, education, and social life. What globalizing elites send abroad, of course, is an ‘export version’ of their home system – a technique first developed by the Romans in order to diffuse the fundamentals of Roman Law throughout their empire. Even so, it is a total system that is exported,

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37 Resolving Structural Conflicts, op. cit. 7.
38 See, e.g., George Mousourakis, Roman Law and the Origins of the Civil Law Tradition (New York: Springer, 2015), esp. 84 et seq.
including socioeconomic, political, and cultural structures.

This neo-imperial system, I believe, provides the structural context needed to help us to understand the plague of religious violence and related warfare that has beset the world since the 1980s. After a long period of relative silence, the study of empire, fueled by the perception that the United States has succeeded to the role once played by the old imperial powers, has again become acceptable in some academic and journalistic circles. An early study of the conflict between Muslim jihadists and pro-Western forces named the neo-imperial system “McWorld”: Benjamin Barber’s way of describing the rapid and pervasive spread of American hegemony around the globe after 1945, culminating in the United States’ emergence as the world’s sole military superpower following the Cold War.39 This vast expansion of influence has been perceived by many groups abroad, particularly in volatile, resource-rich regions subject to foreign economic and military intervention, as an invasion that undermines local and regional autonomy, divides and conquers subject peoples, generates massive political corruption, disrupts long-established patterns of social interaction, and exposes local communities to a barrage of imports that challenge traditional religious values and threaten people’s core identities. It therefore generates numerous forms of violence, including rebellion, repression, and inter-imperialist warfare.

“Invasion,” in the case of neo-imperialism, is more than a metaphor. The modern era of religious politicization and extremism began with the Iranian Revolution of the 1970s and accelerated in the following decade with U.S. aid to jihadi forces rebelling against the Soviet occupation of Afghanistan. It did not involve attacks against the West, however, until the President George H.W. Bush sent an army to Saudi Arabia and invaded Kuwait in 1991. The stated purpose of the invasion was to expel Iraqi president Saddam Hussein’s troops from Kuwait, but Bush’s war was also intended to inaugurate a new era of U.S. neo-imperial activism by overcoming the so-called ‘Vietnam syndrome’ and eliminating Saddam’s Iraq as a major player in Middle Eastern affairs.40 The first communiqué issued by al Qaeda leader Osama bin Laden called for the U.S. to remove its troops from Saudi Arabia’s sacred soil, terminate military operations and deadly civil sanctions against Iraq, and end its one-sided support to Israel.41 Little more than a decade later, lured by the promise of oil wealth, regional ‘democratization,’ and the establishment of U.S. control over the region, the second President Bush invaded Iraq proper. Saddam Hussein was deposed and killed, and the region was plunged into sectarian chaos. From the recipients’ perspective, it seemed clear that, stylistic differences aside, the Americans’ neo-imperial ‘mission’ differed hardly at all

from that of the Western imperialists who had carved up the Middle East following World War I, and who had dominated most of the non-Western world ever since the eighteenth century.

Military imposition, however, is not an adequate explanation for either the relative success of the neo-imperial project or the current wave of rebellions against it. Although force was clearly used to expand and maintain the system, it is also true that certain groups in the receiving nations welcomed the spread of Western economic activity and cultural products in their lands, at least up to a point. Younger, more urbanized people in particular displayed great interest in Western consumer goods, technologies, and fashions, in greater freedom of expression, travel, and opportunities to study in Europe or America, in gender rights, internet access, and parliamentary democracy, online investment opportunities, pop music, and religious pluralism, not to mention TV satellite dishes, mobile phones, and a whole panoply of American and European lifestyles and politico-cultural values. Yet the desire for these goods and services can be intensely ambivalent and guilt-producing, since they threaten traditional identities, patterns of social order, and belief systems, and often extract a heavy price in the loss of personal dignity and national independence. For decades, to cite just one example, this price has included the wholesale bribery of public officials and business executives in nations incorporated into the neo-imperial system. Intense ambivalence about Western mores may help to explain why the al Qaeda operatives living in Florida prior to the September 11, 2001 attacks on U.S. targets imbibed alcohol and visited strip bars before going into battle; it was one way to ‘sharpen the contradictions.’

The two faces of neo-imperialism are therefore intimidation and temptation, a combination that has been a potent stimulus to religious rebellions throughout history. One recalls the popular resistance to the French in the Mahgreb, to the British in old China, India, and East Africa, to the Russians in Central Asia, and to the United States in Iraq. Everywhere that secular leadership was unwilling or unable to push back against foreign political and economic domination, religious leaders mobilized mass insurgencies by fusing traditional values and behaviors with modern ideas and organizing techniques. Religious movements not only offered followers the opportunity to purify themselves and defend their traditions, they often provided the only opposition capable of organizing across the lines of class, region, and ethnicity. Moreover, they linked the promise of personal transformation – repentance and spiritual rebirth – to the achievement of social reform. Frequently, they practiced what they preached by organizing social welfare and relief programs that corrupt or callous governments seemed

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42 Barber, op. cit., 17-20, passim. See also Thomas L. Friedman, The Lexus and the Olive Tree: Understanding Globalization (New York: Picador, 2012), which portrays the process as essentially consumer-driven.


incapable of providing, as well as organizing resistance to imperial claims and impositions. These examples of sacrificial action linked to promises of personal and social transformation appealed to many believers at a time when secular movements that promised radical change had been discredited, and when Western thought no longer inspired movements of cultural revival and national liberation. Given the choice between a pallid, collaborationist secularism and a fiery religious fundamentalism, it is not surprising that many people yearning for change preferred the latter.

This analysis, of course, may be challenged by those who do not believe that “neo-imperialism” accurately describes the current global order or the U.S. role in creating and maintaining it. Similarly, some may object that I have not accurately described the systemic basis for poverty and inequality in the United States and the role of socioeconomic conditions in producing crime and mass incarceration. Those challenges are welcome, so long as they lead to a full discussion of the role played by social systems, as well as individual decisions and attitudes, in generating structural and direct violence. One might say, then, that the first responsibility of a peacemaker, in the context of structural violence, is to facilitate discussions among individuals and groups about the extent to which social systems are generating violence, the nature of those systems, and the most effective ways to transform them.

Systemic Change and the Peacemaker’s Responsibility

For would-be peacemakers, two forms of responsibility in the context of structural violence seem preeminent. The first is their responsibility to help move thinking about mass incarceration, the “war on terror” and other forms of state-supported violence out of the mode of partisan moralism and toward identification and analysis of the social systems that generate them. The second is to develop practical methods of assisting conflicting parties to transform violent systems into systems of peace. The problem, in a nutshell, is how to accomplish a socioeconomic and cultural transformation that is both radical and nonviolent. Inegalitarian structures that fail to satisfy basic human needs generate violent conflict in two ways: directly, as when social classes struggle for economic and political supremacy, and indirectly, as when frustrated people conditioned to think of themselves in national, racial, ethnic, or religious terms hold other identity-groups responsible for their problems and target them for punishment. Conflict resolution requires that ranked socioeconomic structures be altered in order to satisfy the basic needs and vital interests of lower class and lower status groups. But how can this be accomplished without provoking violence by the old regime and its challengers? And, if a nonviolent social transformation is feasible, what roles can specialists in conflict resolution play in the process?

The first question demands attention because of the historic association of radical social transformations with intense mass violence. In some situations where the goal was to replace or alter legal and political institutions without overturning the old socioeconomic order, significant change took place without large-scale bloodshed. The nonviolent movement led by Mohandas Gandhi and the Congress Party ousted the British from India, and the campaign led by
Nelson Mandela and the African National Congress overthrew the apartheid system in South Africa, without a revolutionary civil war, but also without reordering those nations’ socioeconomic structures and priorities.\(^{45}\) Other upheavals that aimed at transforming the system of class and property relations as well as the system of governance proved more destructive. In certain instances (the Russian and Chinese revolutions come to mind), significant system changes were, indeed, accomplished, but state and revolutionary violence exacted a high price both in human lives and subsequent political deformation. Of course, this does not mean that leaving an old social regime in place produces peace! The slow collapse of a defunct system (for example, the centuries-long decay of feudalism in Europe) can be even more costly, generating religious upheavals, communal wars, and struggles between secular rulers, as well as horrendous structural violence.

This history must give us pause. It should also lead us to understand that our social thought and peacemaking practice remain uncomfortably constrained by a dichotomous understanding of “reform” and “revolution.” For example, we know that in some cases, significant socioeconomic changes were made relatively rapidly without serious violence. One recalls the mass mobilizations led by New Dealers in the United States and social democrats in Europe that legitimized the labor movement and created the welfare/interest group state.\(^{46}\) During the 1930s in the U.S., a series of hard-fought strikes and demonstrations led by far-left organizations posed the threat of a violent mass uprising and enabled those advocating structural reforms to portray themselves as relative moderates. Revolutionary violence was avoided, although many of the tactics employed by the labor movement were either quasi-legal or illegal and were branded violent by the old regime. Such innovations in the U.S. as ‘sit-down strikes’ (i.e., factory occupations) and ‘one-cent sales’ (mass demonstrations to prevent property foreclosures) were borderline tactics that the state decided not to challenge in order to avoid a dangerous conflict escalation. One also recalls that American courts declared much of the original New Deal legislative program unconstitutional before the U.S. Supreme Court finally decided to validate it.

Interestingly, the size and militancy of the mass movement seems to correlate positively with the avoidance of civil violence. When people are politically aroused to demand significant structural change, but also have the organized means to express themselves collectively, nonviolent

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transformations can occur. That being said, the extent to which these reform movements actually succeeded in altering the old social system remains a matter of debate. Franklin D. Roosevelt’s enemies branded him a revolutionary tyrant, and the new principles and institutions brought to life by the New Deal were more than cosmetic, but in hindsight, the claim that his administration rescued American capitalism by reforming labor-management relations, strengthening the social “safety net,” and regulating the banking and securities industries seems not at all far-fetched. While the changes implemented by the New Deal and social-democratic movements were in some ways substantial, they did not eliminate old classes or create new ones, permanently reverse relations of class domination/subordination, or transform the system of property relations that reflects and embodies the power of these groupings. This leaves us with a key question that current social science has done little to answer. How can we evaluate the transformative potential of a specific reform program? To do this requires a better understanding of the processes of system change than scholarship now possesses.

A second example of substantial nonviolent socioeconomic change is the rapid and unexpected movement of former Communist systems in the direction of capitalism that has taken place over the past two or three decades in Russia, the former Soviet republics and satellites, China, and Vietnam. In the former U.S.S.R. and its dependencies, as well as in Yugoslavia, the old system virtually collapsed and was replaced by a version of Western-style oligopoly capitalism, while in China and Vietnam, capitalist institutions and markets were permitted to develop under Communist Party control. Major questions concerning these developments remain unanswered. Was violence largely avoided because bureaucratic elites were able to maintain political power or to transform themselves into business elites under the new system? Can the parties now in control of formerly Communist regimes prevent the return of the gross inequalities and related social ills associated with capitalism? Do their activities in the world represent a new model of international behavior, or are they repeating the process of empire building that has so often led to global warfare?

Even with these major issues awaiting exploration, the historical materials suggest that rapid and far-reaching socioeconomic changes can be made without unleashing state and revolutionary violence, at least under certain conditions, and that conflict specialists can play useful roles in facilitating processes of transformation. Taking Crane Brinton’s classic study of violent revolutions, The Anatomy of Revolution, as a rough template, one can imagine an “Anatomy of Nonviolent Transformation” that would involve the following stages of development:

1. The old social system’s functions and basic unfairness become evident, provoking multifarious and contradictory demands for change.

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Historians such as Brinton discuss the decline of the ancien régime at length, emphasizing the role played by the “transfer of allegiance of the intellectuals” in delegitimizing old authority systems. Conflict specialists can play a role in this process by focusing attention on the systemic causes of social problems, the forms of structural violence, and the possibilities of helping to create less violent systems. Like the French Encyclopedists, scholars in conflict studies and related fields can produce publications, new course offerings, conferences, and practice projects applying the ‘structural turn’ to specific issues of class and class conflict. The audiences for such presentations can be students, community residents, journalists, or policymakers. In January 2016, for example, several scholar/activists at George Mason University’s School for Conflict Analysis and Resolution organized a two-day conference at United Nations headquarters in New York to discuss “Poverty, Inequality, and Global Conflict,” and to consider what types of national and international policies might help to solve the problems of system-generated violence. A report of the conference was distributed to a group of ‘opinion-makers’ who could help spread the word that poverty and inequality were systemic causes of violence that needed to be combated by new national and international policies, as well as new community-based programs.

2. In a growing atmosphere of crisis, mass movements organize and demand that substantial changes, not yet carefully specified, be made in the old system. They support their demands by resorting to unusual political tactics.

A further sign that the situation may be ripe for systemic change is the emergence of political movements both to the left and to the right of established elite-dominated parties. This indicates that people are moving toward accepting the need for some sort of social and political reconstruction, although they have not yet agreed on its content. As feelings of disenchantment with the existing socioeconomic order spread, people feel the need for public and private discussions of what has gone wrong with the system and what the possibilities are of changing it. Under these circumstances, conflict resolvers are well positioned to facilitate various forms of public dialogue that may be convened by community groups to help people air their discontents, identify key social structures requiring alteration, and envisage possible methods of altering them. They can offer to inform political groups formally or informally of the results of relevant academic research.

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49 The Conference on Poverty, Inequality, and Global Conflict (January 11-12, 2016) was cosponsored by George Mason University, the UN Academic Impact, and the Chicago-based People Program International. The Conference Report is available from the School for Conflict Analysis and Resolution at scar.gmu.edu.
research, as well as undertaking new research needed to throw further light on systemic problems and possible solutions. Skilled facilitators can also offer to assist such groups to work through their internal differences and/or their differences with competing organizations by using the problem-solving workshop methods developed by practitioners like John Burton, Herbert Kelman, and Christopher Mitchell, the sustained dialogue approach pioneered by Harold Saunders, Johan Galtung’s transcend and transform methods, and other relevant techniques for intergroup analysis and communication.51 These techniques, originally designed to deal with ultra-violent ethno-nationalist conflicts, may be well suited to facilitate discussions reflecting disagreements about the nature of the conflict-generating system.

3. As ferment spreads, social-constitutional discussions erupt on street corners, in churches, and in workplaces, while economic and social experiments take place in numerous communities.

People mobilizing for change select new leaders at the local as well as national and international levels. Rather than await the outcome of some final struggle, however, they begin to imagine and implement local solutions to the problems that most concern them. Conflict specialists can play various useful roles in this process, including advising the members of new organizations how to use tactics that are militant and nonviolent, and how to employ conflict resolution techniques in dealing with their political adversaries. Moreover, they are well positioned to investigate, evaluate, and publicize the community-based programs and experimental projects that have already begun to appear in response to perceptions that the current socioeconomic system is in crisis.

In contemplating further system change, people want to know ‘what works.’ What existing programs already help to get young people in poor neighborhoods off the streets, provide them with useful, well-paid work, and keep them out of the hands of violent gangs?52 How have older people and others declared ‘superfluous’ by the market economy managed to provide services for each other in exchange for ‘time-dollars’: a program now operating in more than 30 U.S. cities?53 What alternative forms of cooperative business and public service enterprise already permit workers and local residents in scores of communities to own their own companies and plan their own economic futures?54 Some activists believe that the spread of these local

51 See Chapter Two, supra, at 46–47.
initiatives and cooperative enterprises is the key to a nonviolent socioeconomic transformation.\textsuperscript{55} Others fear that local movements will be co-opted or repressed as struggle intensifies. Conflict specialists can make a valuable contribution to the discussion by studying and evaluating the evidence for these claims and working to develop programs that they believe are transformative.

4. \textit{Political conflict intensifies at local and national levels, with old elites dividing and political coalitions reorganizing to support competing visions of system change. Specific programs for structural transformation are presented to the public in elections, referenda, and other forms of public decision-making.}

As political conflict escalates and moves toward a possible resolution, conflict specialists could play very important, although virtually unprecedented roles in facilitating agreement on a new social constitution. All the ‘third party’ techniques mentioned earlier can be employed to assist the parties to reach specific agreements on needed changes. Moreover, conflict resolvers skilled in improvising new public decision-making processes could help design political forums to permit open and thoughtful discussion of proposed structural changes.\textsuperscript{56} They could also advise conflicting parties how to deal with two factors that often obstruct nonviolent agreement on new socioeconomic relations: elite groups’ fear of total loss, and all parties’ reluctance to consent to irrevocable changes. Conflict resolvers will understand the need to assure privileged groups that changes agreed upon will not render them non-people, expose them to vengeance, or ignore their basic human needs. They will also work to ensure that any new structural arrangement embodies the ‘principle of reversibility.’ In the same way that citizens can now work to amend a political constitution, the parties to class conflicts need to be assured that restructured socioeconomic systems can also be re-altered to reflect changes in the popular will.

This brings our discussion full circle. The work of peaceful system transformation must involve public education on a large scale. Strenuous new efforts are required to help our fellow citizens and fellow humans worldwide, at a time of increasing insecurity and frustration, to move beyond partisan moralism to a new appreciation of their own responsibility and the system’s responsibility for avoidable violence. The bad news is that, where violent conflict is concerned, no party to the conflict and few bystanders are guiltless. As the Rolling Stones sing (in “Sympathy for the Devil”), “I shouted out/Who killed the Kennedys?/When after all/It was you and me.”\textsuperscript{57} The good news is

\textsuperscript{55} The project is described at http://democracycollaborative.org/content/next-system-project and thenextsystem.org.


that no party is solely responsible for violence sponsored or provoked by an oppressive social structure. And the best news is that, once people decide to transform such a structure, they can help each other to do so. Each of these steps – acknowledging responsibility for violence, perceiving that a system is also responsible for it, and deciding to change that system through collective effort – challenges peacemakers to overcome serious (but not insuperable) political and psychological obstacles to public understanding of such issues. That, I believe, is their particular professional and ethical responsibility.
Terror, Insecurity, State Responsibility and Challenges: Yesterday and Today?

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Abstract:

The further from 9/11, the more vivid its scares remain in the collective conscience. This seems to justify perhaps what has become a persistent state of a global war on terror. A war which in turn has given rise to a persistent surge of violent extremists with resolve for a perpetual state of global warfare. Consequently, now more than before, there is everywhere a shared sense of insecurity and a parallel awareness of vulnerable statehood and state capacity. I argue in this article that the current state of affairs has serious implications for statehood, state responsibility, state obligation and state duties in various forms and spheres of meaningful governance. I reassess how the principles of State responsibility and State duty can be meaningfully understood in light of current global security challenges to common notion of State monopoly to the use of force. I ask how culpability can be assessed and responsibility attributed to bring to end the scourges of terror by violent extremists. To that end, I explore practices, events, and cases to supply explanations and thus, lay conditions for accountability.

Introduction

During war and peace times, there is a question of State responsibility and what obligation sovereign States must legitimately and morally shoulder. This is particularly true during the so-called ‘war on terror;’ a war lacking the conventional warfare framework where the enemies, the Violent non State actors (VNSA), are illusive, and unpredictable with the capacity to morph into different forms in different contexts. Terror or terrorism, the object, is highly contested as lacking in an academic or political consensus in terms of definition. Is it an idea, an ideology or a barbaric strategy in posture? Be it as it may in the face of all of the upsurge in terrorist extremist activities since 9/11, concerns have been raised about the increased vulnerability of the State; Statehood as well as its diminished coercive capacity. Sure enough, the continuous state of the global war on terror post 9/11 has not been helpful; instead it has ushered in with it an ambiguous sense of security.

58 See Wilkinson, Paul (1977) Terrorism and the Liberal State, London: Macmillan. To Paul Wilkinson, a proclaimed expert on terrorism conceives of “terrorism in its broadest sense, as the use of intentionally indiscriminate violence - the systematic use of murder, injury, and destruction or threat of same -- as a means to create terror or fear, in order to achieve a political, religious, or ideological aim.”
In the international community, what once was a sovereign State’s enduring claim to the monopoly of the use of force within territorial borders is today highly contestable, and to a large measure, is in jeopardy. From so-called failed states to the most powerful, there is no exception. In that sense the score card on the effort of contemporary domestic and international counter-terrorism goals, in the long haul, prompt more questions than the answers supplied. One of these questions is whether the all or nothing claim in the fight against terrorism has made the world a safer place today than yesterday. The continued mayhem caused by extremists, the Al-Qaeda of yesterday, ISIS of today and their extended affiliates around the world, and the new global jihadist insurgent types such as the Islamic State of Iraq and al-Sham (ISIS) in Syria and Iraq, Boko-Aram in Nigeria and Northern Cameroon, to name but a few, speaks volumes to any conclusion one may draw of a safer world, today.

The recent movement by the United States to exclude persons, and justifications supplied to ban visitations and immigration from those parts of the world, speaks to the felt sense of global insecurity from the US perspective, and more importantly, to the confusion in sorting the appropriate measures for accountability. It also undoubtedly speaks to a corresponding vulnerability in the US capacity to properly counter precise dangers posed perhaps by immigrants apart from the violent extremists from these parts of the world. Section 2 of the Executive Order 13769 of January 27, 2017 provides that: “It is the policy of the United States to protect its citizens from foreign nationals who intend to commit terrorist attacks in the United States; and to prevent the admission of foreign nationals who intend to exploit US immigration laws for malevolent purposes.”

Recent Global Terrorism Index death statistics of terrorist attacks and fatalities show increase in terrorist activity by 80% in 2014 to its highest recorded level to date. This colossal in that, it is the largest ever year-on-year increase in deaths from terrorism recorded in 2014, rising from 18,111 in 2013 to 32,685 in 2014. Indeed, the number of people who have died from terrorist activity has increased nine-fold since the year 2000. With a much refined source of terror of “non-state terrorism” recorded, the Global Terrorism Database

59 The new insurgent types would be the global jihadist movements groups made of non-state actors composed of al Qaeda-affiliated and -inspired groups and individuals who see Al Qaeda not only as an organization but also as an ideology.

60 The Islamic State of Iraq and Syria (ISIS), also known as the Islamic State in the Levant (ISIL), currently controls about one-third of Iraq and Syria. They are a combination of: (a) revival of the al-Qaeda-sponsored Islamic State of Iraq (ISI) organization that tried to take over western Iraq 2003—2006, and Sunni Syrian rebel groups including the Nusra Front (Jabhat al Nusra), which also has ties to al Qaeda, see Shoshana Bryen and Michael Johnson “TO KNOW YOUR ENEMY: What is ISIS, Where did it Come From, and When Did the US Know it was There?”

61 See Executive Order 13769 of January 27, 2017, “Protecting the Nation from Foreign Terrorist Entry into the United States”

provides that more than 61,000 incidents resulted in 140,000 deaths between 2000 and 2014.63 As depicted in Table 1A, of the 37 deaths from terrorism in Western countries in 2014, 18 fatalities took place in the United States in that year alone. In the eight other countries that reported a fatal terrorist attack, there were a combined total of 19 deaths from terrorist attacks.

Table 1A – Deaths from Terrorist Attacks in Western Countries in 2014

<table>
<thead>
<tr>
<th>Country</th>
<th>Deaths</th>
<th>Attacks</th>
<th>Country</th>
<th>Deaths</th>
<th>Attacks</th>
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<tbody>
<tr>
<td>United States</td>
<td>18</td>
<td>19</td>
<td>13 Germany</td>
<td>0</td>
<td>12</td>
</tr>
<tr>
<td>Australia</td>
<td>4</td>
<td>7</td>
<td>14 Italy</td>
<td>0</td>
<td>7</td>
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<tr>
<td>Canada</td>
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<td>2</td>
<td>15 Sweden</td>
<td>0</td>
<td>6</td>
</tr>
<tr>
<td>Belgium</td>
<td>4</td>
<td>1</td>
<td>16 Cyprus</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>Kosovo</td>
<td>2</td>
<td>1</td>
<td>17 Bosnia Herzegovina</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>Austria</td>
<td>2</td>
<td>1</td>
<td>18 Macedonia</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>France</td>
<td>1</td>
<td>11</td>
<td>19 Spain</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>1</td>
<td>3</td>
<td>20 Bulgaria</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Albania</td>
<td>1</td>
<td>2</td>
<td>21 Hungary</td>
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</tbody>
</table>

Total # of Deaths in 2014 = 37

Total # of Attacks = 254

As depicted in this table, of the 37 deaths from terrorism in Western countries in 2014, 18 fatalities took place in the United States in that year alone. In the eight other countries that reported a fatal terrorist attack, there were a combined total of 19 deaths.

The Federal Bureau of Investigation bulletin with focus on the United States with implications around the world reports that terrorist extremists such as ISIS, Al-Qaeda and affiliated groups to include other Homegrown Violent Extremists (HVE), continue to attempt terrorist attacks on the US homeland. New tactics and tradecraft, the FBI report observes, have emerged which further complicates the innumerable threats facing the United States.64 The FBI report seemingly hinges on whether the reported terrorist threats

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63 See The Global Terrorism Database (GTD): a database of incidents of terrorism from 1970 onward to 2017 maintained by the National Consortium for the Study of Terrorism and Responses to Terrorism (START) at the University of Maryland, College Park. It is also the basis for other terrorism-related measures, such as the Global Terrorism Index (GTI) published by the Institute for Economics and Peace.

were domestic to the United States and therefore unique, or international and therefore widespread and global. A 2010 study by Seung-Whan Choi (2010) presented causal explanation that tends to dampen the domestic terror source hypothesis. Choi suggests instead that “because ordinary citizens can peacefully resolve grievances through democratic rule of law systems, they lack the hopelessness and desperation that motivates international terrorist actions.” Consequently, from that view, legitimately held rule of law systems serve to insulate democracies from terrorist attacks from within.65

Choi therefore invites a thinking that differentiates the impact of terrorism into brands or types (i.e., home grown extremists versus international violent extremists) and political systems (i.e., democratic versus non-democratic or authoritarian regimes). In that view, “home grown domestic extremists” is a category quite distinct from “international terrorism.” Yet terrorist attacks of the kind of 9/11 and most recently ISIS’s gruesome targets in France and Belgium and before that Western journalists in Iraq and Syria, suggest the predominance and magnitude of trans-border flow of persons and to a larger extent, of terrorist groups. That is, it is possible to imagine that the ease of traveling from one point to another may exacerbate the movement of persons and also conclude that it may also facilitate the formation and movement of terror groups as well. For all its positives, “openness” and therefore the increased freedom in the movement of persons across borders, fosters opportunities for terrorist activities predisposed with insidious motives to destabilize international peace and security. This conclusion is not only critical but also controversial, as it invokes serious reconsiderations that are more likely to undermine than foster the free movements of persons.

This article focuses on the global impact of terror unleashed by Violent non-State Actors [VNSA]. It examines linkages between the principles of state responsibility, statehood and sovereignty, especially how these concepts can be properly understood in light of challenges posed by VNSAs within the rapid shifts in State practices in the post 9/11 era. It questions whether statehood, an inherent aspect of a State, and therefore conferring sovereignty - a state’s ultimate liberty to define, as it sees fit, its domestic structures and more. To that end, the article contemplates (a) conditions under which States can be held responsible for their direct wrongful actions; and (b) conditions under which host States can be held responsible for acts of those that use their territories as safe-haven to lunch attacks on other States or groups especially where they fail to act or incapable of doing so.

While the attribution of responsibility to a State for its direct action may be less complicated, attribution to a State for acts of a third party, for example, a Violent non-State Actors (VNSA) party is almost always controversial. By definition VNSAs are elusive organizations that utilize illegal violence as the primary means to achieve political goals. These may include the use of unsanctioned forces which complicates any direct attribution of responsibility under the theory of State responsibility. As argued below, the continued growth of terrorist organizations since 9/11 suggests more, and not less anxiety among those who are the primary target States, notably the United States, Israel, and most European countries. Since 2001, the US Department of State Office of Counterterrorism has documented well over fifty groups and organizations as Foreign Terrorist Organizations (FTO) with well-known attack agendas against western interests (see Table 1b and c).67 Amongst those designated FTOs, ten at the very least have for avowed

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purpose and dedication the elimination of the State of Israel, or to replace Israel with a Palestine Islamic State using violence at their primary vehicle. The remaining forty FTOs on the list pursue a similar agenda but directed to other targets all over the world.

Astonishingly, from a much broader scale, the US Department of State Office of Counterterrorism also reports that over the past years there was a total of 6,771 terrorist attacks worldwide which resulted in more than 11,000 deaths and more than 21,600 injuries. In addition, more than 1,280 people were kidnapped or taken hostage during the same period.68

Table 1B – Designated Foreign Terrorist Organizations

| Designated Foreign Terrorist Organizations (FTO)* (Non-State Actors) **As of October 2017** |
|---|---|---|
| **Designated** | **Group** | **Date Designated** | **Group** | **Date Designated** |
| 2 | 10/8/1997 | Aum Shinrikyo (AUM) | 33 | 6/17/2005 | Islamic Jihad Union (IJU) |
| 3 | 10/8/1997 | Basque Fatherland and Liberty (ETA) | 34 | 3/5/2008 | Haram al-Shahd of the Islamic Province (HSP) |
| 5 | 10/8/1997 | HAMAS | 36 | 5/14/2009 | Revolutionary Struggle (RS) |
| 6 | 10/8/1997 | Harakat as-Sa‘id bin Abi Bakr (HBS) | 37 | 9/14/2009 | Kata’ib Hizballah (KH) |
| 7 | 10/8/1997 | Hizballah | 38 | 1/19/2010 | al-Qa‘ida in the Arabian Peninsula (AQAP) |
| 8 | 10/8/1997 | Kahane Chai (Kachi) | 39 | 8/6/2010 | Harakat al-Sha'ad of the Islamic Nation (HSNI) |
| 12 | 10/8/1997 | Palestine Liberation Front (PLF) | 43 | 9/19/2011 | Indian Mujahideen (IM) |
| 14 | 10/8/1997 | Popular Front for the Liberation of Palestine (PFLP) | 45 | 5/30/2012 | Abdullah Azzam Brigades (AAB) |
| 15 | 10/8/1997 | PFLP-General Command (PFLP-GC) | 46 | 9/19/2012 | Haqqani Network (HNQ) |
| 16 | 10/8/1997 | Revolutionary Armed Forces of Colombia (FARC) | 47 | 3/22/2013 | Amur al-Din (AAD) |
| 17 | 10/8/1997 | Revolutionary People’s Liberation Party/Front (DHKP/C) | 48 | 11/14/2013 | Boko Haram |
| 18 | 10/8/1997 | Shining Path (SL) | 49 | 11/14/2013 | Ansar |
| 19 | 10/8/1999 | al-Qa‘ida (AQ) | 50 | 12/19/2013 | al-Muhajireen Battalion |
| 20 | 9/25/2000 | Islamic Movement of Uzbekistan (IMU) | 51 | 1/13/2014 | Ansar al-Shar’a in Benghari |
| 21 | 5/16/2001 | Real Irish Republican Army (RIRA) | 52 | 1/13/2014 | Ansar al-Shar’a in Darnah |
| 22 | 12/16/2001 | Jund al-Quraish (HJ) | 53 | 1/13/2014 | Ansar al-Shar’a in Tunisia |
| 23 | 12/26/2001 | Liberation Tigers of Tamil Eelam (LTTE) | 54 | 4/10/2014 | ISIL Sinai Province (formerly Ansar Bayt al-Maqdis) |
| 27 | 8/9/2002 | Communist Party of the Philippines/New People’s Army | 58 | 1/14/2016 | ISIL-Sham (ISIS-K) |
| 28 | 10/21/2002 | Jemaah Islamiyah (JI) | 59 | 5/20/2016 | Islamic State of Iraq and the Levant’s Branch in Libya (ISIL-Libya) |
| 29 | 1/20/2003 | Liberation Tigers of Tamil Eelam (LTTE) | 60 | 6/30/2016 | Al-Qa‘ida in the Indian Subcontinent |
| 30 | 3/22/2004 | Ansar al-Islam (AAI) | 61 | 8/16/2017 | Hizballah |

Source: US Department of State. Bureau of Counterterrorism, October 2017, reassembled by author (M.G. Pufong).

Criteria for FTO Designation:

http://www.state.gov/j/ct/rls/other/des/129085.htm., Accessed June 8, 2017; Also see most resent posting for September 2017 on Table 1b and 1c.

The Legal Criteria for group Designation under Section 219 of the INA as amended in 2004 requires that (1) the organization upon which a FTO designation is visited upon is a foreign organization. (2) the organization must engage in terrorist activity, as defined in section 212 (a)(3)(B) of the INA (8 U.S.C. § 1182(a)(3)(B)),* or terrorism, as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989 (22 U.S.C. § 2656f(d)(2)),**, or retain the capability and intent to engage in terrorist activity or terrorism, and (3) the organization’s terrorist activity or terrorism must threaten the security of U.S. nationals or the national security (national defense, foreign relations, or the economic interests) of the United States.

Identification and Designation:

For identification and designation purposes, the Bureau of Counterterrorism in the State Department (CT) continually monitors the activities of terrorist groups active around the world to identify potential targets for designation. When reviewing potential targets, CT looks not only at the actual terrorist attacks that a group has carried out, but also at whether the group has engaged in planning and preparations for possible future acts of terrorism or retains the capability and intent to carry out such acts.

Designation:

Once a target is identified, CT prepares a detailed “administrative record,” which is a compilation of information, typically including both classified and open sources information, demonstrating that the statutory criteria for designation have been satisfied. If the Secretary of State, in consultation with the Attorney General and the Secretary of the Treasury, decides to make the designation, Congress is notified of the Secretary’s intent to designate the organization and given seven days to review the designation, as the INA requires. Upon the expiration of the seven-day waiting period and in the absence of Congressional action to block the designation, notice of the designation is published in the Federal Register, at which point the designation takes effect. By law an organization designated as an FTO may seek judicial review of the designation in the United States Court of Appeals for the District of Columbia Circuit not later than 30 days after the designation is published in the Federal Register.

Unlike before when the INA provided that FTOs had to be re-designated every 2 years or the designation would lapse, under the Intelligence Reform and Terrorism Prevention Act (IRTPA) 2004, re-designation is done only by review and revocation procedures.

<table>
<thead>
<tr>
<th>Table 1C – Delisted Foreign Terrorist Organizations</th>
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<tbody>
<tr>
<td><strong>Delisted Foreign Terrorist Organizations (FTO)</strong>*</td>
</tr>
<tr>
<td><strong>Date Removed from Designated Listing</strong></td>
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<td>7</td>
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<td>9</td>
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<td>10</td>
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<td>12</td>
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</tbody>
</table>

**Delisting/Revocation of FTO Designation**

The act of delisting or revocation of Foreign Terrorist Organizations (FTO) designation under the US Immigration and Nationality Act has three possible basis: First, that Secretary of State has determined that the circumstances that were the basis of the designation have changed in such a manner as to warrant a revocation; second, that the Secretary of State has determined that the national security of the United States warrants a revocation; and thirdly, that the Secretary of State may revoke a designation at any time. Further, that Any revocation shall take effect on the date specified in the revocation or upon publication in the Federal Register if no effective date is specified. The revocation of a designation shall not affect any action or proceeding based on conduct committed prior to the effective date of such revocation.

Source: US Department of State. Bureau of Counterterrorism, October 2017, reassembled by author (M.G. Pufong)

Methodology, Application & Outline

The methodological approach adopted in this article for assessment is primarily analytical and explanatory. Specifically, I use international incidentsthat depict State

http://commons.lib.jmu.edu/ijr/vol1/iss2/1
practices, events, and court cases as case studies to explain outcome consistency or inconsistency with prevailing principle, practices and international norms. So for example, an invasion targeting the capture or to neutralize a Violent Non-State Actor under this approach would invite inquiry into many features of the context or the invasion in light of prevailing international principles. Elsewhere, Riesman and Willard (1988) confirm the relevance of using incidents as method of assessment. Riesman and Willard argue that “incidents” frame the international disputes that shapes and reinforces elite expectations about the lawfulness of acts for which the appraisal of the relevance of international actors occurs in a non-formal setting.69

In the first and second parts of this article I provide summary explanations associated with how one should understand the link between Statehood and State responsibility as important principles under international law. Both principles are further reiterated and their consequences made relevant in subsequent assessments of incidents of State behavior, practices, cases, and events on State responsibility. The third part of the article focuses on the principle of sovereignty and its practical implications for nation states. Specifically, I explore circumstances under which sovereignty may or may not confer to States the absolute right that absolve them from wrongful acts. Particular attention is directed to states that harbor violent terrorist groups.

The article concludes that under narrow circumstances, where a conduct or an incident can be attributed to a specific State – its actions or failure to act – international law and politics permits the use of force for its wrongful acts or for the acts of a violent non-State actor (VNSA) under its jurisdiction or control. Absent direct acknowledgment of responsibility for the initial transgression or the attribution of responsibility that links or inculpates the host State, the use of force is likely only where the host State is unable or unwilling to remove the source-of-threat from its territory.

The last part of the article on the targeted use of drones and the invasion of Pakistan set forth the justification for permissible use of force. Specifically this section argues that the invasion and killing of Osama bin Laden in Pakistan’s territory falls under the latter “unwilling” category and therefore triggered the permissible use of force by the United States. Above all, this article argues that under current status quo, any diminished impact on the State sovereign capacity and more important in terms of cost associated with the increased measures taken to avert global terrorism, is offset by rival gains in the long term security. This is particularly true for the international community absent the initial source-of-threat to its stability.

Explaining Statehood and State Responsibility

The most prominent form of violent conflict in the world today occurs within States rather than between them. Since 1945, over 75% of militarized disputes have been civil conflicts, i.e., non-international armed wars.70 With the increase in terrorist extremists (VNSA), who use domestic structure of States as safe-havens to launch attacks on other States, it triggers questions of distinctions and clarification of this important

principle in international law and politics. To understand what really is State responsibility requires foremost that we disentangle what constitutes Statehood.

The 1933 Montevideo Convention on Right and Duty of States which sets out the definition, rights, and duties of statehood is particularly instructive here.\(^{71}\) It outlines the four elements required for the claim of statehood that heretofore has been recognized as an accurate statement of customary international law. Inherent in them are specific attributes a State must possess, and which upon doing so, sets forth the basis for State responsibility. Accordingly, these attributes require that a state possesses (a) a well-defined territory; (b) a permanent population; (c) a government or an effective rule within the territory; and (d) independence or the competence to conduct international relations. In fact, these attributes differentiate States from so-called non-State actors or units such as belligerent communities (e.g., rebel groups), domestic protectorates (e.g., Indian nations), international organizations etc. As shown in this article, the essence of statehood also conveys statuses that are associated with the various sets of rights and duties, and carry with them obligations and jurisdictional competences. While the Montevideo attributes have traditionally been viewed as legitimate standards that State must possess, serious debate between the constitutive and declarative views of statehood persists.\(^{72}\)

More recently, David Miller argued that the rights over territory standardly claimed by states can be separated into three main elements: the right of jurisdiction, the right to the territory’s resources, and the right to control borders.\(^{73}\) Arguably, statehood and its derivative rights and duties under international law create a framework for extant State responsibility. According to the 2001 (final) “Article on the Responsibility of States…” the principle of State responsibility embraces the conception that State rights and duties must be respected. It outlines the conditions under which violators will be held to account for their action or inactions, as well as the consequences that flow from committing wrongs that violate State rights. It links wrongful acts to the direct State actions or to those that are indirectly the result of State inaction (ARSWA, 2001).

By connecting breach of rights and duties (norms) with responsibility and sanctions for breaches, State responsibility in the end forms the basis for implementing international law and obligation. For example, Article 1 of all four Geneva Conventions is a key provision when it comes to determining State responsibilities under international humanitarian law (IHL).\(^{74}\) It provides that states are responsible to “respect and ensure respect” for the Conventions in all circumstances. To respect, means that all state

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\(^{72}\) For the constitutive basis of state see the 1815 Final Acts, Congress of Vienna and for the declarative basis of statehood and also see the Montevideo Convention on the Rights and Duties of States, 1933. For further discussion, see Ian Brownlie Principles of Public International Law, (Oxford, England: Oxford University Press, 1958) and Hans Kelsen, Principles of International Law, (New York: Rinehart & Company, Inc 1952).

\(^{73}\) See David Miller, Territorial Rights: Concept and Justification. (2012) 60 Political Studies, 252–268.

institutions, and all other individuals or bodies under their authority follow the rules of the Geneva Conventions.\(^75\)

Article 1 however, seems to apply only to traditional State actors. The lack of the requisite attributes of statehood perhaps explains the lack of inclusion of non-state actors who even though very elusive, are also prevalent on the international stage through various trans-border activities. Also, the lack of territorial jurisdiction suggests that non-State actors cannot absorb direct responsibility as understood under the traditional meaning of state responsibility. A question of significant interest for State responsibility, therefore, is under what circumstances can the wrongful act of a purely non-State actor be attributed to a traditional State actor as the host of a country where the action or wrongful act occurred?\(^76\)

To establish that state responsibility, the outcome of state action and therefore a consequence of statehood, is explained below. I further discuss other practical situations that may apply to the principles of State responsibility using case opinions of the International Court of Justice, the international arbitration tribunals, and human rights courts. Finally, I provide a comprehensive understanding of the main principles of the law of State responsibility as an enforcement mechanism in international law, short of other options such as the use of force.

**State Responsibility as a Consequence of Statehood**

What is the link between state responsibility, state action, and statehood? The concept of statehood is central in establishing what in modern understanding is a State, and therefore whether a State by its actions or omissions breaches an international obligation, and incurs international responsibility. This assumes first and foremost that the State indeed, is authentic. The responsibility incurred is said to be either derived or is a consequence to its status and act(s) committed or omitted. Therefore the concept of statehood confers the status of a legal person and a subject under international law. As discussed below under attribution, this is an important concept because any attribution of State responsibility requires a determination based on specific attributes that a State must possess.\(^77\)

Beyond framing the rights and duties of statehood, the Montevideo Convention of 1933 establishes basic criteria that a State must possess to be recognized as a person under international law (See Section III above). These requirements are: a permanent population; a defined territory; a government; and lastly, the capacity to enter into relations with other states.\(^78\) By this action, the Convention effectively codified what is famously known as the **declarative theory** of statehood. It is this conception of Statehood that paved the way to the recognition of State responsibility as further grounds upon

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\(^75\) See The Geneva Conventions, see Note 17 above.


\(^77\) Again, recall that these attributes owe their formal origin from the Montevideo Convention on the Rights and Duties of States as agreed to and signed into effect by member states on December 26, 1933. See Montevideo Convention, see Note 14 above

\(^78\) See note 14
which a State can be held liable for certain conduct. Article 3 of the *Montevideo Convention* for example, explicitly provides that "The political existence of a state is independent of recognition by the other states."\(^79\)

The declarative theory of Statehood was further sustained in 1991 by the EEC *Arbitration Commission of the Conference on Yugoslavia* (commonly known as *Badinter Arbitration Committee*) which held that a state is defined by having a territory, a population, and a political authority.\(^80\) Its practical usefulness lies in the assertion that a State exists by law (de-jure), even if such a State (1) lacks one of the attributes, or (2) some politically powerful entity elects not to recognize its existence. The State of Palestine today is the clearest example yet. It is recognized by many countries, but it does not have control over its claimed territory in Palestine and in spite of recent claims and movements in the United Nations’ towards statehood.\(^81\) That remains the case even if it has extraterritorial instrumentalities such as embassies and consulates.\(^82\)

The *declarative theory* of statehood however, is in sharp contrast to the *constitutive theory* which steadfastly endorses the view of “recognition” as a primary requirement for statehood. The constitutive theory defines a State as a person under international law if, and only if, it is also recognized as a sovereign state by other states, especially the great powers.\(^83\) Justification for this view is found in the logic that because new states cannot immediately become part of the international community or be bound by international law, the existing recognized nations do not have to respect international law in dealings with non-recognized States.

So as stated above, if state responsibility is a natural consequence of statehood, being a state in either a de-jure or de-facto sense, is an important first step. Once it is established that statehood actually exists, and how it exists, under either the *declarative or constitutive* theory, it paves way to a fuller narrative of State responsibility. A showing that statehood exists in a particular instance therefore is foremost. Only upon doing so can a State be held to be liable for any purported wrongful act. According to Article 1 of the 2001 (final) *Articles on the Responsibility of States for Internationally Wrongful Acts* (ARSIWA), “every internationally wrongful act of a State entails the international responsibility of that State.”\(^84\) In an era increasingly thought to be transformative, from

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\(^79\) See *Montevideo Convention*, note 8 above.


\(^82\) A distinction is important here. Israel allows the Palestine National Authority to execute some functions in the Palestinian territories, depending on special area classification. Israel however, maintains minimal interference (retaining control of borders: air, sea beyond internal waters, land) in the Gaza strip and maximum in "Administrative Division of the Oslo Accords." Palestine therefore does not meet the clear definition of state under Montevideo.


the rigid veil of statehood, the emphases on the principles of State responsibility and sovereignty is important, even if both concepts are often thought to be conflicting. It is a common observation that States in their sovereign capacity would not surrender their rights or create conditions that would entice them to accept responsibilities that would undermine those rights. States would even go as far as avoiding responsibilities in situations where they initially agreed to accept one. Such a scenario is too common because States reserve the power to assert for themselves the right to decide their own interest in everything, and to recognize no other authority above them in their relations when dealing with each other.85

Thus, questions of state responsibility assume that once statehood is acquired, the emergent State incurs obligations for its action, inactions, or omissions arising from the new international status. To meet this standard and be held accountable under international law, State action must constitute a breach of an international instrument or must be one that is not in conformity with its international obligation or custom.86 Such an obligation may entail the responsibility for the breach of an existing or newly formulated obligation that impacts one state or the entire community of nations and for which the new State is required to make reparation. The requirement for reparations – that is, payments or other compensation offered as an indemnity for loss or damage87 speaks to the measures that a new State is obligated to take if and when a showing is made establishing that the wrongful act committed constituted a breach of responsibility, and consequently, a violation of its responsibility. Lastly, reparations viewed as a form of sanction, can be also be applied to remedying the wrongful acts attributed to a State regardless of whether those acts were committed by its agents or private parties under the color of its orders. In the section below, I examine further events and cases that provide clarity to the link that exist between statehood and state responsibility.

Statehood and State Responsibility

What are the consequences of the legal personality of a State? When a State commits a wrongful act against another State or the international community, its breach of international law triggers the duty that it makes reparation for the harmful infringement of its obligation. Under such circumstances, the state is said to have breached state responsibility. In this section, I provide and discuss four events and/or cases that shed light on statehood and state responsibility.

Case-in-point A: In August 2008, the Italian government apologized for Italy’s occupation of Libya from 1911-1943. Italy thus paid the equivalent of $5,000,000,000 to

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compensate for this long term breach of Libya’s territory. Italy further provided Libya with electronic monitoring devises on the Libyan coastline to help prevent clandestine migration to Italy. Summarily, three elements combine to trigger State responsibility in the expectation that there is (a) the existence of a legal obligation recognized by international law, (b) an act or omission that violates that obligation, and (c) some loss or articulable damage caused by the breach of that obligation. Whether actual damage is required is the subject of intense debate. These elements are drawn from a variety of sources, including various judicial and arbitration awards.

Case-in-point B: The previously Permanent Court International Justice in a 1928 case The Factory at Chorzow is another example. In this case the PCIJ ruled that “it is a principle of international law and even a greater conception of all law that any breach of an engagement (responsibility to another State) involves an obligation to make reparation.” This, according to the Court, reflects the fact that all legal systems require those who cause harm through illegal or wrongful acts to take action to repair the harm they have caused. In that case Germany had sued Poland seeking reparations for Poland’s breach of its treaty obligation not to impound a German factory once built in Poland.

In addition, human rights treaties and declarations adopted by the United Nations guarantee individual victims the right to a remedy, that is, access to justice and reparations in national proceedings. The Universal Declaration of Human Rights, Article 8, proclaims that “everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or laws.” This guarantee would, of course, include remedies for criminal acts that violate guaranteed rights. The International Covenant on Civil and Political Rights contains a similar guarantee in its Article 2(3). The UN Human Rights Committee overseeing compliance with the covenant has stated that when acts of torture occur, for example, a government is under a duty to: “Conduct an inquiry into the circumstances of [the victim’s] torture, to punish those found guilty of torture and to take steps to ensure that similar violations do not occur in the future.” That committee has also called for investigation and prosecution in cases involving arbitrary executions and disappearances. All these acts constitute types of reparations for the wrong done for which State Responsibility are lodged. Support for these principles can be found in many arbitration decisions.

Case-in-point C: In 1985, the crew of the Dutch-registered Greenpeace ship Rainbow Warrior protested French nuclear testing in the South Pacific. The French
military security service “Direction Générale de la Sécurité Extérieure” then destroyed the vessel in a New Zealand harbor, killing one of the crew members. New Zealand was obviously upset because of this ostensible breach of its territorial sovereignty. France consequently agreed to transfer the responsible French agents to its base in the Pacific where they would remain for the last three years. The agents however, were subsequently repatriated to France without New Zealand’s consent.

In a 1986 arbitration decision, the UN Secretary General ruled that “in such cases where a state sends its agents abroad to commit acts which are illegal under international or the domestic law of the target country, it is customary for the state to take responsibility for the act and issue compensation …even where its agents are usually granted immunity from local courts.” Essentially, France had incurred State responsibility for its agents and related violation of its commitments to incarcerate its agent in the geographical region, which was the scene of the crime. The Rainbow Warrior Arbitration decision affirmed that “the legal consequences of breach of a treaty, including the determination of circumstances that may exclude wrongfulness …the appropriate remedies for breach, and subjects that belong to the customary law of state responsibility.” Even though the actions of the French state were not a threat to "international peace and security" per the UN Charter, they were widely held to be acts of international delinquency comprising breach of sovereignty and espionage.

The Rainbow Warrior case is important at several levels. First, it bolsters the notion that there is a doctrine of non-intervention in international law and that states will be punished for contravening it. Second, it is also an interesting study of state responsibility, individual responsibility, use of force and reparations. Third and lastly, it supports the thesis that attribution is an important instrument in the goal of righting justice under certain situations. France incurred State responsibility for its agents and related violation of its treaty commitments because it presumably failed, per the treaty, to incarcerate its agent in the geographical region which was the scene of the crime. The logic of State responsibility here is that there had been an initial finding of fault or intent on the part of a State’s agents from which State responsibility was imputed. The failure of its agent to respect the terms the imprisonment was attributable to France as its responsibility, for which it was held to pay reparations. It is not at all consequential nor does matter if French State was itself at fault or its agents. The 1949 Corfu case below clarify this problem.

Case-in-point D: The Corfu Channel Incident refers to three separate events involving Royal Navy ships in the Channel of Corfu which took place in 1946. During

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96 Corfu Channel Case (United Kingdom v. Albania); Assessment of Compensation, 15 XII 49, International Court of Justice (ICJ), 15 December 1949, available at: http://www.unhcr.org/refworld/docid /402398c84.html [accessed 6 June 2017].
the first incident, Royal Navy ships came under fire from Albanian fortifications. The second incident involved Royal Navy ships striking mines, and the third incident occurred when the Royal Navy conducted mine-clearing operations in the Corfu Channel, ventured into Albanian territorial waters, and Albania complained to the United Nations. On the question of whether a finding of fault or intent on the part of a State’s agents is required for State responsibility when one alleges State harms, the International Court of Justice in the 1949 *Corfu Channel* opinion suggests that some showing of fault is required for liability (responsibility) to arise. Albania, the Court ruled, was responsible under international law for the explosions and for damages and loss of life resulting from them and that Albania owed a duty to Great Britain to pay compensation. In that case Great Britain had sued Albania when British naval vehicle hit mines that had been laid in an international strait off Albania’s coast. Albania denied any knowledge of the presence of those mines in spite the rather suspicious circumstances. The Court reasoned that in light of the facts of the case presented … “it cannot be concluded …that the state [Albania] necessarily knew or ought to have known, of any unlawful act perpetrated therein, nor yet that it is necessarily knew, or should have known, the authors of the mine lying in the strait.”97 Restated, Albania knew… and should have known since its Coast Guards kept an eye [upon] and fired shots at potential violators and therefore fault is attributable to the State of Albania via its agents ….. who presumably laid the mines.”

Finally, while judicial and academic writings are divided on the showing of fault, most writings tend to agree that a standard of “strict liability” is required. In that view, the State’s fault, intent, and apparent knowledge are not necessary conditions for State responsibility. Under this standard, Albania would again have been liable for the damages to British warships—even if it did not intend to harm another State, citizens, or property of Britain. Under a strict liability standard however, a state can be held liable for failure to act, such as when floating mines are placed in its territorial waters through which foreign vessels routinely navigate. This may also include a State being held liable for an act of its agent or a non-state actor within its jurisdiction under specified conditions.

**Explaining Attribution, State Responsibility and VNSA in the Post 9/11 World**

Can a State be held responsible for the wrongful acts of the violent non-State actors within their jurisdiction, and if so, under what condition? This can only be possible through a procedural fiction known as attribution. In the section below, I examine specific conditions for attributing state responsibility in the post 9/11.

*First, what is attribution?* It is the direct theory under which responsibility is ascribed. More generally Article 2 of the Act of State Responsibility sets out the required elements for the existence of an internationally wrongful act.98 A necessary requirement for holding any State responsible for wrongful conduct under this concept is a proven relationship between the State and the actual perpetrator of the wrongful conduct. This ranges from the most mundane cases to the most complicated. An important aspect of this is that a State is not held responsible for the acts of private individuals. The State of course, is an abstract entity that is unable to accomplish any physical act itself. Just as in domestic law, corporations act through their officers and agents, so too under

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97 See *Corfu Channel* Opinion Note 39 above.
international law, the State acts mostly through its organs, the legislative and executive officials. There is however, a substantive difference between legal consequences of (a) attributing a non-State act to a State (for host of reasons that include direct sponsorship) and (b) a failure of a State to meet due diligence obligations (e.g., a duty to prevent terrorism ….. or the unwillingness to hold accountable a non-state actors within the its control). In the latter case, the host State will bear responsibility for the failure to exercise due diligence rather than being held culpable, i.e., responsible for the act itself.

When then can the acts of Violent non-State Actors be attributed to a state?

First, the events of 9/11 make this question fundamentally an important one in the assessment of attribution responsibility in the general discussion of State responsibility. One has to be careful in assuming however, that in the post 9/11 world, all else goes. For example, it is a faulty assumption that the sovereign of country A is necessarily responsible and therefore liable just because bad guys, a terrorist, a revolutionary, or a guerilla group opposed to country B has been given safe haven in country A. As observed in this article, the theory of attribution is in practice a framework under which the ascription of responsibility ideally flows under any assessment, the intent of which is to impute State responsibility. However, in practice, the result of that assessment may or may not necessarily lead to a conclusion worth making attribution to country A.

Before a state can be held responsible for an act of a non-state actor, it is necessary to prove a significant causal connection between the injuries caused by the act of the non-state actor. This is further imputed to the State assumed to have breached its international duty or obligations in the specific support provided to, for example, a terrorist organization. Such specific support may very well include the provision of safe-harbor to the violent non-State Actor. The Nicaragua v United States case in 1985 speaks to the reach of state responsibility and therefore set conditions and requirements for making attribution of a non-state act to a state. According to the International Court of Justice (ICJ) opinion in that case, in order for an act of a non-state armed group to be attributable to a nation State, there must be a showing of an "effective control" of that armed group.99

Ordinarily, the degree to which the act of a non-state actor is attributable to a particular State would depend on some key factors. Famously amongst them is one where the attribution is clearly established. For example, India’s radical Hindi group invades Pakistan from India and kills women and children or a radical Islamist extremist invades Israel from Jordan or Lebanon and does the same in Israel. Here the causal connection between the injury (killing) and an act committed (invasion) by the Violent non-State Actor in both scenarios are unquestionable. If proven, then the host States (India, Jordan or Lebanon) which provided comfort or looked the other way would incur international legal responsibility for the conduct of the Violent non-State Actors. This kind of attribution is increasingly important today for several reasons. More than before because Violent non-State Actors such as Al-Qaeda, the Revolutionary Armed Forces of Columbia (FARC) in Ecuador, multinational corporations, and non-governmental

100 Nicaragua v United States of America Note 42 above.
organizations play variable roles in the international system. Also more than before, governments around the world are at increasing rates farming out to non-state actors what use to be traditional State functions.

In some situations, demonstrating the cause and effect connection may not be all that is standing on the way. The initial Act of State Responsibility (ARSIWA) commenced in 1950s made a seemingly easy question into a difficult one. For example, on the simple question “...who bears international responsibility when an armed non-state actor or group launches an attack in another country?” Is it the State from which the group operates or the non-state actor? At first blush, ARSIWA Article 1 and 2 seem to provide a clear answer. However, on close examination both provisions deal more with procedural than substantive rules in addressing which acts or omissions give rise to State responsibility for breach of international law. After seventy years of tinkering, both Articles 1 and 2 of the ARSIWA in 2001 were restated in what appeared to specific terms. Article 1 of the 2001 version provides that "very internationally wrongful act of a State entails the international responsibility of that State." Article 2 concurs, stating that "there is an internationally wrongful act of a State when conduct consisting of an action or omission (a) is attributable to the State under international law; and the action (b) constitutes a breach of an international obligation of the State." What is unclear in this version, however, is the nature of the wrong - the type of wrong that constitutes State action versus those that are not.

Beyond the unsettling aspects of Article 1 and 2, under the 2001 ARSIWA, there are five instances from which clear and undisputable State attribution can be made. The first clearest case of attribution is that of an organ of the State, notably, police officers, and the army. Their actions are attributable to the State even in situations where they flout orders or deploy orders that exceed authority under the national law. Article 7 makes no distinction whatsoever between the levels of involvement of the particular State organ in the scheme of State organizational structure. So State responsibility can arise from say the actions of a local policeman, just as it can from the actions of the highest officials such as the head of state or Secretary of State.

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101 See Resolution 799 (VIII) of 7 December 1953. By this resolution the General Assembly requested the International law Commission to undertake “the codification of the principles of international law governing State responsibility” as soon as it considered advisable. Indeed, at the first session of the International Law Commission in 1949, the question of State responsibility was included on a provisional list of fourteen topics which were considered suitable for codification, but was not given priority (A/CN.4/13 and Corr. 1-3). Also see 2001 version of Articles on State Responsibility, The UN General Assembly, International Law Commission Draft Articles on State Responsibility, Resolution A/RES/56/83 of 12 December 2001.


104 See Article 8, ARSIWA, see Note 45 above.

105 See Article 1 and 5, ARSIWA, see Note 45 above.

106 See Article 7, ARSIWA, see Note 45 above.

107 See Article 7, ARSIWA, see Note 45 above.
Second, Article 5 provides that the rules of attribution cover situations in which individuals, not otherwise State organs, are exercising "elements of governmental authority." 108

Third, Article 8 provides that acts of private individuals are attributable to the State if those individuals are acting on the instructions of the State, or under its effective direction or control. 109

Fourth, according to Article 9, in exceptional circumstances in which there is an absence of governmental authority, the acts of private individuals may be attributable to the State if those individuals perform necessary governmental functions. 110 Lastly, the State may incur responsibility even though actions have been carried out by private individuals, because the essence of the obligation is to ensure that a given result occurs. However, events discussed below such as the Hezbollah in Lebanon, FARC in Ecuador, and the Al Qaida in Afghanistan-Taliban, seem to put in doubt aspects of the five stated instances from which state attribution for responsibilities can be ascribed.

Attributing State Responsibility in Practice

Recent conflicts in Ecuador (with FARC, 2008) and in Lebanon and northern Israel (2006), occurring between Nation States and violent non-state armed opposition groups on the territory of States that had not themselves taken up arms, raise distinct challenges for interpreting international law related to attribution of responsibility under the most 2001 version of Act of State Responsibility (ARSIWA, 2001).

Case in point I: Ecuador-Columbia incident: On March 1, 2008, Colombia attacked members of the Revolutionary Armed Forces of Colombia (FARC) located within Ecuador, killing the group's second highest-ranking member and 21 other militants. 111 Colombia justified its action under the right to use force in self-defense insisting that State responsibility lay with Ecuador, which provided save haven to FARC to launch attacks on Colombia. Colombia argued that Ecuador equally failed to meet due diligence obligations in preventing the installation of terrorist cells within its territory. Ecuador claimed that Columbia had violated its territorial sovereignty by engaging in hostile arm attack with it territory without its consent.

The Organization of American States (AOS) ruled against Columbia, resolving in favor of Ecuador that "the principle that the territory of a state is inviolable and may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatsoever." 112 Rejecting any

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108 See Article 5, ARSIWA, see Note 45 above.
109 See Article 8, ARSIWA, see Note 45 above.
110 See Article 9, ARSIWA, see Note 45 above.
112 The principle of non-intervention and the right to territorial integrity are recognized by the Charter of the OAS. According to Article 21, "The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatsoever. No territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognized."
right of a State to use force in self-defense against terrorist groups located in another State without that State’s consent (since the OAS resolution does not mention the right of self-defense) the ruling place the OAS in collision course with US policy and practice, as well as with the UN Security Council’s post 9/11 position on the matter. In a nutshell, that policy considers terrorist violence as a trigger of the right to use force in self-defense. Notwithstanding the outcome, the Colombia–Ecuador dispute is part of the ongoing controversy in international law about the legality of the use of force by States against Violent non-State actors that enjoy safe haven in the territory of other sovereign States. Similar actions had been taken before by other States such as Israel, United States, and Turkey as part of response to terrorist threat or the ongoing global war against terror.

Case in point II: Lebanon–Israeli conflict: While the facts of Ecuador–Columbia incident is one upon which a direct attribution and failure to meet due diligence obligations could not stand, a particularly interesting point in the Lebanon–Israeli conflict is whether the acts of Hezbollah can be attributed to Lebanon, Syria or Iran, given the multitude attribution scheme it presents. Press accounts and Israel’s own view are clear confirmation that Israel understands to whom attribution could be assessed in the Israeli–Lebanese conflict. For example, Steven Erlanger of the International Herald Tribune quotes the Likud Party leader Benjamin Netanyahu as calling Hezbollah "an Iranian Army division" fighting in a war "conceived, organized, trained and equipped by Iran." Even if one were to assume that attribution of State responsibility cannot adequately be made in light of all available information, it also raises interesting questions since Hezbollah and its professed stands against Israel are widely known.

Hezbollah’s obvious lack of transparency prompts the question of whether its acts are attributable to the three countries – Lebanon, Syria and Iran, or any combination of all three States in the attribution of State responsibility for the actions of Hezbollah. Assuming that proper attribution is made to Lebanon as the host country (or Iran and Syria) then the level of force used by Israel in Lebanon (that resulted in extensive human
casualties and property destruction) may raise further questions relative to how the existing international laws of armed conflict applies to the conflict. This has to do with the separate legal principles that govern (1) “the legality to resort to armed force” (jus ad bellum) which generally turns on whether the U.N. Security Council has authorized the use of force or whether the force is properly used as self-defense, and (2) the regulation of “state conduct during of armed conflict” (jus in bello) which turn on whether in using the authorized force proper measures were taken primarily to protect civil population or non-combatants and their property once an armed conflict has begun.

Sanctioned State Practices

An examination of recent state practices reveals a picture different from the outcome of the Ecuador-Colombia conflict settled by the Organization of American States (OAS) against Columbia. Recall that in that conflict, Colombia was held to have violated Ecuador’s territorial sovereignty for failure to seek consent even though a non-state was given safe-harbor in Ecuador, from which attacks were launched on Colombia. Recent practices go beyond the scope of the international law for attributing State responsibility. Under the circumstances presented below, the United States, Israel, and Turkey all used and defended military strikes against non-state actors terrorist groups located inside other sovereign nations.

As it turned out, the important difference in the Ecuador-Columbia conflict was Colombia’s failure to seek Ecuadorian consent before entering its territorial space to strike the FARC forces. The failure to seek consent according to OAS amounted to a violation of the OAS treaty obligation and therefore constitutes a violation under international law. Colombia was at fault, according to OAS, even if it had a legal right to self-defense and Ecuador had in fact failed to take effective action to prevent the FARC groups from operating within its territories. Thus, the question is not whether Ecuador failed to take action against a terrorist group effectively enjoying safe-harbor within its territory but whether Colombia’s took all legal means necessary to assert its self-defense before invading Ecuador. Colombia could not argue, for instance, that Ecuador was unwilling or unable to deter FARC faction within its territory.

Below are discussion of facts and circumstance that explain how the United States, Israel, and Turkey in similar situation used and defended military strikes against non-state actors or groups located within other sovereign nations.

Case in point I - United States pre-and post 9/11: The United States launched military attacks against suspected terrorists in Sudan in 1998 as a response to the terrorist bombings on the U.S. embassies in Kenya and Tanzania. At the wake of 9/11 and more specifically in spring of 2002, the United States again attacked Afghanistan with the intent to exterminate Osama Bin Laden, the leader of Al-Qaeda.117 Afghanistan was a source of threat, and its territory was either held hostage or being actively used by Al-Qaeda as safe-haven from which it launched attacks on United States and other countries.

As impressively documented by the 2004 9/11 Commission Report, Al-Qaeda was the entity that launched the 9/11 commercial passenger jet attacks on US soil, killing

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Over 3000 civilians in New York, Washington DC, and Pennsylvania. Following the theory of attribution in law of State responsibility presented above, would Al-Qaeda acts on 9/11 be attributed to Afghanistan, Iraq, or perhaps Saudi Arabia, the nationality of most of the 9/11 terrorists? Although the 9/11 Commission Report, issued two years later in 2004, confirmed most of what was already known right after the attacks, in 2002 the US and its coalition of the willing invaded Afghanistan. The US never declared war against Afghanistan when it responded with deadly military force within its territory. That was only part of the story since the choice to invade Afghanistan in particular had been furnished earlier by the prior history of the Al-Qaeda terrorist attacks on United States and its consular services in Africa.

Indeed, well before October 7, 2001 the United States had claimed self-defense as it struck parts of Sudan in a 1998 retaliation against terrorist attacks on US embassies in Kenya and Tanzania which took place on August 7, 1998. However, the US self-defense claims were supported by a series of UN Security Council Resolutions issued after the 9/11 attacks and well before it. These resolutions condemned the terrorist attacks in Kenya and Tanzania as well as establishing an Al-Qaeda and Taliban sanction committee. It was this committee that charged the Taliban government of Afghanistan with serious violations of international law for its role in providing safe haven to the Al-Qaeda terrorist group, training and planning facilities, and allowing the continued use of the Afghan territory as safe-harbor for Al-Qaeda. These early resolutions passed in 1998 and 1999, even though unanticipated, were instrumental as they laid the legal framework for the United States-led coalition for the armed incursion into Afghanistan territory in response to 9/11th terrorist attacks.

Thus, as the world public opinion sympathetic to the United States after the 9/11 increased, new resolutions such as Resolutions 1368 and 1373 (2001) further recognized the United States’ inherent right of self-defense under article 51 of the UN Charter. Codenamed “Operation Enduring Freedom,” the invasion of Afghanistan had at least three major goals: capture Osama Bin Laden, eradicate Al-Qaeda terrorist safe havens in that country, and promote regime change in Afghanistan. Thus supported by Security Council findings and resolutions condemning Al-Qaeda, a non-state actor, the post 9/11 resolutions doing the same, and a sympathetic world public opinion, the 2002 US attack on Afghanistan was properly within the law of self-defense of the UN Charter.

Case in point II - Israel- Hezbollah conflict in Lebanon 2006: The State Department Bureau for Counterterrorism 2013 report presents terrorist attack statistics on Israel that have become very ordinary and routine. In other words, people have come to expect the worst but from Israel’s perspective it is no laughing matter – the danger of its destruction is immensely clear and present every day. It provides for example that some 224 mortar

118 The 9/11 Commission Report is the official report of the events leading up to the September 11, 2001 attacks commissioned by the President and Congress. The Commission concluded that 15 of the 19 hijackers who carried out the attacks were from Saudi Arabia but found no evidence the government of Saudi Arabia conspired or funded the attackers. While the leader of the attacks, Mohamed Atta, was from Egypt, two were from the United Arab Emirates, and one was from Lebanon. All 19 hijackers however, were members of the al-Qaeda terrorist organization, led by Osama bin Laden.


shells were launched toward Israel in 2013 compared to 2,331 rockets fired from Gaza at Israel for the same period. That figure, of course, was up from a previous high of 2,000 in 2008. Table 2 provides a list of terrorist groups with an avowed agenda, the destruction of Israel.

### Table 2: Selected Violent Non-State Actors

<table>
<thead>
<tr>
<th>Names &amp; Base of Operations</th>
<th>Description (Who are they?)</th>
<th>Goals &amp; Targets</th>
<th>Estimated Strength</th>
<th>Year Founded</th>
<th>Suspected Activities</th>
</tr>
</thead>
<tbody>
<tr>
<td>1  Abu Nidal Organization (ANO) a.k.a. Fatah; Iraq</td>
<td>Transnational organization, composed of functional committees</td>
<td>Targets U.S., UK, France, Israel, moderate Palestinians, the PLO, Arab countries</td>
<td>A few hundred</td>
<td>1974</td>
<td>Attacks in 20 countries, killing or injuring 900. Leader Abu Nidal died in 2002</td>
</tr>
<tr>
<td>2  Al-Aqsa Martyrs Brigade; West Bank, Gaza Strip, Israel</td>
<td>Small cells of Fatah-affiliated activists</td>
<td>Aims to drive out Israelis and to establish a Palestinian state</td>
<td>Unknown</td>
<td>2000</td>
<td>Shootings, suicide operations (first Palestinian female suicide bombing)</td>
</tr>
<tr>
<td>3  HAMAS (Islamic Resistance Movement); West Bank, Gaza Strip, Israel</td>
<td>Outgrowth of the Palestinian branch of the Muslim Brotherhood</td>
<td>Aims to replace Israel with Palestinian Islamic state using political and violent means</td>
<td>Unknown</td>
<td>1987</td>
<td>Large-scale suicide bombings and attacks against Israelis</td>
</tr>
<tr>
<td>4  Hezbollah (Party of God); Lebanon, worldwide cells</td>
<td>A radical Shi'ite group with aims for the creation of Iranian-style Islamic republic</td>
<td>Dedicated to eliminating Israel, is anti-U.S. and anti-Israel</td>
<td>A few hundred</td>
<td>1982</td>
<td>Suicide bombings, hijacked 1985 TWA Flight 847; rocket attacks against Israel in 2006</td>
</tr>
<tr>
<td>5  Al-Jihad (AJ); Cairo, Egypt, Yemen, Afghanistan, Pakistan, Lebanon, UK</td>
<td>Egyptian Islamic extremists, merged with al-Qaeda in 2001</td>
<td>Aims to replace the Egyptian government with Islamic state, attack U.S., Israeli interests</td>
<td>Several hundred</td>
<td>1970s</td>
<td>Attacks on Egyptian government personnel, assassinated Anwar Sadat</td>
</tr>
<tr>
<td>6  Kahane Chai (Kach); Israel, West Bank</td>
<td>Jewish extremist group aims to restore the biblical state of Israel</td>
<td>Organizes protests against the Israeli government</td>
<td>Unknown</td>
<td>1994</td>
<td>Threats made to Arabs, Palestinians, and Israeli officials</td>
</tr>
<tr>
<td>7  Palestine Islamic Jihad (PIJ); Israel, West Bank, Gaza Strip</td>
<td>Militant Palestinians committed to destroying Israel through holy war</td>
<td>Targets Israeli military and civilians, opposes secularism</td>
<td>Unknown</td>
<td>1970s</td>
<td>Suicide bombings, attacks on Israeli interests</td>
</tr>
<tr>
<td>8  Palestine Liberation Front (PLF); Iraq</td>
<td>Broke away from PFLP-GC and split into pro-PLO, – Syrian, and – Libyan factions</td>
<td>Known for aerial attacks against Israel</td>
<td>Unknown</td>
<td>1970s</td>
<td>Attacked Italian ship Achille Lauro, murdered a U.S. citizen</td>
</tr>
<tr>
<td>9  Popular Front for the Liberation of Palestine (PFLP); Syria, Lebanon, Israel, West Bank, Gaza Strip</td>
<td>Marxist-Leninist group that broke away from the Arab Nationalist Movement</td>
<td>Targets Israel’s “illegal occupation” of Palestine and opposes negotiations with Israel</td>
<td>Unknown</td>
<td>1967</td>
<td>International terrorist acts in the 1970s, attacks against Israel and moderate Arab targets since 1978</td>
</tr>
<tr>
<td>10 TanzimQa’dat al-Jihad fi Bilad al-Rafidayn (QJBR) a.k.a. Al-Zarqawi Network and Al-Qaeda in Iraq; Iraq</td>
<td>Established soon after start of Operation Iraqi Freedom to bring together jihadists and other insurgents; merged with al-Qaeda</td>
<td>Aims to expel Coalition forces and establish Islamic state in Iraq, then move to Syria, Lebanon, Israel, and Jordan</td>
<td>Unknown</td>
<td>2003</td>
<td>Many bombings, killing hundreds; assassination of key Iraqi political figures; beheadings of Americans</td>
</tr>
</tbody>
</table>

*Table includes the descriptions of each terrorist group, its goals and targets, estimated strength in numbers, year established, and its suspected activities as designated by the US Department of State.

Source: U.S. Department of State, Office of the Coordinator for Counterterrorism — From selected yearly reports on global terrorism 2010-2014 Compile and reconstructed by author (M. G. Pufong)
In 2006, responding to a similar attack, the Israeli Defense Force (IDF) launched an armed attack on Hezbollah, a violent non-state terrorist group within the territory of Lebanon, a State that did not take up arms against Israel’s interest. Specifically, Israel’s action was in response to Hezbollah’s capture of two IDF soldiers and the killing of three others. Israel’s response would escalate to what became the 34 day long Israel-Hezbollah war. The question of whether Israel’s actions constituted a well-founded self-defense within current State practices and within the spirit and letter of the UN Charter’s Article 51 is one of interest. Relative to Israel State practice, Amos Guiora reports that even before the 2006 conflict, Israel maintained a policy that allowed for repeated target-killings of Hezbollah, Hamas, PLO and Black September leaders in Gaza, South Lebanon, and Syria. For a country such as Israel the post 9/11 apprehension or state of apprehension is not new. Israel for one and more than any country, lives under the constant threat of an attacked from known or unknown terrorist organizations.

By most accounts, the Israeli-Hezbollah conflict (July 12, 2006) began when the armed Islamic militant group Hezbollah crossed into Israel and attacked an IDF patrol, killing three and capturing two others. While Hezbollah's leader Hassan Nasrallah confirmed the capture of the two soldiers he said he was interested in setting up a prisoner swap with Israel. Israel’s Prime Minister Ehud Olmert response was that Hezbollah's attack constituted an "act of war" on Lebanon, to which he promised Israel’s strong response. Israel’s response however, never included asking Lebanon to locate Hezbollah nor did Israel seek Lebanon’s consent (as the first step of attributing State responsibility) before a formal encroachment into Lebanese territory. The month-long war between Israel and Hezbollah in Lebanon caused heavy civilian deaths and property casualties in Lebanon, Israel, and the Israeli occupied territories, with the lion's share being in Lebanon. It is possible that having concluded that Lebanon did not have the capacity to suppress Hezbollah or Iran and Syria, Israel took matters into its own hands to launch the attack into Lebanon. Under the theory of attribution of State responsibility, Israel

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121 One source attempt to offer a rational basis for diverse name for the war -- in Lebanon, the war is known as the "July War," while many Israelis call it the "Second Lebanon War" (see http://www.historyguy.com/israel-lebanon_war_2006.html) accessed January 20, 2017.
122 For example, on February 1992, Israel killed Sheikh Abas Musawi, head of Hezbollah, in a targeted strike against his convoy in South Lebanon. On February 2008, Israel was the mastermind behind the targeted killing of another Hezbollah leader, Imad Mugniyah, the second in command of the organization, in the heart of Damascus, Syria. The real argument is that targeted killing is a legitimate form of active self-defense in the context of anticipatory self-defense. As Amos Guiora observe if the decision to target a particular individual is based on reliable and corroborated intelligence information and on the premise that no alternatives exist including arrest, and the individual being targeted is perhaps a leader whose death will impact upon the terrorist organization then the targeted killing is legal. See Amos Guiora "Targeted Killings as Active Self-defense." (2004) 36 Case Western and Reserve Journal of International Law, (xx): 319-330 available at SSRN: http://ssrn.com/abstract=759584. Also elsewhere Hunter define targeted as the premeditated, preemptive, and deliberate killing of an individual or individuals known to represent a clear and present threat to the safety and security of a state through affiliation with terrorist groups or individuals. See Thomas B. Hunter, Targeted Killing: Self-Defense, Preemption, and the War on Terrorism, (Charleston, SC: BookSurge Publishing 2009).
123 Table 3 listing terrorist organization with mission the express intent the elimination of the state of Israel paints the clearest picture of the level of concern Israel must have about her security and why she must take offensive measure for its protection.
could legitimately have gone after Iran and Syria, the known sources of Hezbollah and related terrorist support in Lebanon.

In the end, reactions by other States and actors as the 2006 incident unfolded were generally that Israel was entitled in principle to act in self-defense, but that Israel’s actions were disproportionate in the sense that it did not exclusively target Hezbollah. But neither the Israeli official position on its use of force, nor the international community’s reactions to it, were clear enough to be conclusively meaningful. For example, the UN Security Council Resolution 1701 (2006) which ended hostilities called for the full implementation of the relevant provisions of the Taif Accords, [the initial resolutions 1559 (2004) and 1680 (2006)]. These resolutions required the disarmament of all armed groups in Lebanon, the withdrawal of Israel from Lebanon (so that, pursuant to the Lebanese cabinet decision of July 27, 2006) there would be no weapons or authority in Lebanon other than the Lebanese government. If anything, the 2006 war and the UN Resolution that followed confirmed once again that the Lebanese government was impotent and could not either defend or keep others away from fighting proxy wars within its territorial space.

Indeed, the Palestine Liberation Organization (PLO) had done the same in the 1970s as they moved in and took over southern Lebanon to fight against Israel. The UN Resolution 1701 calling for a full implementation of the Taif Accords of 2004 suggests that had Israel sought UN permission before intervening into Lebanon in 2006 it would have met some difficulties. At the very least, it is very likely that Israel could have been asked to see through the implementation of the outstanding peace accords. For Israel, the alternative route – i.e., the war of July 2006 – did not accomplish much. In light of the human and capital damages inflicted on Lebanon, it is likely that Israel’s claim of self-defense as the trigger for intervention could not have stood scrutiny under the standard of necessity and proportionality under the prevailing customary international law.

The case between Uganda and the Republic of Congo (2006) is also instructive here. In its assessment of Uganda’s claim that its use of armed force within Congo was in self-defense, the International Court of Justice (ICJ) observed that “the taking of airports and towns many hundreds of kilometers from Uganda’s border would not seem proportionate to the series of trans-border attacks it claimed had given rise to asserted the right of self-defense ....” Indeed, most people remained unpersuaded that the customary right of self-defense is the strongest in light of its consequences.

Case in point III - Turkey-Iraqi conflict in Northern Iraq: In 2008, Turkey launched a major military incursion into Iraq to attack Kurdish militants of the Kurdistan Worker Party (PKK) and killing at least 150 PKK fighters, which Turkey considered a terrorist group. The ground offensive was preceded by Turkish Air Force aerial bombardments against PKK camps in northern Iraq, which began on December 16, 2007. This constituted the "first confirmed ground incursion" of Iraqi territory since the 2003 U.S.

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led invasion. Turkey’s successful incursion into Iraqi’s territory, which was intended to destroy PKK bases, was accomplished with the help of well over 10,000 troops who took part in the operation.128 Turkey’s main argument was that Iraq had not been able to exercise its authority over the northern part of its country since 1991.129

The Turkish government argued that a request was made to the Government of Iraq to fulfill its obligations under international law to prevent the use of its territory for the staging of terrorist acts against Turkey. Thus, while Turkey’s position could well have been that because of the failure to act in the part of Iraq, Turkey was then absolved of any responsibility for violating Iraqi sovereignty, it contended instead that it had acted within the legitimate measures to protect its own security in the face of Iraq’s inability to exercise authority over the northern part of its country. Thus, the failure to prevent the use of its territory as staging ground to launch terrorist acts against Turkey compelled Turkey to take the necessary and proportionate actions.130 In a letter dated 24 July 1995 to the UN Security Council refuting Libya's allegations of Turkey's violations of Iraqi sovereignty, Turkey claimed to have resorted to a legitimate measures to protect its own security in the face of Iraq's allegations "to exercise authority over the Northern part of its country" to prevent "the use of its territory for the staging of terrorist acts against Turkey.131

It is important to note that one can only assume the rightness of Turkey’s intervention in northern Iraq if one believes that (a) it sought permission and that Iraqi’s failure to respond or prevent the use of its territory justified such a military intervention; and (2) if one agrees also that the means used by Turkey to attack Kurdish militants of PKK and killing 150 of their fighters was proportionate to the harm inflicted by the PPK on Turkey. The logic is self-defeating.

**Precedents on Responsibility**

By all accounts, the traditional approach to State responsibility for acts of non-State actors was articulated by the International Court of Justice (ICJ) in *Nicaragua v. United States* and later in the *Iran Hostages* judgments rendered by the Court in the 1980s. That precedent would later be reaffirmed, be it in a modified form, by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadic* case in 1999. The Court thus has spoken only on few cases leaving the rest to state practices which also serve as additional source of law.

**Case in point 1 – Nicaragua v United States and Tadic Cases:** In the *Nicaragua* case, to establish State responsibility the Court required an effective State control of the non-State actor. Further, the Court held that the conduct of the non-State actor must have been under the effective control of the state, and that the state must have had actual knowledge or at least constructive knowledge of such conduct.132

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129 The Economist March 1, 2008, Note 65 above.
Thus for example, financing, organizing, training and equipping a group is not enough to trigger State responsibility per the standard adopted by the Court. In the end, the US was found to be internationally responsible to Nicaragua but not under the “effective control” standard of attributing responsibility to a State. In this case the US was accused by Nicaragua for supporting the opposition group, the Contras. According to the ICJ, in order for an act of a non-state armed group to be attributable to state, there must be an "effective control" wherein even 'financing, organizing, training, supplying and equipping" as well as "the selection of its military or paramilitary targets and the planning of the whole of its operation" is not enough to meet the exacting threshold.  

However, the 1999 Tadic ruling relaxed the "effective control" standard of attribution specifically for acts by non-state military organizations, but still required the State’s “overall control” going beyond the mere financing and equipping of such forces to also include participation in the planning and supervision of military operations.”

**Case in point 2 – The Iran Hostage Case:** Beyond the Nicaragua and Tadic rulings noted above, another way in which acts of non-state actors can be attributed to a State is if the State acknowledges and adopts such actions after they have occurred. That is, a State may incur responsibility, even if those individuals acted on their own initiative. This is precisely how the ICJ reasoned in Iran Hostage Case where foreign embassies were overrun by mobs and diplomatic staff were taken as hostages by private individuals. In that case, the Court opined that State Responsibility was extended to the Iranian government not only because it conceded the facts, but because “the government subsequently adopted the student-driven attacks on the US and Canadian diplomatic offices and hostage taking.” According to the Court, the Iranian government was responsible even if its position and those taken by the student had no affiliation at the time the hostage situation occurred. Thus, a State may incur responsibility even though actions have been carried out by private individuals, because the essence of the obligation is to ensure that a given result occurs.

It is obvious from the Nicaragua, Iran, and Tadic cases discussed here that along the way it became evident that the Nicaragua standard for State responsibility became extremely difficult to sustain. Attributing State responsibility and therefore culpability became difficult to apply even where a State was in fact in the wrong. The International Law Commission’s 2001 report codifying customary law titled "Articles on State

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133 See Nicaragua v. United States of America – Note 61 above.


136 See United States v Iran, Note 78.

137 See United States v Iran, Note 78.
Responsibility” sought to clarify this point of law in Articles 8 and 11. First it recognizes the effective control standard for State responsibility announced by ICJ in the Nicaragua Case in 1985. Articles 8 therefore asserts the prevailing view of State Responsibility relative to acts of Non-State actors by stating that “The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct.” Prior to the adoption of the Articles on State Responsibility the conduct of the private individuals were not attributable to the State, and Article 8 of the 2001 version of the Articles on State Responsibility prospectively remedied that deficiency. With this adjustment made acts of private individuals occurring at a point where there is an existing relationship between an individual and the State is as 2001 applicable to host the State.

Second, also complementing Article 8 and providing much needed clarity, Article 11 provides that “Conduct which is not attributable to a State under the preceding articles (1 through 10) shall nevertheless be considered an act of that State under international law if … the State acknowledges and adopts the conduct in question as its own.” Thus, once the threshold of responsibility is met, the act of the non-state actor is considered an act of the State with all ensuing legal consequences.

State Responsibility and Sovereignty

There are obvious tension between the prohibitions against the use of force (UN Charter 2 (4)) intended to safeguard the political independence and territorial integrity of a UN member State and the right to self-defense to protect the territorial sovereignty of a member State (UN Charter, Article 51). The use of predatory drones to hunt and to kill Al Qaeda and Taliban operatives, the invasion and killing of Osama bin Laden in Pakistan and the invasion and capture of Abu Anas al-Libi in Libya who planed Al Qaeda’s 1998 bombing of two US Embassies in East Africa are examples of self–defense par excellence that may be complicated by the initial territorial independence or sovereignty violation claims.

Case in point – I: The use of Drones: Ongoing studies by the New America Foundation show that between 2004 and 2013 they were 365 reported US drone strikes in the northwest Pakistan with 132 of these occurring between January

139 See Note 21 above, James Crawford (2002) [pp. 110-113, 121-123], commentary on The International Law Commission's Articles on State Responsibility.
140 However, the new Articles 8 commentary cautioned that most common cases of the kind would arise mostly where a State organ supplements their own actions by instigating or recruiting a third party (private persons) to act either as an auxiliary while remaining outside the official structure of the State.
141 See Articles on State Responsibility, ARSIWA Note 39 above. … Resolution A/RES/56/83 of 12 December 2001
and September 30, 2013 alone. According to the New America Foundation, the 365 drone strikes occasioned approximately 2065 to 3064 individual deaths, of whom 1611 to 2787 were described as militants. Non-militant fatality rates since 2004 through 2013 were approximately 12%, a decrease of 6% from 2012 percentages.142 The sheer number of US drone strikes alone begs the question whether, in the continued war on terror, the US encroached on the sovereignty of some other state (Pakistan) in violation of Article 2(4) of the UN Charter? If not, at the very least, it raises the question whether under the new post 2001 Article of State Responsibility, United States must obtain consent of the target State (Pakistan) before targeting Violent non-State Actors (VNSA) who engage in armed attacks against US military personnel within that country.

Professor Kenneth Anderson takes the position that the right to use targeted predatory drones as weaponry in the war on terror to protect U.S. troops from continued Al-Qaeda and Taliban attacks is a valid asserted right of self-defense under Article 51 of the UN Charter.143 However, seen in isolation of any factual determination of US claim for self-defense, the notion that the US violated the territorial sovereignty of Pakistan is an incomplete assertion. What is necessary is an individualized and factual determination of any purported claim of self-defense. For example, UN Article 51 not only grants the right to self-defense but also requires proportionality in its execution. In the last few years there has been an emerging consensus among scholars that an armed attack by a violent non-State actor (VNSA) on a State, its embassies, its military post, or on its nationals abroad would trigger the right to self-defense, even if such an attack is directed to a safe-harbor in a foreign country.144 More recently (2010), Jordan Paust also confirmed that the...
use of targeted predatory drones is permissible if done in response to an armed attack by VNSA to protect US and NATO troops, and not to engage a foreign state or occupy its territory.\textsuperscript{145} Also, human rights treaties such as the International Covenant on Civil and Political Rights [(ICCPR Article 6(1)] and the European Convention on Human Rights [(ECHR Article 2(1)] recognize “the inherent right to life” and “prohibit arbitrary deprivations of life”\textsuperscript{146} as well as “allow[ing] for the intentional taking of life when absolutely necessary.”\textsuperscript{147}

Both the ICCPR and ECHR instruments require a State to show, for example, that an invasion and/or killing is necessary and that other non-lethal options were explored but were not viable. Thus for example, drone targeting of Al-Qaeda and Taliban membership does not constitute a violation of human rights treaties if actual arrests were difficult or even impossible to execute.

\textit{Case in point – II: The Killing of Osama Bin Laden:} The US invasion of Pakistan and killing of Osama Bin Laden in Pakistan on May 2, 2011 raises several important legal and political issues under the international law of responsibility and territorial independence. At the wake of the successful U.S. military operation, the Pakistan Government objected to the “unauthorized unilateral action” by the United States and cautioned that the event “shall not serve as a future precedent for any state.”\textsuperscript{148} Former President Musharraf also followed suite complaining that the operation violated Pakistan’s sovereignty.\textsuperscript{149} The UN Charter Article 2(4) prohibits the use of force against the political independence and territorial integrity of a UN Member State. But Article 51 speaks to the exception and therefore to the right to self-defense. Both Charter provisions address what in practice are matters of law and state practices. Beyond the


\textsuperscript{146} See the International Covenant on Civil and Political Rights (ICCPR) [adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI)] December 16, 1966, entry into force March 23, 1976.


trappings of the law and claim of sovereignty, state practices support the “unwilling or unable” standard of self-defense as a contemplative limit before invasion is executed.150

As the Columbia-Ecuador conflict in 2008 discussed earlier exemplifies, non-State actors including terrorist groups such as Al-Qaeda regularly launch attacks against States from bases within the State they enjoy safe-harbor. Such practices not only violate international law but they are risky undertakings which more often than not would instigate retaliatory measures. However, victim-States (such as the United States) are well advised not to undertake any action without the consent of the source State. Specifically, any incursion of military forces into the territory of the source State would objectively violate its territorial sovereignty and formally the UN Charter Article 2(4), which prohibits the use of force against the political independence and territorial integrity of UN Member States. The normal calculus for a victim State, who seeks to respond with force, is to consider whether to proceed with force on the territory of a State with whom it has no conflict. Absent consent from the host State of the source of attack or an authorization from the UN Security Council, international law requires that a victim-State assess whether the host State is “unwilling or unable” to suppress the threat within its territory. Effectively, a balance between sovereignty and self-defense is necessary in that assessment.

Writing in 1958, Ian Brownlie observed that military actions across national frontiers to suppress armed groups, which has been determine to be a “source of an attack” and which the host state was unable or unwilling to suppress, could be seen as a legitimate form of self-defense.151 In an August 2007 speech, then-Presidential candidate Barack Obama reasserted the Brownlie conception as he stated that, if elected, his Administration would take action against the leadership of Al-Qaeda in Pakistan if the United States had actionable intelligence about al Qaeda targets and President Musharraf had failed to act.152 Obama would later clarify his position, stating that what he said instead was that “if we have actionable intelligence against Bin Laden or other key al Qaida officials . . . and Pakistan is unwilling or unable to strike against them, we should.”153

151 See Ian Brownlie, International Law and the Activities of Armed Bands, (1958) 7 International & Comparative Law Quarterly 712, 732 for the thread of the argument that the United States was well within its rights under international law to launch an attack into Pakistan against bin Laden.
More recently, both Noam Lubell\(^\text{154}\) and Harold H. Koh\(^\text{155}\) have also recited the *unwilling or unable* test as the correct yard stick to determine when a victim State may take retaliatory measures against non-State actors within the territory of another State. The assessment is fact-based and intensive. In practice, States such as Israel, Russia, and Turkey are among those who have taken liberty of the *unwilling or unable doctrine* to exercise their self-defense right, thus establishing chronological records of contemporary state practices.\(^\text{156}\) The United States invasion and killing of Osama Bin Laden viewed in light of the US’s own views and related precedents on the matter also fit well with the *unwilling or unable* test. Here is why: both the Bush and Obama administrations took the view that the United States is in an armed conflict with Al-Qaeda. To both governments Al-Qaeda undertook an armed attack against the United States on September 11, 2001, which triggered the U.S. right of self-defense.

Therefore given the nature of the enemy and the mayhem caused and likelihood yet of another hit, the ensuing conflict extends beyond any particular battlefield, be it in Afghanistan, Yemen or Bahrain to wherever members of Al-Qaeda can be found, as the case *Al-Aulaqi v. Obama 2010* makes abundantly clear.\(^\text{157}\) For those who adopt this position, once a state is in an armed conflict with a non-state armed group, that conflict follows the members of that group wherever they go, as long as the group’s members continue to engage in hostilities against that Victim State. The contrarian view is that armed conflicts have geographic limits as a matter of international law. That is, such a fact must be determined to establish the existence of an armed conflict before all things else.

In light of the United States’ position in the war on terror, the US as the victim State had the option of seeking the consent of the source-of-attack State (Pakistan) before intervening in Pakistan to capture or kill Osama Bin Laden or go at it alone without notifying Pakistan. It elected the later. The United States went after Bin Laden alone, but why? A *New York Times* piece of May 4, 2011 suggest that “Pakistani officials were angry about C.I.A. Director Panetta’s post-fact assertion that Washington did not share advance knowledge of the raid with Pakistan because it might have leaked, allowing Bin Laden to escape.”\(^\text{158}\) Also a *Wall Street Journal* piece of May 5, 2011, confirmed that “U.S. and European


\(^{155}\) See Keynote Address “The Obama Administration and International Law,” to the American Society of International Law in a Time of Change (Harold H. Koh Mar. 25, 2010)

\(^{156}\) See John Bellinger, “Legal Issues in the War on Terrorism,” London Sch. Economics.,

\(^{157}\) In Al-Aulaqi v. Obama a ruling favoring the Obama administration, the Court observed that “…the fact that the United States’ armed conflict with al-Qaeda exists in one particular location does not mean that it cannot exist outside this geographic area” (See, 727 F. Supp. 2d 1 (D.D.C.2010) (No. 10 Civ. 1469). Opposition to Plaintiff’s Motion for Preliminary Injunction and Memorandum in Support of Defendant’s Motion to Dismiss at p.1.).

intelligence officials increasingly believed active or retired Pakistani military or intelligence officials provided some measure of aid to Al-Qaeda leader Osama bin Laden, allowing him to stay hidden just a mile from an elite military academy.”159 Beyond the obvious lack of trust that one senses, both the New York Times and Wall Street Journal sources suggest why the United could neither sought consent or shared information with Pakistan before the invasion to its territory that resulted in the killing of Osama Bin Laden.

What exactly constitute unwilling and unable? From the victim-State perspective, it simply means whether the host State has demonstrated a clear and convincing willingness and is logistically capable or able to suppress the sources-of-threat from its territory. For example, in the Pakistan-US relationship during the war on terror, many facts should stand out when evaluating Pakistan’s willingness or ability of Pakistan to suppress the threat posed by Bin Laden and Al Qaeda on either the United States, NATO and Afghan forces, or to the security of other States that suffered the 9/11 al Qaeda attacks. More specifically, the victim state must (1) ask the host State to address the threat and provide adequate time for the host State to respond; (2) reasonably assess the host State’s control and capacity of the threat; (3) reasonably assess the host State’s proposed means to suppress the threat; and (4) evaluate prior interactions between the victim State and the host State. It must be understood that for host of reasons state practice does not mandate that a victim State such as the US seeks the support of the host State (Pakistan) before an invasion is executed. Exempted situations include those where a victim State has strong reasons to believe that the host State is colluding with the non-state source-of-threat, or where asking the host state to take steps to suppress the threat might lead the host to tipping off the non-state actor before the victim-State can undertake its mission against the non-state actor.160

Thus, the test just stated is an action-based test that requires a careful examination of Pakistan’s conduct in the US initiated war on terror and US expectation of Pakistani role in that war. This also requires an assessment of the United States’ perception of Pakistani support relative to the mission of finding Bin Laden or the Al-Qaeda operatives. Thus, the purpose of Operation Enduring Freedom in “President Bush’s National Strategy for Combating Terrorism” released February 14, 2003 is worth reiterating as well as its major goals: (1) to capture of Osama Bin Laden, (2) to eradicate Al-Qaeda terrorist safe-havens, and (3) to promote regime change in Afghanistan.161 Pakistan’s assistance relative to the stated goals is decisive in any assessment of what influenced the United States to go alone after Bin Laden, a decision that might stand scrutiny to the conclusion that Pakistan was either “unwilling or unable” to fully assist the United States in its mission on war on terror. To both the United States and Pakistan there was an undeniable lack of trust which wore

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160 See John Bellinger, Note 99 above.
down considerably, especially during the declared decade of the war on terror. The bases of such mistrust it has been asserted were often very different and conflicting in expectations and national interests. Well before the US intervention and killing of Osama Bin Laden, Pakistan had long harbored doubts over whether the United States respected its sovereignty. Pakistan pointed to the fact that US aircraft in transit to Afghanistan, flew outside the established air corridor from the Arabian Sea in violation Pakistani territorial sovereignty. The Pakistani military and its Intelligence Service had always been suspicious of the real motives of the United States and how a long term relationship with the US would benefit their own interest. On the other hand, there is also the observation that the United States primary concern has always been whether the Pakistani establishment and elements within it, receiving US financial aid, publically proclaimed allegiance to US causes while in private acting against US global interests in the war on terror. Overcoming these suspicions required creating trust in an effort to sustain the critical effort of achieving the objectives of the global war on terrorism.

In light of these doubts, the killing of Osama Bin Laden on May 4, of 2010 signaled to Pakistan that the United States could act alone to defend its self-defense interest, especially where it deemed that Pakistan was either unwilling or incapable of outsourcing an avowed enemy of the United States. The practical effect of US behavior should be seen less as the willingness to act with impunity on the territory of a foreign state and more as the share brazenness to root out terrorists out who were eager to cause another 9/11 on United States before they could do so. The fact that Osama Bin Laden could hide in plain sight of Pakistan's intelligent Services (ISI) reinforced US suspicion that privately Pakistan was unwilling to assist the US in the war on terror. The other possibility—that Bin Laden perhaps was sheltered by the Pakistan's Intelligence is even more terrifying. Yet, it also supports the trustless thesis, that Pakistan was not a reliable partner in the war on terror. This is a stronger conclusion as US officials in the past had consistently maintained that Al-Qaeda’s top leaderships were hiding in Pakistan.

Lastly, the invasion and capture of Abu Anas al-Libi in Libya who planed Al-Qaeda’s 1998 bombing of two US Embassies in east Africa, similar to the invasion of Pakistan, from the US perspective, signaled as the New York Times put it “a limit to its patience.” Thus, two years after NATO intervention

163 See Koehlmoos Note 105 above.
164 See Koehlmoos Note 99 above.
that removed Qaddafi from power and waiting for the new Libyan government to go after suspected terrorists’ cells in Libya, the US signaled with this invasion and capture, its willingness to go alone.

Table 3: List of Security Council Measures Adopted on Aspects of United Nations Focus on Terrorism, 1999-2014

<table>
<thead>
<tr>
<th>Resolution</th>
<th>Date Passed</th>
<th>Content and Purpose</th>
</tr>
</thead>
<tbody>
<tr>
<td>S/RES/1284 (2004)</td>
<td>20 Dec. 2010</td>
<td>[on extension of the mandate of Counter-Terrorism Committee Executive Directorate (CTED) as special political mission under the policy guidance of Counter-Terrorism Committee (CTC)]</td>
</tr>
<tr>
<td>S/RES/1287 (2004)</td>
<td>17 Dec. 2009</td>
<td>[on authorizing the establishment of an Office of an Ombudsperson for an initial period of 18 months to assist the 1267 Committee in its consideration of delisting requests; directing the 1267 Committee to grant humanitarian exemptions expeditiously and transparently; and streamlining the listing process of names of individuals and entities onto the Consolidated List.]</td>
</tr>
<tr>
<td>S/RES/1292 (2004)</td>
<td>30 June 2008</td>
<td>[on directing 1267 Committee to conduct a review of all names on the Consolidated List by 30 June 2010 and followed by regular reviews; making accessible publicly releasable reasons for the listing of individuals and entities and extending the mandate of the Analytical Support and Sanctions Monitoring Team for a further period of 18 months]</td>
</tr>
<tr>
<td>S/RES/1293 (2004)</td>
<td>25 April 2008</td>
<td>[on extending mandate of the 1540 Committee for a further three years until 25 April 2011]</td>
</tr>
<tr>
<td>S/RES/1277 (2007)</td>
<td>10 Dec. 2007</td>
<td>[on extension of Counter-Terrorism Committee Executive Directorate (CTED) mandate]</td>
</tr>
<tr>
<td>S/RES/1278 (2007)</td>
<td>22 Dec. 2006</td>
<td>[on reviewing the measures imposed resolution 1267 (1999) with a view to their further strengthening in 18 months; providing cover sheet for listing submissions, extending consideration period for exemption requests under resolution 1452 (2002), and extending the mandate of the Analytical Support and Sanctions Monitoring Team for a further period of 18 months]</td>
</tr>
<tr>
<td>S/RES/1291 (2007)</td>
<td>19 Dec. 2006</td>
<td>[on establishment of a focal point within the Secretariat to receive de-listing requests and directs the relevant sanctions committees to revise their guidelines accordingly]</td>
</tr>
<tr>
<td>S/RES/1290 (2007)</td>
<td>8 Aug. 2006</td>
<td>[on requesting the Secretary-General to take the necessary steps to increase cooperation between the United Nations and Interpol]</td>
</tr>
<tr>
<td>S/RES/1292 (2007)</td>
<td>27 April 2006</td>
<td>[on extending mandate of the 1540 Committee for a further two years]</td>
</tr>
<tr>
<td>S/RES/1297 (2007)</td>
<td>29 July 2005</td>
<td>[on reviewing the measures imposed by resolution 1267 (1999) with a view to their further strengthening in 17 months; providing definition of “associated with”, calling for submission of checklist, and requesting the Sec.-Gen to extend the mandate of the Analytical Support and Sanctions Monitoring Team for 17 months]</td>
</tr>
<tr>
<td>S/RES/1299 (2007)</td>
<td>8 Oct 2004</td>
<td>[on creation of working group to consider measures against individuals, groups and entities other than Al-Qaeda/Taliban]</td>
</tr>
<tr>
<td>S/RES/1300 (2007)</td>
<td>28 April 2004</td>
<td>[Under Chapter VII of the United Nations Charter, obliges States to refrain from supporting by any means non-State actors from developing, acquiring, manufacturing, possessing, transporting, transferring or using nuclear, chemical or biological weapons and their delivery systems]</td>
</tr>
<tr>
<td>S/RES/1301 (2007)</td>
<td>26 Mar. 2004</td>
<td>[on creation of Counter-Terrorism Committee Executive Directorate (CTED)]</td>
</tr>
<tr>
<td>S/RES/1303 (2007)</td>
<td>30 July 2004</td>
<td>[on further improving the implementation of resolution 1267 (1999), strengthening the mandate of the 1267 Committee and requesting the Secretary-General to appoint an Analytical Support and Sanctions Monitoring Team for 18 months [paras 1, 3, 6 &amp; 7]]</td>
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Table 4: International Counter-Terrorism Conventions, Pre and Post 9/11

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<thead>
<tr>
<th>Table 4: International Counter-Terrorism Conventions, Pre and Post 9/11*</th>
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<tr>
<td><strong>Terrorism Convention, Purpose &amp; Date of Passage</strong></td>
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<td><strong>1</strong></td>
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Sources: Various United Nations Documentations compiled by Author (M.G. Pufong)
8  **Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (1968)**

Establishes a legal regime applicable to acts against international maritime navigation that is similar to the regimes established against international aviation; makes it an offence for a person unlawfully and intentionally to seize or exercise control over a ship by force, threat, or intimidation; to perform an act of violence against a person on board a ship if that act is likely to endanger the safety of the ship; to place a destructive device or substance aboard a ship; & other acts against the safety of ships;


Establishes a legal regime applicable to acts against fixed platforms on the continental shelf that is similar to the regimes established against international aviation;

10  **Convention on the Marking of Plastic Explosives for the Purpose of Detection (1999)**

Provides for chemical marking to facilitate detection of plastic explosives, e.g., in underwater aircraft sabotage; designed to control and limit the use of unmarked and undetectable plastic explosives (negotiated in the aftermath of the 1988 Pan Am 103 bombing); Parties are obligated in their respective territories to ensure effective control over “unmarked” plastic explosive, i.e., those that do not contain one of the detection agents described in the Technical Annex to the treaty; generally speaking, each party must, among other things: take necessary and effective measures to prohibit and prevent the manufacture of unmarked plastic explosives; prevent the movement of unmarked plastic explosives into or out of its territory; exercise strict control over possession and transfer of unmarked explosives made or imported prior to the entry-into-force of the convention; ensure that all stocks of such unmarked explosives not held by the military or police are destroyed or consumed, marked, or rendered permanently ineffective within three years; take necessary measures to ensure that unmarked plastic explosives held by the military or police, are destroyed or consumed, marked, or rendered permanently ineffective within fifteen years; and, ensure the destruction, as soon as possible, of any unmarked explosives manufactured after the date-of-entry into force of the convention for that state.

11  **Convention for the Suppression of Terrorist Bombing (1997)**

Establishes a regime of universal jurisdiction over the unlawful and intentional use of explosives and other lethal devices in, into, or against various defined public places with intent to kill or cause serious bodily injury, or with intent to cause extensive destruction of the public place;

12  **Convention for the Suppression of Financing of Terrorism (1999)**

Establishes a legal mechanism for the freezing and seizure of funds allocated for terrorist activities, as well as for the sharing of the forfeited funds with other states on a case-by-case basis; creates a regime of universal jurisdiction over the financial support of financing of terrorism; requires parties to take steps to prevent and counteract the financing of terrorists, whether direct or indirect, through groups claiming to have charitable, social or cultural goals or which also engage in such illicit activities as drug trafficking or gun running; commits states to hold those who finance terrorism criminally, civilly or administratively liable for such acts; provides for the identification, freezing and seizure of funds allocated for terrorist activities, as well as for the sharing of the forfeited funds with other states on a case-by-case basis.


Protects a broad range of acts and possible targets, including nuclear power plants and nuclear reactors; covers threats and attempts to commit such crimes or to participate in them, as an accomplice; stipulates that offenders shall be either extradited or prosecuted; encourages states to cooperate in preventing terrorist attacks by sharing information and assisting each other in connection with criminal investigations and extradition proceedings; and deals with both crisis situations (assisting states to solve the situation) and post-crisis situations (rendering nuclear material safe through the International Atomic Energy Agency (IAEA).


Criminalizes the act of using civil aircraft as a weapon to cause death, injury or damage; criminalizes the act of using civil aircraft to discharge biological, chemical and nuclear (BCN) weapons or similar substances to cause death, injury or damage, or the act of using such substances to impact civil aircraft; criminalizes the act of unlawful transport of BCN weapons or certain related material; a cyber-attack on air navigation facilities constitutes an offence; a threat to commit an offence may be an offence by itself, if the threat is credible; conspiracy to commit an offence, or its equivalence, is punishable.

The listed 14 major multilateral conventions and protocols above deal with terrorism and related to State responsibilities for combating terrorism. Provided are brief summary of each of these instruments. In addition to these summaries, most of them provide that state parties to each establish criminal jurisdiction over offenders (where the offenses take place, or in some cases, the state of nationality of the perpetrator or victims). Although most UN Member State may not yet be party to these instruments, or better yet implementing them, other instruments may be relevant to particular circumstances such as bilateral extradition treaties. The 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations are notable examples. Moreover, number of important UN Security Council and General Assembly Resolutions on international terrorism also specify how to deal with specific incidents. For full text of any of these conventions see United Nations Treaty Collection, conventions on terrorism:

Sources: United Nations Documents and Various Sources. Compiled and structured here by author (M.G. Pufong)

**Lessons from Cases, Events and Incidents**

**State responsibility and State duty today:** The lessons drawn are at best ambiguous but in the end, one can draw some obvious positive trends from the cases, events and incidents presented in this article.

The first lesson on “self-defense” is that in the post 9/11 world, most NATO countries, the Organization of American States (OAS), and the UN Security Council have all recognized that terrorist attacks by any violent non-State Actor located within a State or otherwise, present sufficient enough cause to use force for self-defense. To follow that position Tables 3 and 4 provides a detail listing of UN resolutions and explanation in the area of terrorism. Table 3 or example provide a listing of Security Council Measures adopted on aspects
of United Nations focus on terrorism from 1999 through 2014. It is comforting to see that the United Nation has been in the forefront. Also, Table 4 is a listing of 14 International Conventions and protocols initiated by the United Nations dealing with terrorism and related to state responsibilities for combating terrorism.

These conventions and protocols all relate to state responsibilities for combating terrorism, and are provided in a familiar format. Typically they: (1) define a particular type of terrorist violence as an offence/crime under the convention (i.e., the seizure of an aircraft in flight by threat or violence); (2) require member State Parties to penalize that activity/conduct in their domestic law; (3) identify certain bases upon which the member State are responsible or required to establish jurisdiction over the defined offence (territoriality or nationality); and (4) create an obligation on member State parties in which a suspect is found to establish jurisdiction over the convention offence and/or to refer the offence for prosecution if the member state party does not extradite pursuant to other provisions of the convention. The last element is the principle of no safe haven for terrorists where for example, Security Council Resolution 1373 of September 28, 2001 mandates the Member State in which a suspect is found to establish jurisdiction over the convention offence as an essential anti-terrorist obligation on Member States.

The second lesson is on “State Responsibility” and is on the recognition that in spite the seeming prevalence of terrorist acts perpetrated by violent non-State Actors in the post 9/11, international law requires that victim States act responsibly within prevailing rules and practices of international law. What this means is that they obtain proper consent before launching attacks against non-state actors located within the territory of another State. Lastly, that victim States be mindful that the failure by host States to terminate terrorist groups' activities within their territory or deny safe-haven does not effectively grant carte blanche permission to use force. Under the traditional right of self-defense, the legality for the any use of force must be established before any action is contemplated. That is, where necessary and appropriate, (1) it must be shown that the host state is unwilling or unable to reduce or eliminate the source of the threat, and (2) all means adopted and damage inflicted must be proportionate to the initial harm caused to the victim state, and (3) any use of force is very temporary and one that does not result in non-consensual occupation or annexation of the State or territory. To most critics, very little has changed.

As in the past, the UN Charter continues to limits the use of force to collective security however, one that is duly authorized by the Security Council as provided under Chapter VII of that Charter. Under what can be termed as I do here as the minimalist view of Article 51, self-defense is justified only as a reaction to an armed attack in the most imminent of the circumstances. Contrasting the minimalist view is what I also term as the post 9/11 maximalist relaxed view of international affairs and especially Article 51. This view holds that the Charter does not require that an armed attack is attributed to a State actor in order for a victim state to invoke the right to self-defense for retaliation. There is therefore no distinction between a State and a non-State actor. The problem with the later maximalist view is that attacking a non-state actor within another state will almost always require using military operations in the
territory of that State. That being the case, if the host state does not grant consent, then such any use of force on its territory is an act of aggression, and therefore an illegal use of force consistent with UN Charter prohibition.

The collision course between the harsh reality of the real world fight against terrorism and the danger it presents and the rule law is undeniable. Put simply, the reality of the current infinite capacity of VNSA to launch armed attacks against States defies the continued relevance or the strict adherence to Article 51 of the UN Charter. To underscore the point using the Israeli-Hezbollah conflict in 2006, Israel's use of force in the Lebanese territory was and would be problematic. It will be if the acts of Hezbollah cannot be attributed to any state or if the acts of Hezbollah are attributable to either Syria or Iran and not Lebanon in light of Hezbollah's occupational history in that country. However, in the post 9/11 maximalist view of a relaxed view of the right of self-defense under Article 51 of the UN Charter, Israel's campaign in Lebanon was and is legal under international law.

Discussions & Conclusion

State responsibility and State duty in perspective: States unquestionably remain sovereign entities whose power to do routine business in international affairs are recognized and respected. However, States are less and less the sole players on the international scene, and even much less so in armed conflicts. The picture this conveys is that States do not have absolute power to control and do not have absolute freedom to do as they please. Codified rules of State responsibility are clear on this point. Also, the constraint imposed as displayed by international humanitarian laws that structures and limits the conduct of war cannot be underestimated. Contemporary application of immunity still premised on the 1648 Westphalia understanding of sovereignty which positions the State above all orders but its own, is waning at a faster rate. Yes the State does matter, but only on those matters that are essential to statehood and no more.

The assessment presented in this article shows that current international law admits the use of force against terrorist groups which is hardly attributable to a specific State. This, of course, is an expansive view and therefore maximalist on the matter. For example, in the post 9/11 world, while the use of force against non-state actors in theory is permissible only under certain prescribed circumstances, in practice it is far easier to use force today than was the case twenty-five years ago. The US killing of Osama Bin Laden in Pakistan in 2011 is a classic example, and so is the second regroup of US led coalition to after ISIS in Iraq and Syria in 2014. Also the use of drones in Pakistan depended on the inquiry into many features of context and appropriate application of principles of reasonable necessity and proportionality but shows the ease to which States can use force. The ease with which force is used today begs the question for further explanation however in context specific situation.

In the post 9/11 international environment, force can be used in particular instances, as in the case where the host State is unable or unwilling to repress the non-state terrorist organization operating within its territory. This, of course, suggests that all reasonable measures are taken prior to such a use of force. Also, force can be used when a request for intervention has been made by
the international community in order to fight or repel non-state groups within the territory of a UN member state. In either case, the degree of force required (and used) must be proportionate and necessary to deter the specific source of the threat.

Also as the assessment above shows, State practices also demonstrate that in the face of mounting threat posed by a terrorist organizations and for which there is a consensus at the international community, it is not necessary to demonstrate a link between such non-state terrorist organizations and a particular State. This suggests that one or more States can use force against another State when the latter gives shelter to terrorist organizations in its territory. This of course is the case only when the host State does not signal its intent to repress the terrorist threat within its territory despite repeated requests to do so by the victim state or the international community.

The United Nations Charter and the numerous initiatives taken by the United Nations since late 1990s (see Table 2) also provides for self-defense recourse to be used strictly for such a purpose. If for example, a Member State were attacked or invaded by another Member state, the Victim State has the right to resort to self-defense as provided by Article 51 of the UN Charter. The International Court of Justice (ICJ) has spoken on this matter. The Victim State must demonstrate the involvement of the aggressive State according to strict criteria identified by the ICJ and by the International Law Commission. That is, where necessary and appropriate, (1) it must be shown that the aggressive state is unwilling or unable to reduce or eliminate the source of the threat, and (2) all means adopted and damage inflicted must be proportionate to the initial harm caused to the victim state, and (3) any use of force is very temporary and one that does not result in non-consensual occupation or annexation of the State or territory.

Finally is the case of Failed States, that is, those meeting known definitions of failed states used by terrorist organizations as a base from which to inflict mayhem on other countries. As shown in the case of Lebanon in this article, when State authorities are unable to exercise effective control over part or the entire territory, as was the case of Lebanon during the Israeli-Hezbollah conflict in 2006, they are fair game for intervention. And where terrorist organizations are operating and using that territory as a launching ground, Victim States do not need permission to invade such a sponsoring territory. That is, Victim States do not need to seek further approval or meet the strict criteria of informing the State harboring the VNSA where the attack is being launch.

The US killing of Osama Bin Laden, in spite of Pakistan’s avowed partnership in the war on terror, is a case in point, and therefore, precedent-setting in light of the set of facts explaining their prior partnership. The use of force is therefore permissible under such circumstances to the extent that such a use is proportionate and necessary to deter the specific source of threat from the host territory especially where the authorities are unable or unwilling to exercise control over their territory or the terrorist group. In the end, the larger prevailing message for accountability and state responsibility is that State preferences, be they their sovereign prerogatives or assertions who uphold similar rights, cannot operate to avoid adherence to the broader goal of international security.
Responsibility, Community, and Conflict Resolution in an Age of Polarization

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To what or to whom are human beings ultimately responsible and what is the mechanism by which responsibility is mediated down to day to day life and decision making?

The answer for much of human existence was the gods and religious systems. Later, as civilizations rose, emperors and kings wrapped themselves in mantles of the gods and demanded obeisance. In recent centuries, alarmed by the brutality and injustice of tyrants and religious warfare, societies have separated the realms of sacred and secular and turned to rule of law and democracy to guide the latter.

In America, classical liberalism (predecessor to both conservatism and liberalism as known today) took deep root and has shaped national discourse on responsibility for centuries. Conservatives emphasize economic freedom, liberals emphasize individual freedom. But they share deep individualism and skepticism about giving too much power to government.

As a result, they also share a tendency to foster conflict avoidance, for both tend to license a simple parting of ways. When protection of individual freedom is sacrosanct, and imposition of government anathema, unless processes and structures for jointly exploring differences have been carefully constructed, the solution to differences easily becomes to withdraw and pursue separate futures.

Conflict avoidance has not always obtained; intense battles have been fought. But neither conservatives nor liberals have a history of deep commitment to dialogue in the midst of differences or a track record of investment in the skills and processes of dialogue.

This narrow repertoire of response to conflict - pitched battle and avoidance - seemed to serve the needs of the nation well for several centuries. But events of recent years now raise concerns about the foundations of social cohesion in American that seemed unimaginable a few years ago. Americans of

all political persuasions increasingly feel that something is seriously wrong and question whether the “center will hold”.

Having spent a lifetime in professional practice of conflict resolution in a variety of settings, I ponder our present situation with alarm and disappointment. Like others, I worry about the “center” holding. And I am disappointed that, despite several decades now of activity and apparent progress, the field of conflict resolution seems to be little engaged with the crisis.

I know a large number of conflict resolution practitioners with magnificent skills that would be beneficial in polarized situations in America today. But so far as I am aware, like everyone else they are on the sidelines, uninvited and unable to gain entry to situations where they are desperately needed.

What does conflict resolution have to offer in this time?

**Conflict Resolution for Utilitarian Reasons**

In the thirty plus years in which conflict resolution has been prominent as a movement in the United States, the case for its contribution has largely been made on utilitarian grounds. Conflict resolution, we have said, is faster, cheaper, and produces better solutions than litigation.¹⁶⁹

¹⁶⁹ A common argument for conflict resolution is that existing options for resolving conflict are expensive and inefficient. An early and powerful proponent of Alternative Dispute Resolution, or ADR as it is often called, has been the American Bar Association. The ADR movement is commonly traced to a 1976 speech, sometimes described as the “big bang moment of ADR”, when Harvard Law Professor Frank Sanders argued “that traditional litigation systems process only certain kinds of disputes effectively” and suggested that the remaining types of disputes might be better addressed through other mechanisms. (From https://law.uoregon.edu/images/uploads/entries/Michael_Moffitt-Before_the_Big_Bang-The_Making_of_an_ADR_Pioneer.pdf.) In the decades since, lawyers have played an active role in encouraging the use of arbitration, mediation, facilitation and other activities that deploy responses to conflicts that have repeatedly been shown to be faster, more effective, and often more satisfactory to disputants in their outcomes than litigation. Another common utilitarian case for conflict resolution is cost. A 2012 infographic reports that 15 million civil cases are filed annually in the US. Americans spend 2.2% of their GDP on tort cost, which is about 30% higher than second place Italy, and double that of third-place Germany. Per capita tort costs have increased by eight fold since 1950, even after adjusting for inflation. In the business world, wrote Dan Dana, a veteran conflict resolution trainer, in Measuring the Financial Cost of Organizational Conflict: “Unresolved conflict represents the largest reducible cost in many businesses, yet it remains largely unrecognized.” (MTI Publications: 1999). Yet another utilitarian reason for conflict resolution is widespread ineptness in conflict resolution. This results in inefficiencies in organizations. A Grovo survey found that 98% of managers said that, in their company, managers need more training, and conflict resolution was one of the topics managers most frequently identified as a need. A survey by survey by Roffey Park found that 57% of managers said that “inaction” was their organization’s main method of conflict resolution, and that avoidance and “pretending it isn’t there” were common responses. Even pastors name lack of preparation for conflict management as the biggest gap in their training.
I agree with these utilitarian arguments and have made them myself. But increasingly I think that advocating conflict resolution on utilitarian grounds may handicap possibilities for achieving the larger benefits of our work. When conflicts turn out to be deep-rooted and trenchant, perseverance flags if those involved expect quick results.

Of greater consequence, a utilitarian emphasis overlooks perhaps the most important reason why conflict resolution should play a central role in society: the learning and use of conflict resolution skills facilitates the development of human beings and society capable of taking responsibility for making decisions and resolving problems in the midst of controversy.

Until quite recently, a limited repertoire of responses to conflict and an \textit{ad hoc} approach towards teaching the skills and values of conflict resolution were adequate equipment to navigate the challenges of communities and society. Today the forces of disintegration are so strong, the technology-enabled pull of individualism so powerful, the occasions for integrative experiences and unifying narratives so few, that old responses are out-dated.

In unique ways, conflict is capable of catalyzing high level responses in human beings that mobilize our best resources. But not when preparation is haphazard. To achieve high-level responses we must approach things differently than in the past.

\textit{Conflict Resolution as a Foundation of Existence}

Let us start from the given that human beings are tribal creatures, hardwired to seek out and live in proximity to others. At some deep level we know, as our ancestors knew, that we need partnerships with others. Survival itself requires it. Dependency on community is perhaps most undeniable when we are young and again when we are old. But even in the more autonomous middle years, maintaining communal connections is a central concern for most people.

This deeply imprinted awareness of reliance on community gives conflict and its resolution a special place in the human psyche, for we know instinctively what they portend. Unresolved conflict threatens danger to and loss of community, and thus death, for in our ancient past, safety required numbers. Successful resolution portends continuation and renewal of community and thus survival.

Activities and processes of conflict resolution, then, have more impact in the human psyche then we might estimate from the significance of the issues alone that humans quarrel about. Weighty though the issues of a given dispute may be, the symbolic impact of conflict and human response to it may be even weightier in the psyche.

Successful experiences of conflict resolution assure us that we are not helpless to defend against loss of community and connection to others. Aside from the practical implications of agreements, to experience or witness a process of conflict resolution is to participate symbolically in an act of
existential renewal and hope. By the same token, to experience efforts at conflict resolution that fail threatens the foundations that sustain us.

If this analysis is true, we are wired to pay attention to conflict resolution and to invest in achieving it. We feel anxious when we are not connected as allies to others. Conflict and how to resolve it, then, is not a matter of mere utilitarianism. We are programmed to consider it a foundation of existence. So why not then act on this deep knowledge?

**Brooks on Loss of Covenantal Attachments**

In a recent, thought-provoking essay, columnist David Brooks wrestles with the requirements of building a humane society. He draws on psychological attachment theory and a 2014 essay by Yuval Levin\(^{170}\) to make his case.

At the foundations of American life, Brooks writes, there once was "a society with strong covenantal attachments — to family, community, creed and faith. Then on top of them we built democracy and capitalism that celebrated liberty and individual rights."

Deep covenantal attachments, says Brooks, provide human beings with the foundation required to use freedom well. Without them, we grow selfish: "Freedom without connection becomes alienation."

When large numbers of people come to take freedom without connection for granted, the result is chaos and breakdown. "[T]hat’s what we see at the bottom of society — frayed communities, broken families, opiate addiction," Brooks writes. "Freedom without a unifying national narrative becomes distrust, polarization and permanent political war."

Brooks attributes grave outcomes to loss of covenantal attachments. When people are deprived of good covenantal attachments, "they will grab bad ones. First, they will identify themselves according to race." People become so deficient in meaningful attachment that they are unable to cope with those who differ from them: "The only people who can really know me are in my race. Life is a zero-sum contest between my race and your race, so get out."

From racism, things go to tribalism. Political demagogues encourage simple in-group and out-group dichotomies and build political movements out of them. This is the appeal of Trump. "As history clearly demonstrates, people will prefer fascism to isolation, authoritarianism to moral anarchy."

The solution, Brooks holds, is to renew covenantal relationships. "If we are going to have a decent society we’re going to have to save liberalism from itself. We’re going to have to restore and re-enchant the covenantal relationships that are the foundation for the whole deal. The crucial battleground is cultural and pre-political."

Covenantal Relationships Require Skilled Conflict Resolution

I agree that loss of covenantal relationships lies at the core of what is happening in America today. But Brooks' suggestion that the cause is too much liberalism - resulting in isolation - is shallow. Ineptness at community building lies at the core of both liberalism and the conservative communities whose demise Brooks mourns.

"Re-enchantment" of covenantal relationships, Brooks' answer to the problem, is similarly facile, suggesting a magical solution. A way out of this impasse will have to include addressing injustices and developing new ways of responding to conflict.

Brooks points to the weakness of liberalism of giving priority to individual freedom at the expense of covenantal relationships. However, he ignores the dark side of many conservative institutions and practices: Deep connection and community exist in such communities only for those who fit in or blend in. Those whose social status, history, preferences, appearance, identify, or priorities differ from a certain ideal type are second-class citizens. As such they are expected to put up and shut up.

Some amount of abnegation of self, equally distributed across the human community, is arguably good, perhaps compelling individuals beyond the narcissism that seems to come naturally for human beings.

But intolerable oppression is rife in conservative settings. Those unable or unwilling to accept the norms of their group are often lonely, scorned, isolated, ridiculed, exiled, or worse. Hence there is good reason for the rise of liberalism: A significant portion of people in most covenantal groups have experienced at one point or another the pain of not fitting in. For some, this is chronic.

Conservative institutions, though effective in fostering covenantal relationships, often have terrible processes for managing diversity and conflict. Those in power impose their will on others. Those not in power withdraw to survive, or over-rule their own views, wishes, needs, and preferences to go along with the majority.

Peace is often valued such setting, for the chaos of conflict is threatening and disruptive. But the peace sought is not achieved through vigorous mutual engagement, but rather through acquiescence and submission.

The latter may reduce conflict on the short-term. But the long-term cost is severe, not only to individuals but to the entire community. When dissenters are chronically squelched or driven out, groups lose their ability to self-correct. Weaknesses and failures of leaders go unchecked. The ability of the entire community to adapt to change is diminished.

Brooks has it wrong, then, in asserting that covenantal relationships once formed a pristine core to which liberalism later added an outer layer of freedom now gone to excess. The core itself was deeply deficient and survived only at enormous cost to minorities of many kinds. The institutions that fostered covenantal relationships often relied on destructive social processes for their power. Let there be no return to those days.

How then to make restoration of covenantal relationships a central part of our response to the polarizations of our times, without returning to the
oppressive structures and processes of the past? The answer lies, I believe, in re-thinking old assumptions about conflict and revising our responses to it.

**Liberals and Conservatives from the Perspective of Conflict Styles**

Liberalism and conservatism share a common tendency: aversion to conflict and an instinct to end it by disengaging from conversation. Liberalism values diversity and makes room for it, but it does so in ways that are often conflict avoidant. Its underlying individualism facilitates too-ready a parting ways and avoidance of difficult discussions, thus undermining covenantal relationships.

Conservatism, for its part, values the peace of quiescence and actively pursues it by squashing dissent. Certain things should not be talked about and dare not be challenged. Those who do so anyway are often silenced or removed.

We can gain further insight on these responses from conflict style analysis. An early and enduring model for evaluating the dynamics of conflict is the Blake Mouton Managerial Grid, an analytic tool for assessing styles of leadership, proposed in 1964 by Robert Mouton and Jane Blake, and used as organizing principle in a variety of conflict analysis tools. The latter include the *Thomas Kilmann Conflict Mode Instrument* and my *Style Matters* conflict style inventory, which adds elements that recognize the impact of stress and culture.

The Mouton Blake model assesses situations according to two key factors, commitment to goals (or agenda) and commitment to relationship (or to pleasing others). By intersecting these factors in a grid, the Mouton Blake framework (hereafter referred to as the Five Style Model) posits five distinct responses. When considering conflict, these are referred to as conflict styles:

- Forcing or Directing - High commitment to goals and low commitment to relationships

- Accommodating or Harmonizing - Low commitment to goals and high commitment to relationships

- Avoiding - Low commitment to goals and low commitment to relationships

- Collaborating or Cooperating - High commitment to goals and high commitment to relationships

- Compromising - Medium commitment to goals and medium commitment to relationships
A key concept in the Mouton Blake framework is appropriate response. Each conflict style has intrinsic strengths and weaknesses, and effective conflict response requires discernment in each situation in light of its unique requirements\textsuperscript{171}. But in fact few people make informed choices, relying instead on habit and often favoring one or two styles over others.

From the perspective of the Mouton Blake Model, over-reliance on the Directing/Forcing style as a response to conflict is common in conservative communities. Conflicts are quickly polarized and turn into power struggles, resulting in broken relationships and marginalization of nonconformists.

The Directing/Forcing conflict style, as the diagram above makes clear, gives low priority to relationships and deep damage to them often results in conflict. Recognizing this, individuals often choose silence and withdrawal in the face of conflict, for they know that if they challenge others they are likely to be targeted with a Directing/Forcing response.

\textsuperscript{171} See my short online “Intro to Conflict Styles” for more on this.
This means that not only Directing/Forcing but also Avoiding is overused as a conflict style. In practice, this manifests in a pattern common in many conservative communities: long periods of cottony silence punctuated by occasional outbreaks of intense conflict.

From the perspective of the Mouton Blake model, liberalism too is over-reliant on Avoidance, thanks to its underlying individualism. Given liberal high commitment to individual freedom, conflict quickly leads to a parting of ways. Both conservative and liberal communities then are seen to rely heavily on conflict avoidance.

Neither conservative communities, rich in covenantal relationships, nor liberal communities, rich in individual freedoms, bring a balanced repertoire of responses to conflict. For different reasons, both neglect the practice and teaching of skills required to engage difficult issues without damaging relationships.

Conflict Response and Covenantal Relationships

Technology greatly expands options for individuals and make it ever easier to live in isolation from others. This means that sustaining covenantal relationships is likely to grow ever more difficult, and if Brooks’ analysis is correct, that dynamics of tribalism are likely to grow more problematic in the future.

A number of attributes of conflict make it a potent resource in resisting this, but a particular response to it is required:

1) **Re-think attitudes towards conflict so as to harness its energy.**

   One of my first learnings as a young professional working in organizational conflict was the discovery that dynamics in a room shifted when, as a resource person, I adopted a positive, inquisitive attitude towards the presence of conflict. Faces softened and voices shifted from angry and demanding to intense and engaged, often within minutes.

   Conflict is easier to deal with when invited rather than discouraged. When people consider conflict to be wrong or irresponsible, they make it a habit to hide their true feelings. Dishonesty soon becomes normal. Frustration and anxiety rise and inevitably candor overcomes caution. When it does, battles immediately follow. People assume that others are now casting aside integrity and that warfare is the only realistic response.

   When instead disagreement is **invited** and the airing of diverse views is considered a contribution to the health of community, a different dynamic results. Anxiety is still present, of course, but not in its bitter, aggressive, judgmental forms. Reason and principle remain accessible, even in the heat of differences.

   Treating conflict as a normal part of relationships transforms it from a destructive force to an energizing one. Nothing focuses attention, stirs energy,
and attracts engagement like conflict. Harnessing this energy with robust constructive processes of dialogue and decisionmaking must become a central goal of any community that cares about covenantal relationships.

The problem with modernity, after all, is not that it is intrinsically destructive, but that it disrupts and diverts attention from the things required to build deep relationships and stable communities. Every smart phone bearer carries a world of interesting engagements, waiting to be summoned from pocket or purse. To build covenantal relationships requires social processes capable of break through these self-constructed cocoons that increasingly isolate people.

Conflict is one of the few aspects of human life capable of doing this. The atomizing and isolating trends of our times make it ever more important that we recognize conflict as a moment of opportunity. We must direct the energy that it brings towards responses that bring true dialogue, and in the process, help create individuals and communities capable of covenantal relationships.

2) Recognize isolation and alienation, not ideology, as the drivers of the conflicts that threaten the fabric of American society today.

The deep polarizations that increasingly threaten the very foundations of society are rooted in more than competing ideologies. Modernity, on a daily basis, erodes the ties of community itself. The individual reigns supreme, empowered by technology to construct life and relationships in the mold of personal preferences. Information that differs, and people who differ, are easily blocked out.

The phenomenon of “fake news” is a reflection of this reality. Technology now assists individuals to coalesce into influential movements that convincingly propagate their own self-sustaining vision of reality, isolated from serious intellectual or social challenge by those whose experience differs.

We can’t address this dystopian reality by sending specialists to the frontlines somewhere. We have to address the core problem of alienation underlying it, the pervasive isolation from meaningful engagement with diversity of any kind that makes individuals easy marks for extremists.

Alienation at this level can’t be remedied by setting up dialogue across the major gaps that divide society. We have to start more modestly, with a goal of simply reducing the alienation and isolation that characterizes daily life. On both sides of the ideological spectrums, evidence abounds that people have a hard time getting along, not only with their predictable opponents, but with their own fellow partisans. Our strategies must move at a level that targets the needs within groups as much as between them.

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172 It’s hardly chance that readership for some newspapers increased drastically in the heat of the 2016 elections, for the New York Times by 47% and for the Washington Post reportedly by 75%.
3) **Give greater attention to community building as a goal of intrinsic value, as a prerequisite to a peaceful social order; and to conflict resolution as a facilitator of community building.**

Although conflict between groups receives a great deal of attention, conflict within groups is widely ignored. Behind the scene in every well-known public conflict - whether Israel/Palestine, Syria, Iraq, Ireland, or current polarization between Democrats and Republicans in the US - exists serious intra-party conflict. These less visible conflicts often turn out to be the biggest obstacle to resolution of the public inter-party conflicts themselves.

When groups that nurture covenantal relationship weaken or when they are riven by internal tension, a common strategy for unification is to stoke conflict with external groups. Heightened perceptions of a common enemy predictably serve to unify group members.

In an era in which covenantal relationships are under great threat, then, it is urgent to find ways to build community without resorting to the shortcuts of tribalism, which creates community at the expense of denigration of others. A key strategy in this must be to strengthen the ability of groups to deal with internal issues. As networks and groups are better able to work out their own differences with each other, they will have less need to rely on the predictable but destructive strategies of demonizing opponents outside.

This applies across the spectrum of groups. Strange as it may sound, helping radicals learn constructive ways of working out differences with other radicals would reduce their danger to others.

There would be many ways to work at this in various settings. But the common denominator would be to improve the quality of how communities conduct meetings, set priorities, make decisions, and resolve conflicts.

A community is shaped, after all, by many small moments and micro-responses to the diversities that people carry into every gathering, small or large. Are divergent views welcome, are divergent people welcome? Do participants interact respectfully with those who challenge them? Are decision making processes transparent and participatory? Is there clarity and easy access to information about things pertaining to structures, power, and use of resources? Conflict resolution has enormous contributions to make on these issues.

4) **Treat conflict resolution as a full spectrum of responses.**

The case made for conflict resolution has often focused on a limited understanding of its potential, often presented only in reference to mediation of micro-level, interpersonal conflicts. This limited focus ensures that when conflict has systemic roots, as the polarization now threatening us has, conflict resolution is considered irrelevant.

Conflict resolution competencies should be presented embedded in a larger context of functions. Only then is the full potential contribution of the field visible. Below is one example that highlights how each level is essential for effective response at higher levels. For example, mediation skills assume
certain predecessor skills and in turn are an essential pre-requisite for effective responses to intergroup and group conflicts.

5) **Integrate conflict resolution training broadly into education.**

A consequence of the prominence of lawyers in promoting mediation in its early years and the rapid growth of community mediation centers with a focus on mediation of interpersonal conflicts and divorces is that conflict resolution has come to be understood largely as an alternative to courts.

Conflict resolution is indeed such an alternative and it should continue to be. But it is also potentially much more. To achieve this larger community building potential will require more than occasional workshops for a peace-oriented fringe of society. Conflict resolution components need to be attached to every level of education and every profession.

Conflict comes with the life for learners of every level, whether school children, university students, or professionals in training. The need to function effectively in groups, to define key issues, set priorities, explore options, and make decisions with others is intrinsic to human functioning.
Relevant issues and pressing needs, for which appropriate skills can be taught and practiced, reside at every level of education.

If it seems utopian to hope that such an agenda could be inserted into an already crammed educational environment, it should be pointed out that professional schools and agencies of many kinds have already initiated the offering of such skills training. Typically such offerings come in response to utilitarian concerns - the awareness of practitioners in the professions involved of the high costs of badly managed conflict to their profession.

Many of those who live and work in the world of professions and projects understand the practical costs of badly managed conflict as well or better than the philosophers of peace. Some have learned or teach related skills under rubrics such as problem solving, personnel management, leadership skills, human resource management, etc.

Now we are in a time when a large number of people harbor serious concerns about the sustainability of our entire system. Yet many of these same people, through their professional experiences, have learned skills with great potential to build common purpose among diverse people in the presence of high stress.

From their own lived experience, the latter know that as a society we already possess, in scattered pockets and veins, the knowledge and skill required to shore up our faltering system. They surely know as well that the structures are lacking to teach and use these skills on the scale needed.

My suggestion then is for a new initiative from the field of conflict resolution. What might result if we made a systematic outreach to the educational institutions around us?

I return in conclusion to the question with which the essay began: To whom are we responsible as we face the many issues of pressing importance that confront humanity, and what is the mechanism by which we connect this responsibility to day-to-day life at the lowest level?

Humanity long answered the question by pointing too high in the cosmos, first to the gods, then to their stand-ins, the kings, and then to the state. However, recognizing the injustice and brutality unleashed by those answers, classical liberalism in the US, the parent of both liberalism and conservatism as we know them today, turned in the opposite direction.

But in turning to the individual as the ultimate focus of discourse on responsibility, we have aimed too low. The implications of this are becoming rapidly more apparent as technology expands the ability of individuals to create isolated and self-sufficient universes independent of deep relationships.

Responsibility in the end must lie in the hands of those involved in and those affected by the issues in contention. This rules out neither query after divine guidance nor baseline principles of individual rights. But the processes, forums, and norms shaping discourse and decisionmaking should look to those involved and those affected by the issues in disputes as key interlocutors.

To achieve this would require the enskilling of humanity at all levels in competencies of dialogue, problem-solving, and conflict resolution that today are possessed by only a minority. We already know what those competencies
are, what each is capable of, and how to teach them. The key missing piece is the will and the resources to teach them on the scale required.
Beyond Non-Violence to Courtship

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Abstract:

This study argues that for international conflict, and for many conflict situations within a nation, the most pragmatic, responsible option is neither coercive nor evasive. It proposes an alternative strategy, dubbed courtship, that is neither. By coercion is understood violence or any other form of dominant control or forcing the enemy against their will, including many methods often described as nonviolent such as economic sanctions, majority rule, and the rule of law. By evasion is understood appeasement, deception, self-exile, or any attempt to run away, cover up one’s needs, or hide from the aggressor. The study introduces healthy community as a refinement of Martin Luther King Jr’s beloved community. A healthy community is founded on a widespread public commitment whereby no party attempts to evade conflict, and no party attempts to control or coerce others—no one exercises control of the social situation. In a healthy community there is respectful longstanding healthy confrontation between parties that see the world differently and come to different moral and ethical conclusions. The parties’ commitment to renounce control provides safety for negotiation. Within a healthy community, justice is the practical experience that negotiation with one’s opponent produces positive results. The epistemological claim is made that knowledge can only grow through the friction and tension arising from the diverse points of view within a healthy community. Courtship is then introduced as a non coercive unilateral strategy designed to bring an enemy into healthy community. To respond to the obvious objection (“If you won’t use coercion or evasion, won’t your enemy just wipe you out?”) the study discusses the relative success of courtship, coercion and evasion. Criteria are given for deciding when to use courtship, and when to trust to coercion or evasion. An analysis of the American civil rights movement of the 1960s is given using the lens of courtship. Courtship is distinguished from coercive nonviolence, principled nonviolence, and diplomacy. Courtship is our opportunity, it is within our agency, it is our responsibility.

Introduction

This study makes a difficult, almost outrageous claim: that for international conflict, and for many conflict situations within a nation, the most pragmatic, responsible option is neither coercive nor evasive. It proposes an alternative strategy, dubbed courtship, that is neither.

This study uses the term coercion to cover violence, military power, use of weapons, oppression, exile, rape, power of class or gender or race etcetera, indeed any attempt at dominant control, including many recourses often described as nonviolent, such as economic sanctions, majority rule, and the rule of law. The latter two have a coercive foundation—citizens who continue to disregard the law will eventually be put in jail, with violence if need be. Economic sanctions are an attempt to coerce one’s opponent into a desired behavior against their will. This study lumps all of these under the term coercion.
This study uses the term *evasion* to cover appeasement, deception, self-exile, or any attempt to avoid, run away, cover up one’s needs, or hide from an aggressor.

The terms coercion and evasion will be here used mostly as descriptions of group behavior, whereas their parallels on the individual level are characterized as *fight* and *flight*. Since the beginning of life on earth, human ancestors evolved in the presence of predators. The most effective rejoinder to an attack by a non-communicative predator is either fight or flight (including hiding as a form of flight)—they are evolutionarily proven survival mechanisms. The concern herein is with predators that can and do communicate well—humans—and in particular, *parties* of humans. In this study, the term *party* can be taken to mean a political party, but is always used more largely, to denote any large group of people sharing some common identity and/or value system, such as ethnicity, religion, ideology, culture or geographical community.

Reinhold Niebuhr, who in his youth was a pacifist socialist activist pastor, matured into a prominent anti-pacifist “realist” in the 1930s. While not agreeing with him on all points, Martin Luther King Jr. was much taken with Niebuhr’s perspective (King, Jr., 1954). Niebuhr was skeptical both of the good behavior of uncoerced parties, and of the effectiveness of non-noercive methods. He argued that “[a]ll social co-operation on a larger scale than the most intimate social group requires a measure of coercion” (Niebuhr, 1932, p. 3) and that “[t]he selfishness of human communities must be regarded as an inevitability” (1932, p. 272). He concluded that non-coercive social idealists could never “make their vision of a just society effective” (Niebuhr, 1932, p. 13). This study describes a non-coercive option that arguably Niebuhr never considered and examines this option in the light of his scepticisms.

We are responsible for those actions we could have changed, to the degree we could have changed them. If one assumes the most effective rejoinder to coercion is coercion, then responsibility can become a weasel word justifying coercion and imperial intervention. Under this logic, someone who chose to talk to the leadership of a terrorist organization, rather than kill them when they had the chance, is negligent—bears some responsibility if their intervention did not prevent the organization from attacking. Had they killed the leadership, but the organization nonetheless was able to execute their attack, they would not likely be accused of negligence, which only demonstrates our culture’s deep faith in the stature of violence as the best response to violence. This study challenges that faith on empirical grounds.

This study speaks to the body of scholarship on coercive nonviolent political action surveyed, for example, in Sharp, Paulson, Miller, and Merriman (2005). Most activists in the nonviolent movement downstream from Sharp’s three part *The Politics of Nonviolent Action* (1973) have generally accepted Niebuhr’s view that effective nonviolence must be coercive, including such coercive elements as sanctions, the rule of law, and majority rule. This study, presenting an alternative that is not perceived as coercive by one’s opponent, sees coercion as an often avoidable, often unfruitful cost to the real process of establishing justice.

The concept of healthy community is introduced below as a refinement, or perhaps restoration to founding principles, of the *beloved community* as developed by Martin Luther King Jr. and others in the American civil rights movement. Where theKingCenter.org describes *beloved community* as “a realistic, achievable goal that could be attained by a critical mass of people committed to and trained in the philosophy and methods of nonviolence” (“The King Philosophy,” n.d.), this study holds that *healthy community* is a realistic, achievable goal that could be attained by a critical mass of people...
committed to and trained in the philosophy and methods of courtship, also introduced below.

This study can be seen as promoting a form of proactive peacebuilding (fostering *healthy community*), via a particular intervention (*courtship*). In the lens of the Dual Concern Model (Carnevale & Pruitt, 1992), negotiators representing a healthy community in conflict with another party enjoy a mandate for strong levels of concern for outcomes for both parties, i.e. to problem solve while shunning either concessive or coercive options. A healthy community even has the capacity, via courtship, to increase the capacity of the opposing party to perform at such a high level. This study also transcends the us-versus-them stance implicit in the Dual Concern Model, in that it demonstrates that we need each other, i.e. it values the continued existence of the other as distinct from us and challenging us, and thus gives grounds for why we should have concern for outcomes of both parties. Healthy community creates a higher notion of us that transcends the lower us/them distinctions that it preserves and values.

*The appropriate use of coercion: the limited rule of law*

A good metaphor for understanding appropriate coercion is a surgeon’s scalpel. While surgery can certainly be beneficial, no one believes that cutting is the root of health. Every use of a scalpel makes a wound, a trauma that will have to be managed until it heals. The least damage done, the better—microsurgery is a great advance over large-scale surgery. Surgery isn’t used to treat malaria, or tuberculosis, or dozens of other diseases.

As the scalpel makes a wound requiring healing, coercion creates a social trauma requiring healing. Healing will have to come from elsewhere, later. While competent coercion can exchange greater, irrevocable damage for limited coercion damage, that coercion damage must be within our ability to manage while it heals, or it will fester. And clearly an unlimited use of the scalpel of coercion, such as in war, causes unmanageable trauma.

A fundamental justification of government is security. A government, by violent coercion if needed, prevents the use of violence by anyone else in its territory, and promises to protect the weak (shopkeepers, farmers, all who focus on production rather than proficiency with weapons) from being robbed or oppressed by the strong (raiders, anyone with superior strength or arms) inside its territory, and also from the strong who would invade from outside its territory. A government maintains its monopoly on violence within its territory, since otherwise it can’t pretend to offer security.

The rule of law implemented by a government reflects the surgeon and scalpel metaphor, at least in those countries where there is a historical skein of legal development whose clear intent is to limit the trauma from, and abuse of, the violent coercion that underlies the rule of law. As with surgeons, it is required that judges and lawyers have extensive education and qualifications. To avoid abuses many limits (such as defending human rights, requiring warrants, requiring the state to prove its case, and providing appellate courts) are placed on the use of government power.

The rule of law has proper application where there is broad social consensus: to protect from rape, robbery and murder, to regulate vehicular traffic, the marketplace and financial institutions, and to protect the environment. It is within our current competence to manage the limited trauma to society of using coercion to enforce social cooperation on very broadly agreed-upon norms.
There is still much work to be done here, but I affirm the historical intent, the path that many countries are on, to limit the trauma done by the application of violence under the rule of law, and to limit the rule of law to norms which enjoy wide consensus within society. Under such conditions the scalpel of the rule of law is life-saving. I affirm this limited “measure of coercion” (Niebuhr, 1932, p. 3).

The rule of law is insufficient

However, the rule of law, alone, has not brought peace and justice. The rule of law is abused by applying it beyond its proper bounds, for lack of a credible alternative. It’s like using surgery to treat malaria. Such abuse turns it into a monster and is the main impediment to progress on the historical path to limiting the rule of law. The rule of law is not sufficient, for at least three reasons.

First, trying to control an ugly situation by long term coercion is analogous to daily surgery to correct a chronic problem—there can be no healing. Occupation fails for the obvious reason: communities rarely change their values just because they are coerced to behave according to someone else’s values. Even if you succeed at compromising one generation, the next plots its revenge for the damage inflicted on their identity.

Second, what happens when a society can’t agree on a law to be ruled by? Societies having significant parties that cannot agree on the law and are in a state of civil unrest or war, need something to get them to a place where a coherent law can be framed within a broad consensus. Even perfect majority rule can establish laws that oppress minorities. What can people do who find themselves on the short end of a broad consensus? For the oppressed, the law is the problem, not the solution.

Third, jurisdiction presents a problem. A legal system must exercise a monopoly on violent power within its territory, its jurisdiction, otherwise it can’t offer security. What happens when the territorial boundaries between different legal systems are in dispute? Our planet has been cursed by turf wars between competing governments.

In short, the rule of law is helpful for the me-us problem (how to maintain collaboration within a group sharing common values), but doesn’t do well with the us-them problem (how to maintain collaboration between parties having different values). An option is needed beyond the rule of law.

This study would dispense with both evasion and coercion (including the rule of law) between parties and proposes an alternative. It is easy to think “Nonsense. There are very tough people in this world. If the weak cannot flee them, and are not protected by coercive strength, the strong will just come and take all their stuff, move them off their land, reduce them to slavery, or eliminate them.”

To respond adequately to the above objection, this study has to offer an alternative to coercion or evasion, and evaluate the effectiveness of the new alternative relative to coercion or evasion in conflicts involving large groups of people.

To evaluate the effectiveness of different strategies this study needs to be clear about the goal. Thus other than the Introduction and Conclusion, this study is in three sections:

The Goal: a Healthy, Just Society
Courtship: an Alternative to Coercion or Evasion
Evaluation: When is Courtship Better Than Either Coercion or Evasion?

The Goal: a Healthy, Just Society

In English, the word *conflict* does not always imply violence. Two parties that live within a commitment to each other to use neither coercion nor evasion can still have a heated conversation where past traumas are exposed, and much grief and anger are expressed, and mutually incompatible perceptions of the same events are asserted, and mutually incompatible requests are made. They are stuck within their commitment to each other to use neither coercion nor evasion, to face their problem and muddle through it together, even when there does not seem to be a resolution at hand. I value such conflict, it is a hallmark of every healthy community, and I contend below that it is the signature of a just society.

Healthy Community

A healthy community is founded when overwhelming numbers of people from two or more conflicting parties—ethnic groups, movements, religious groups, communities—demonstrate their mutual commitment to life together while refusing both coercion and evasion. Their public commitment is that they will not attempt to control the situation coercively, nor to evade the conflict inherent in the situation.

Renouncing both control and appeasement can be excruciatingly uncomfortable as we explore and face our real and hard differences without either party being in control of the situation. Healthy community means struggling together, not letting each other go, and not walking out of our commitment to keep struggling with each other until something new is born. Our differences have no value if we sweep them under the rug. Our goal is neither to blend nor compromise, but to create something new that changes the situation for each of us.

The success of either fight or flight is the end of tension, for the enemy is dead, or dominated, or placated, or avoided. The result is silence: the end of communication, the death of relationship and community, and no more public tension. Such silence is not peace.

Healthy community represents a third option. The success of healthy community is life together in tension, life in community despite our differences. Healthy community thrives on voicing our identities and needs, on listening, asking, transparency, respect, assertiveness, calling to account, and hospitality. It weakens with any attempt to coerce, dominate, placate, deceive or hide.

Fight and flight are visceral reactions deeply wired into us by evolution. The sex drive is an equally visceral, deeply wired reaction to difference, and it is a partial metaphor for healthy community. Reproductive sex captures well the value, the complementarity, of difference—two that are different can make a baby, can make something new happen that would be impossible for either one of them alone. Often our opponents can do things we can’t, and vice versa. It captures well that we confront each other vulnerably. But it does not capture the mutual labor of birthing that often characterizes a healthy community. Healthy community is not just a nice abstraction. Wooing someone of the opposite... persuasion... into healthy community is as primal and deep a reaction to difference as either fight or flight. But it is certainly more difficult, in
that it takes two to tango. If the other chooses fight or flight, we don’t have to retreat to
fight or flight ourselves. We can persist in calling the other to community, but it is
risky and takes more of a skill set, described as courtship below.

Humans are finite, limited and therefore fallible. With the best of intentions or
virtues they often misunderstand, they make mistakes, and they thereby sometimes do
harm. A healthy society is one where such harms are negotiated between trustworthy
opponents—where the relationships between people, and between groups of people, are
committed enough, robust enough, that solutions are sought in healthy conflict.

Disagreement can be productive when we disagree within the safety of a
commitment to neither coerce nor evade, a public commitment at least as strong as
marriage vows: through thick and thin, in sickness and in health, until death. But
disagreement can feel offensive. Experienced mediation practitioners know that one
party’s truth-telling can feel like abuse to another party (Mayer, 2009, pp. 141–145).
Constant hospitality—frequent sharing of tea, coffee, alcohol, food, or whatever else
might symbolize social acceptance—is needed, because we are constantly offensive to
each other.

A healthy community is not a utopia where nothing ever goes wrong. It does not
require that everyone behave virtuously nor uniformly. It is rarely utterly peaceful.
Rather, it is a robust, just society which can deal with its problems.

Epistemology

My son spent years in China learning Mandarin. He did not come back saying
we should all forget about English because Chinese is better. Or, horrors, that a blend
between Chinese and English is what we need. Rather, he came back with the ability to
look at the world through two profoundly different framing systems, and he is the
better for it.

Like the proverbial story of the blind people feeling an elephant, each party
perceives the world differently. Every cultural framework has limitations of language
and perception and intentions. Some frameworks might feel more of the elephant, some
less; each framework is in some error, there are better frameworks and worse ones, but
the story reminds us that none of them do very well. If we keep our commitment to each
other and keep struggling together even though our perceptions remain different, a
healthy community of different parties together can comprehend reality better than any
one party can. The community of different parties, muddling through together, has
more information about the elephant than has any one party. What we bring to a
healthy community is our perception, our framework. Each party owes it to the others
to be themselves, to express their perceptions in all their difference, because otherwise
there’s no point, no value to the relationship. We need each other.

There are a lot of major real-world problems (think “riots,” for example) for
which nobody can design a good solution, but some people can design much better
solutions than other people. As with the elephant, different people can have different
points of view on such a problem. None of these points of view are very good, but some
are better than others. In The Difference: How the Power of Diversity Creates Better Groups,
Firms, Schools, and Societies Scott Page (2007) gives strong evidence that a group of
experts, those who individually design the best solutions, is not the best group to attack
such a problem. Why? Because, says Page, the experts tend to all have the best point of
view—not a very good one, but the best one. A better problem-solving group is made
up of people who have some experience but have very differing points of view on the problem, some of them not the best. Those sub-optimal points of view carry information that is not seen from the best point of view. The more diverse group does better because the combination of points of view gets at information that the best point of view misses.

The goal isn’t to build the perfect orthodoxy. The goal is a polyglot community of different frameworks, because we need to live in that tension. The goal is not dependent on discovering one framework that describes the whole elephant—we’ll never get there, humanity isn’t capable of that. Certainly, we evolve better and better understandings, indeed a healthy community is the best place for that evolution, but we will never understand perfectly. The pragmatic goal is to be in community even while we see differently. Healthy community isn’t a means, it is the end. It is, of course, a path, a way, but all we aspire to is to live on the way, not to get to the end of the way.

Indeed, healthy community is an epistemology, one not based on reason or objectivity, but on good social process. We need our trustworthy opponents, those who see the world differently, to deliver us from our ignorance, from the narrowness of our own point of view, from the weakness of our good intentions, from our laziness. (As a personal case: I need opponents to deliver me from the ignorance of my privilege as an American, white, Anglo, wealthy, educated, hetero, liberal, elder, male.) An agreement worked out by opponents represents an epistemological advance. Our trustworthy opponents keep us honest and call us to account. Together, we gain some freedom from the limitations of language and perception and intentions.

Justice and the healthy society

Justice is impossible without conflict. In a just, healthy relationship, neither party is dancing around the other, trying to be the perfect partner so that the whole thing won’t blow up. A relationship in which one side is catering to the other—to avoid misery—can give the appearance of a peaceful relationship because there is no apparent conflict, all is silent. One side has internalized the load of keeping the peace by submitting or catering to the other. If a relationship is utterly peaceful, someone is oppressed.

Given that we are fallible, and finite, and have needs, and see the world differently, we will inevitably step on each other's toes. We are offenders, we are trespassers. A relationship that is too brittle to support a lot of working-out-of-offenses cannot be just.

Justice doesn’t only deal with the past. There is no justice if victims can’t prevent an aggression being repeated in the future. Within a healthy relationship, justice is the practical experience that negotiation with one's opponent produces positive results. Both parties' commitment to renounce control provides safety for negotiation.

An individual victim of abuse may be able to escape and avoid the abuser indefinitely, and I affirm that choice. There’s nothing wrong with flight when it works for us. But sometimes our abuser is our parent or child or spouse, our community or home culture or legal system. And for parties, evasion isn’t always an option. It is very difficult for an oppressed ethnicity, religious group or minority to evade their oppressing culture, which has erected a system that controls the oppressed. The oppressed have to forge a healthier relationship with their oppressors within which they can productively work to dismantle that system. I submit that we don’t get justice first, and then have a healthy relationship. Justice flows from the health of the relationship.
Dealing with past injustice

Reparations, restitution payment, or blood money may be appropriate and helpful but can never restore what survivors really want. Survivors want the past undone.

Imagine for a moment a people who have been oppressed for generations, with many dead and many traumatized. They grieve the loss of the beauty, the music, the discoveries, the lives of the people that could have been, the whole world that could have existed. The past is unchangeable, and that future that could have been, is gone—nothing can be done to restore it. The only way to restoration of relationship between the survivors and the aggressors is for the survivors to bear that unredeemable cost, to live in this nightmare of a present that they never wanted, and from there dare to desire a healthy relationship with their enemy.

Often survivors don’t want a relationship. They just want to be left alone. That is a natural enough reaction, and for individuals it can work. But short of emigration or self-exile into closed communities such as the Hutterites, avoidance is not an option for minority groups, because interaction with the majority group is inevitable.

In a longstanding cycle of violence both parties have past trauma to deal with. Both parties see themselves as oppressed by the other. Though we live a life we did not choose, if we dare healthy community with our enemy, and they dare to meet us there too, we can arrive at a livable relationship in tension. The experience of that healthy community, in time, can slowly grow our confidence that the trauma won’t happen to us again. The experience of healthy community can gradually convince our traumatized psyches that the world has a place for us.

The small contribution that this study brings to King’s vision of beloved community is that healthy community envisions how to live, justly, with tension which may never cease and which is seen as valuable. Where King said “no matter what he [the white man] does to us, our aim must never be to defeat him or to humiliate him, but to win his friendship and understanding” (1960a), healthy community aims short of friendship or understanding, accepting the absence of coercion and evasion as sufficient. Where King spoke of the goal of tension being reconciliation and a resolution of conflict, healthy community expects and appreciates the tension of longstanding unresolved differences. The one envisions progress towards peacefulness, the other envisions progress towards a dance of partners pulling in different directions.

Epistemologically, the one hopes for an eventual integration into a communal truth, the other explicitly values a diverse community of unintegrated voices. King may well have had something like a healthy community in mind, but the language of the nonviolent movement has not been clear on this point.

Courtship: an Alternative to Coercion or Evasion

Note to those for whom English is a second language: The verb “to court” has nothing to do with the legal system. Dictionary definitions of courtship include “behavior designed to persuade someone to marry you” and “the behavior of male birds aimed at attracting a mate” (Oxford Dictionaries, n.d.).
This section deals with dynamics between opposing parties where at least one side considers that the other's behavior is wrong, is causing trauma, is evil—and usually that works both ways. Examples would include oppressor/oppressed relationships (such as in the Jim Crow American South), and parties on either side of a moral divide (such as those for or against same-sex marriage). To simplify the language of the following discussion, the first-person plural (we, us, our) is used to denote any party practicing courtship, and the term enemy is used to designate the opposing party. As used in this study, courtship is a unilateral strategy designed to awake in our enemy the desire to build a healthy community with us.

How do we move from toxic dysfunctional politics to a healthier, more moral society? How do we move from a situation of oppression and violence to a healthier, more just society? A healthy community implies a mutual (multilateral) commitment. To have such a healthy relationship previous oppressors must relinquish all control over the surviving victims, which is a very risky thing to do—the survivors may respond with violence. So why would an oppressor give up control? Are there any unilateral moves that the oppressed can make to bring powerful oppressors to the place where they relinquish their power, willingly, and dare healthy community? Finally, what steps can those take who find themselves in a party that enjoys privilege at the cost of the oppression of some other party?

In the 1950s and 1960s, King and many others in the civil rights movement developed the practice of nonviolent direct action to answer the above questions. Before launching mass nonviolent actions, they trained hundreds of demonstrators in how to control their reactions to being verbally and physically abused—with curses, taunts, dogs, fire hoses and clubs (Lewis & D’Orso, 1999, pp. 249–250). For lack of space this study does not reiterate all of the hard and good lessons learned. Indebted to that experience and practice, the following discussion refines King’s practice with an eye towards attaining healthy community. If we want a non-coercive relationship, we can hardly use coercion to get it.

Courtship includes the following actions:

We announce our desire to forge a healthy community with our enemy. We pledge and maintain our respect for our enemy’s safety, identity, history, dignity and honor. We extend hospitality.

We announce our desire not to dominate our enemy. We do not respond to coercion with coercion if the enemy would perceive that as an attempt to control them. We make concrete moves, entailing some risk, that demonstrate our desire not to control them. We want our enemy to feel safety, to feel greater freedom to act.

We announce our desire not to be dominated. We do not comply with any attempt to coerce us to do or not do anything that is not fair. Asking them to excuse us, we deliberately cross any lines of control that the enemy has laid down that appear to us to be unfair. Given that we avoid using either coercion or evasion, we risk imprisonment or death or humiliation, but we do not comply. We acknowledge that our enemy may have reason to be offended at us. We listen to our enemy, learning their story so well they are convinced we have
understood them. If we come to understand that we have done wrong, we change our behavior, make amends to the degree we are able, and ask for forgiveness of the remainder.

If there are needs of our enemy that can be met without compromising our own identity or honor, we share resources to fill those needs. We boldly ask our enemy for what we need from them and keep asking until those needs are met.

Courtship inspires our enemy to see us as trustworthy opponents. We do not beg for mercy. We do not cooperate with oppression—no display of cooperation with oppressors’ coercive power will incite them to cooperate with us. We do not bribe them, for we are not appealing to their base instincts. Rather, we are greeting and inspiring their highest and truest identity, that part of them which wants to be fair, present in every human’s psyche, though often buried deep under insecurity.

Nowak and Highfield (2012), working at the confluence of evolutionary theory and game theory, argue that evolution has bred us for cooperation as much as competition, and that for eliciting cooperation one’s reputation that one will treat others fairly, is paramount. To presume that most individuals have an instinct for fairness is not an idealistic position, but a realistic one.

Courtship is based on the faith that our enemies are, in the main, not subhuman monsters—they have the potential to be trustworthy opponents. This faith may be in the face of bitter evidence, but I submit that any party larger than a few hundred that has sustained itself for more than a generation has had some success dealing with its internal conflicts and has been able to generate strong internal collaboration. Thus, the people in it do understand, to some degree, how to negotiate differences, i.e. they sometimes practice healthy community among themselves. They value fairness, and they are capable of seeing the benefit of healthy community with us, if they come to trust us enough.

Courtship is only non-coercive in that it must be perceived, by our enemy, as revealing our desire for a non-coercive relationship. Courtship can use force as long as few of the enemy perceive it as an attempt to dominate or control them. For example, King (1960b) wrote “When the Negro uses force in self-defense he does not forfeit support—he may even win it, by the courage and self-respect it reflects.” That is, courtship does not ask “Is this action coercive?” but rather “Will this action inspire our enemy to perceive us as trustworthy in a non-coercive relationship?”

We offer hospitality and respect and opposition. We do not withdraw any of our requests for what we truly need. We will not accept less than a healthy peer relationship. But our approach must not be tainted with any shred of disrespect.

When threatened by enemies, we ignore the fearful, tyrannical part of them, to speak respectfully to that part of them that we assume is there, that part of them that values fairness. We have a claim on that part of their psyche that appreciates and understands fairness, we press that claim boldly, taking risks in order to fan the flames of their collaborative instinct. We do not let go. Our advocate in this confrontation is their own humanity.

Someone who is fearful or traumatized has great difficulty opening themselves to a healthy relationship—they have a fevered need to control the situation. If they also have more power than we do, they will have some confidence in their ability to dominate. Why should they negotiate with us—risk loss of control—when they have
the power to keep control? Therefore, we comfort our enemies' fears, yes, our oppressors' fears. They especially fear those they have oppressed, since they deeply feel how offensive they have been, and they expect an angry violent response. So, we show them hospitality, and make them feel safe. We listen to their stories of their traumas and their perception of the situation and express all that back to them until they are satisfied that we have understood them correctly. Hospitality, respect, feeling safe, and being heard all decrease our enemies' need to maintain control.

Our only liberation comes from our enemies, our only salvation is our enemies' salvation, our only victory is our enemy's victory in forging a healthy community with us.

Enemies who are under coercive control of a leader or oligarchy are themselves in need of liberation. They form a party exclusive of their oligarchs whose separate identity is forged by their experience of domination by their oligarchs. This can be a very fraught situation, for their identity with their oligarchs may be sustained by the oligarchs' control of the media, symbols of nationalism, and calls for patriotism. Here courtship has to deal with a three-way relationship: us, the party dominated by the oligarchs, and the oligarchs, which latter may be a very small and therefore unstable group centered around one person. Often the situation is mixed, for example people will sometimes distinguish "the American people" from "the American government," and sometimes not. Of course governments bristle at the suggestion that they do not represent the will of their people, because that threatens their legitimacy, but it is frequently the case. The point is that there may be multiple opportunities for courtship, and we must not be blind to internal fault-lines in our enemy.

Sustainability

It was said above that a healthy community is founded when overwhelming numbers of people from two or more conflicting parties demonstrate their mutual commitment. By "overwhelming" I mean sufficient that the tipping point of group psychology goes their way, instead of towards violence. Courtship is an attempt to get to that critical mass, which may be far fewer than a majority. Tipping points can be reached by a relatively small number of courageous people willing to stick their necks out before the tipping point has been reached, taking the risk that the crowd might tip against them.

Violence is infectious, but so is courtship. Group action, once a tipping point is reached, can be quite suddenly united and purposeful. To keep it so requires constant positive feedback. I am, like Niebuhr (1932), very skeptical of a party's ability to reason, but unlike Niebuhr, I do not look to reason, but to mutual inspiration. So that's another useful thing our erstwhile enemies do for us: our astonished and glad observation of their courtship of us helps us maintain our own courtship of them. We get extraordinarily strong feedback from observing someone we once feared, practicing courtship on us. It is plausible that healthy community can be sustained by a core of strong individuals who, whenever there is an offense, take the risk of demonstrating courtship.

Distinguishing Courtship from Nonviolence and Diplomacy

The difference between courtship and principled nonviolence is primarily in the intent, and thereby in many pragmatic details. Nonviolence is a negative term, focused
on what it isn’t—violence against the enemy—whereas courtship is a positive term that values the enemy’s identity and distinctives. Coercive nonviolence has a binary win-lose dynamic—you agitate, sanction, use the court system, pass legislation and vote until your side wins and the other side loses. This polarizing dynamic induces both sides to feel that their enemies are evil. However, if we don’t believe that our enemies are capable of fairness, we have demonized them. Courtship is the opposite of such demonization in that it bets on the fairness of the enemy and values their different point of view even while it refuses their control. Courtship succeeds only when both sides join in a mutually positive healthy community.

The difference between courtship and traditional diplomacy is that diplomacy is interstate, whereas courtship, like traditional nonviolence, is a movement within civil society. Diplomacy is built on the need for the nation-state to maintain its monopoly on violence within its territory, whereas courtship would let an occupying army sweep over the land, which for courtship broadens the opportunity to relate to the occupying humans and culturally woo them into a just relationship, though this may take decades. Courtship does not accept the partitioning of humanity into states. Courtship does not accept a state’s use of coercion solely to maintain the state’s existence.

What if they ignore us?

The classic frustration of the oppressed is that their protests are ignored by the powerful. The powerful will have a myth—the myth of the inhumanity of those they oppress—that permits them to sustain the privileged life they have. All they want is to continue that myth, that status quo, why should they change it and plunge into uncertainty? They believe they "own" their privilege, why should they give up what they own? The tired dynamic is that the oppressed then turn to violence, or sabotage, or terrorism, to try to force the powerful to the negotiation table.

But an oppressor cannot completely ignore the oppressed. Oppressors must actively maintain the oppression, which presents an opportunity. They need laws, treaties, regulations, tax incentives, and bureaucratic processes that make the oppressive system a web that is difficult to grasp at any strategic place. But there are people who implement and maintain the web where it meets the street—the police, the regulators, the lawyers, the legislators, the bureaucrats, the soldiers. And there are people in the chains of command above them. Being human, all of these people are vulnerable to courtship.

Systemic oppression usually has cultural support. Usually there is a language in place that rationalizes and justifies the system. There are voices—preachers, politicians, songwriters—who champion that language. They have blinded themselves to the injustice—they’ve blocked it out, it’s too painful to look at. And they can’t face the ostracism they would face within their own group were they to draw attention to the painful reality. But they too are human, and thus vulnerable to courtship.

In *Eichmann in Jerusalem: a Report on the Banality of Evil*, Hannah Arendt (1963) wrote that even Adolf Eichmann, the chief of operations of the Nazi program to exterminate Jews, was not an inhuman monster but a horrifyingly normal human. It is a corollary that even Eichmann could have been vulnerable to the hospitality and respect of courtship evoking in him his birth right allegiance to fairness.

Finally, no party is homogenous. There will be some people within the oppressing party who are more open to courtship from the oppressed party. Those who
belong to a party that enjoys privilege over some other party with whom they want to live in healthy community, can join with others in their party who think like they do, and they can practice courtship towards those who oppose them within their own party. The risk is that they may be shunned, exiled, or persecuted along with the oppressed, but it is the sole option that expresses their own spirit of fairness. Such courtship can loosen the logjam of hardened defensive positions that oppressing parties find themselves invested and trapped in.

An historical analysis

The successful use of courtship is not new, though it is rarely practiced unadulterated. This section examines the American civil rights movement of the 1960s through the lens of courtship. The Public Broadcasting System video “Birmingham 1963” (AmericanHistoryRules, n.d.) includes TV news footage of Birmingham police chief Bull Connor’s fight against black civil rights demonstrators that summer. The images of peaceful black marchers, many of them children, being attacked by police with fire hoses and vicious dogs ignited the nation, as white Americans struggled with the feeling that they identified more with the black marchers than the white police, that they admired the marchers more than the police. The video states:

He [King] was asking white Americans in a sense to, finally, after hundreds of years, confront this contradiction: they believed in freedom, and yet they denied freedom to African Americans. Which was their true self? In a sense asking white America, “Are you Bull Conner, or are you someone who believes in human rights?” Forcing people to make a choice, in a non-threatening manner.

In the eloquent letter he wrote from a Birmingham jail, King (1963) writes:

You may well ask: "Why direct action? Why sit ins, marches and so forth? Isn't negotiation a better path?" You are quite right in calling for negotiation. Indeed, this is the very purpose of direct action. Nonviolent direct action seeks to create such a crisis and foster such a tension that a community which has constantly refused to negotiate is forced to confront the issue. It seeks so to dramatize the issue that it can no longer be ignored. My citing the creation of tension as part of the work of the nonviolent resister may sound rather shocking. But I must confess that I am not afraid of the word "tension." I have earnestly opposed violent tension, but there is a type of constructive, nonviolent tension which is necessary for growth.

People who parse the world into winners and losers, who believe that having coercive power over one’s enemy is the only pragmatic way to bring about justice, cannot understand King. His direct actions were very public and persistent ways to not comply with unjust laws, to ask for what the black community needed, and to inspire the fairness response in white Americans. The purpose of direct action was to get to confrontation at the negotiation table. The power of direct action was the realization by white Americans that they admired the black resisters' courage, that the resisters were...
their heroes, that the resisters were displaying their, white Americans’, deeper identity and spirit. This was courtship.

As already mentioned, King accepted violent self-defence. However, King chose not to use violence in direct mass actions, because courtship is not a defensive posture. They were crossing enemy lines of control. Their direct actions were deliberate trespasses onto what southern law reserved as white turf—white-only restaurants and facilities, the front of the bus. Courtship is invasive—we are asking for a relationship of peers—so be successfully courted, our enemies must feel our commitment not to coerce or dominate.

Many in the nonviolent movement make the mistake of using power politics—they really want the other side to lose—and so deprive themselves of being lastingly effective.

In (Lewis & D’Orso, 1999), now U.S. Congressman John Lewis gives a first-hand account of the whole civil rights movement of the 1960s. By the end of chapter sixteen, after the movement had endured all the beatings, shootings, teargas and bombings of the Freedom Rides and Birmingham and Mississippi and Selma, Lewis writes:

Something was born in Selma during the course of that year, but something died there, too. The road of nonviolence had essentially run out. Selma was the last act.

... We’re only flesh. I could understand people not wanting to get beaten anymore. The body gets tired. You put out so much energy and you saw such little gain. Black capacity to believe white would really open his heart, open his life to nonviolent appeal, was running out. (Lewis & D’Orso, 1999, p. 347)

The movement attempted to use the federal government to force the southern states to end segregation. They built on Supreme Court decisions declaring segregation unconstitutional in education and in interstate commerce. Their strategy was to generate national political momentum that would force the Kennedy and Johnson administrations to intervene against southern states to uphold federal law.

Their strategy worked, in that it attained its goal of forcing southern states to end legalized segregation. Their nonviolent courage inspired the nation, and the widespread political support they generated resulted in the US Civil Rights Act of 1964 and US Voting Rights Act of 1965. In terms of courtship, they successfully courted the majority of American voters, whose political power then turned to demolishing legal segregation in the south. By Lewis’ account, the political impact of the horrific TV footage of the peaceful marchers’ fate on the bridge out of Selma impelled the federal government to send federal troops, federal marshals, and the FBI to protect the marchers from the sheriff posses and the populace as they walked through the hate-laced countryside from Selma to Montgomery. Lewis continues:

Now we needed to deal with the subtler and much more complex issues of attaining economic and political power, of dealing with attitudes and actions held deep inside people and institutions that, now that they were forced to allow us through the door, could still keep the rewards inside those doors out of our reach. Combating segregation is one thing. Dealing with racism is another. (Lewis & D’Orso, 1999, p. 349) [emphasis mine]
In short, the movement hadn't set out to heal its relationship with its enemies. The Klan supporters who signed up for the sheriff posses and cheered the club-swinging mounted police, were coerced by the feds, not courted into healthy community with blacks.

Bull Connor's violence against the demonstrators had the support of Birmingham's mayor and city council, but Connor, the mayor and the council were elected representatives of a wider community and dealt with many other issues than the demonstrations. Successful leaders of large sustained groups have some semblance of empathy and fairness. Even the relatively unified and very prejudiced leadership of Birmingham felt the impact on their political base of the moral contrast between the demonstrators and the police. One cannot conclude that they, or their segregationist political base, were immune to courtship, but in the end, the movement did not successfully court them. Not for lack of trying, but the fact that the segregationists were coerced by the federal government made courting next to impossible.

The movement's great but limited results were a result of the limitations of their strategy. I'm not saying what they did was an error—they had an opportunity to force the system to behave by its own values, and they seized that opportunity to take a giant step in the right direction. Clearly school integration and access to public universities, facilities, restaurants and accommodations would not have been won in the 1960's without federal coercion.

But there was work left undone. In 2017 the laws are no longer overtly prejudicial, but American society has found more indirect structures to maintain oppression of blacks. If courtship had been exclusively practiced and continued, the movement might have taken steps to protect the southern states from federal coercion, making plain that what they were after was a healthy relationship with the white community. This would have been a very difficult and long-term strategy. Probably the old generation would have had to die off before it came to fruit. But it is at least plausible that by now, 60 years later, we would have been better off than we are.

The way forward is to raise our strategic sights to the healing of our whole society. We need to court each other into a healthy community. It is a daunting proposition, but I believe there is no other final solution. Our weapons are courage, hospitality, humility, mutual inspiration and perseverance.

**Evaluation: When is Courtship Better Than Either Coercion or Evasion?**

A cynic might say "Let's get practical here. Do you really think that power can just be wished away?"

It is easy to think of nightmare scenarios which seem impossible to solve by courtship. The cynic continues "Suppose you're awakened in the middle of the night by a man with a Glock who has come into your house to rape and kill. Do you really think that trying to court his humanity is going to work?" 'There's a whole class of nightmare scenarios (a purse snatcher, a high school shooter) that question our ability to react effectively to stop individual or group violence with anything less than violence.

Another class of nightmare scenarios involves massive structural systemic evil involving large groups of people: slavery, the holocaust, human trafficking, the trail of tears, Darfur, trying to challenge a tyrannical regime from below. The cynic rounds out his remarks with: "You've just jumped down from your boxcar at Birkenau. Do you
really think you can talk your way out of a death camp? Do you somehow think those Jews didn’t try to evoke mercy from the guards, or that none of those prisoners were as sophisticated or spiritual as you? Never again.”

If evasion is not possible, the most reliable defense against evil such as the Glock scenario is not courtship, but to call 911, i.e. to invoke the coercion of the rule of law, since broadly accepted social values condemn rape and murder. And in the Birkenau scenario the prison guards were pawns, many chosen for their lack of apparent empathy, within a very coercive command hierarchy. So, these are worst-case scenarios for courtship, though I still want to examine them closely.

What happens if we can’t appeal to the law to help us, either because it has failed us or because it is not available to us? In the Glock scenario, if we’re staring down the barrel of a pistol, calling on the law is perhaps not an option. In the Birkenau scenario the law is part of the systemic evil, it is part of the problem, not the solution. In either case, supposing we have some weapon—mace, a gun, a grenade—the question here is whether violent self-defence is more productive than courtship.

The question here is not moral, but pragmatic. If we’re cowering in our church or mosque, temple or synagogue or arena, surrounded by a bloodthirsty genocidal mob, and some of our young guys want to make a brave sortie to either cow the mob or fight a path for us all to escape to a safer place, more power to them. In those circumstances I affirm flight or fight. I affirm those who hide in holes or deceive their way out, or those who turn at bay, show their teeth, and fight to the last. The last-ditch defensive fight against all odds is not the cause of the great evils in this world, save that the media and the politicians push us to panic before we are truly threatened, and cite “the best defence is a good offense” to legitimize state pre-emptive violence against another state.

But pragmatically, if we’ve got a bullhorn, or if the mob has effective leadership and we’ve got a mobile phone to talk to them, courtship could be a better bet. If there is any way to effectively communicate to those threatening us, and they are in any state to listen, courtship could be a better bet. And most certainly courtship is a better bet if they are a whole people, an ethnicity or nation.

Even the worst-case scenarios for courtship do not justify the belief that the sole effective response to violence is violence. Courtship is not a reliable solution to these scenarios, but neither is violence nor hiding. The chance of having a happy ending to the nightmare situations is tiny, whether we choose coercion, evasion or courtship. But beyond revealing our blind faith in violence, our thinking about such nightmare scenarios often suffers from the following defects.

The first is to ignore reliability. Violent self-defence isn’t very reliable. We daydream about getting the drop on the perpetrator, but reality usually doesn’t work that way. In the Glock scenario, if we are surprised, then even if we’re carrying a gun and are trained, the chance of our surviving our attempt to fire is small. The same is doubly true for the Birkenau scenario. So, to outperform violence as a practical means of self-defence, courtship does not have to be always successful—just more often than violence is. There will of course be cases in which violence would have worked, and courtship wouldn’t, and vice versa. We’ll never be able to perfectly predict which are which, so we’ve got to go with probabilities.

In the Glock scenario, it is not hard to imagine conditions under which one should shoot. If I’m a good shot and I have the drop on the guy and yet he still makes a move to shoot, I shoot first. In the more likely case that he’s got the drop on me and is
conflicted about his intent, courtship is a better bet. My chances are tiny—but better than with violence.

One cannot infer from the Glock and Birkenau nightmares that violence is in general more reliable than courtship.

A second defect in our thinking is to ignore structure. Situations such as Birkenau, where the guards implementing the horrors were selected for the task and caught in a net of Nazi SS surveillance and reprisal, are bad tactical territory for self-defence by either violence or courtship. If the person threatening us is themselves encased in a system, an organizational structure where they know they are being watched, and they know they will suffer if they don’t obey an order, then they are not free. They are themselves oppressed. They may kill us in an attempt to appease/placate the demands of their commanders/oppressors. Whether using violence or courtship, anyone would prefer attacking when and where the organizational structure is not so strong.

Whether using violence or courtship, to have a reasonable chance we have to attack the system before we get to Birkenau.

A third defect in our thinking is to not count the benefits. While violence can prevent harm to us from taking place, courtship presents the possibility of both preventing the harm and bringing the would-be perpetrator into a just relationship. In a case in which the two approaches have equal chances of preventing harm to us, courtship is preferable because if it succeeds, much more has been accomplished.

A fourth defect in our thinking is the ease with which politicians and the media manipulate us by our fears. Certain scenarios stick in our minds because they frustrate our human experience and expectation that courtship very often does work. We are fascinated by imaginary scenarios in which it doesn’t. Such scenarios engage all our fears of being losers, of suffering injustice, and we're like moths circling a flame. The media take advantage of our fascination to sell their products. Such scenarios have become common plot devices of movies and novels, in which some utterly implausible solution is usually found, through incredible luck, that lets the good guys kill all the bad guys in a nice, bloody catharsis. The result is to distract us with nightmare situations rather than helping us seize the opportunities we must court people to change the dynamics ahead of time, before our options run out.

Finally, one attraction of a violent response to violence is that we really hate to be losers. We will even spite ourselves so as not to be second best. Game theorists have studied (Chaudhuri, 2011) pairs of people playing simple games involving real money but no chance of communication between players. Game theorists find that these players choose to lose in absolute terms in order not to lose in relative terms. Lacking communication, we'd rather suffer less than our opponent, than gain less than our opponent.

Courtship, by contrast, is not a way to guarantee coming out on top. Unlike the games mentioned above, in the real world we can communicate with each other. Courtship is communication that induces synergy: a mutually productive life together. It creates the possibility for health and wealth. It insists on justice—we don’t let go until the situation is fair. But courtship comes at the relationship from below, not from above. We are not in control, and we take a calculated risk of coming out second best, based on our hope of inspiring a much more productive response. We risk losing, to create a just relationship.
Conclusion

This study takes the establishment of a healthy society as the highest goal, where the term healthy implies a capacity for robust, sustainable struggle over longstanding differences of values within a commitment to use neither coercion nor evasion. Short of such a society, if a group is attacked their right to hide or counterattack is not here disputed, nor are these choices labelled morally bad. Rather, the wisdom of either under many conditions is questioned, and an alternative called courtship is recommended to move the conflict towards health.

This study would have us limit the role of government to enforcement of laws which enjoy a broad consensus. The practice of extra-national courtship is not the purview of governments, at least not any more than that of any other institution, culture, ethnicity or other human party that can court its adversaries. On a thumbnail, the model of change espoused here is that if we strengthen the capacity of parties to inspire and sustain healthy relationships, the rest (good governance, robust justice, sustainable peace) will follow.

Thus, it is our duty, opportunity and responsibility as participants in civil society, our duty as religious leaders, politicians, educators, authors, journalists, NGO activists, song and script writers, media creators and so on, is to increase public understanding of the practices of healthy community, which lead to robust civil health. Civil health should be as highly regarded and widely understood as hygiene and public sanitation.

However, no amount of education will change people’s gut reactions. Only the experience in smaller, local, less threatening conflicts, of the justice flowing from a healthy relationship with a trustworthy opponent, can prepare a party to brave courtship during a larger, more global and more threatening conflict. We cannot expect the latter without long experience in the former. So, we must lead our communities in the practice of what we teach. The opportunities are many.

King admired the phrase “The arc of the moral universe is long, but it bends toward justice” (1958, p. 14). Betting on courtship is a calculated, long term evolutionary strategy. Conflict can be temporarily extinguished by killing or fleeing, oppressing or placating now, but that only defers the costs to future generations, when the conflict will be even greater. To minimize the total cost to all generations, we should bring the whole risk into now, into our lifetime. It may cost us our lives, but we may save the lives of many in the future. We should risk being open to a mutual salvation with our enemies, or else the future costs will be far greater. Courtship is our opportunity, it is within our agency, it is our responsibility. Over time, the lowest cost and least reversible path to justice and peace is for us to face our enemies, invoke the human fairness in them, state our needs, court them to join us in a healthy relationship, and not let go, today.
References


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The Editorial Board of the *International Journal on Responsibility* is pleased to announce an intention to publish two issues in coming months – one a student issue, and the other a special issue. A call for papers for these issues will be distributed during the summer and fall of 2018.

In the interim, submissions on any aspect of responsibility are welcomed for peer-review by the journal’s Editorial Board and may be sent to both the Editor-in-Chief and Managing Editor by email (contact details below).

Instructions for the preparation of manuscripts appear on page 139 of this issue. Thank you for considering submitting a paper to the *International Journal on Responsibility*.

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