Terror, Insecurity, State Responsibility and Challenges: Yesterday and Today?

Marc G. Pufong

Professor of Political Science and Public Law
Valdosta State University
Valdosta, Georgia, USA

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.\textsuperscript{58} 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 in 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.

\textsuperscript{58} See Wilkinson, Paul (1977) \textit{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 jihadist59 insurgent types such as the Islamic State of Iraq and al-Sham (ISIS)60 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.61 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.62 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?” http://chainsoff.wordpress.com/2014/08/26/


provides that more than 61,000 incidents resulted in 140,000 deaths between 2000 and 2014.\footnote{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.} 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.

\textit{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>
</tr>
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<tbody>
<tr>
<td>United States</td>
<td>18</td>
<td>19</td>
<td>Germany</td>
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<td>12</td>
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<tr>
<td>Australia</td>
<td>4</td>
<td>7</td>
<td>Italy</td>
<td>0</td>
<td>7</td>
</tr>
<tr>
<td>Canada</td>
<td>4</td>
<td>2</td>
<td>Sweden</td>
<td>0</td>
<td>6</td>
</tr>
<tr>
<td>Belgium</td>
<td>4</td>
<td>1</td>
<td>Cyprus</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>Kosovo</td>
<td>2</td>
<td>1</td>
<td>Bosnia Herzegovina</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>Austria</td>
<td>2</td>
<td>1</td>
<td>Macedonia</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>France</td>
<td>1</td>
<td>11</td>
<td>Spain</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>1</td>
<td>3</td>
<td>Bulgaria</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Albania</td>
<td>1</td>
<td>2</td>
<td>Hungary</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>0</td>
<td>102</td>
<td>Iceland</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Ireland</td>
<td>0</td>
<td>30</td>
<td>Netherland</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Greece</td>
<td>0</td>
<td>26</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Total # of Deaths in 2014 = 37

Total # of Attacks = 254

As depicted on 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.\footnote{See Lauren B. O’Brien, “The Evolution of Terrorism Since 911,” The FBI Law Enforcement Bulletin, (2011) http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/september-2011/the-evolution-of-terrorism-since-9-11, Accessed June 8, 2012 and October 2, 2017}

The \textit{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.\footnote{See Lauren B. O’Brien, “The Evolution of Terrorism Since 911,” The FBI Law Enforcement Bulletin, (2011) http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/september-2011/the-evolution-of-terrorism-since-9-11, Accessed June 8, 2012 and October 2, 2017} The FBI report seemingly hinges on whether the reported terrorist threats
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.

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). Amongst those designated FTOs, ten at the very least have for avowed

66 See Note 8 Seung-Whan Choi (2010: 941).
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.  

Table 1B – Designated Foreign Terrorist Organizations

<table>
<thead>
<tr>
<th>Date Designated</th>
<th>Group</th>
<th>Date Designated</th>
<th>Group</th>
</tr>
</thead>
<tbody>
<tr>
<td>10/8/1997</td>
<td>Baqaris Fatherland and Liberty (ETA)</td>
<td>3/31/2008</td>
<td>Al-Shabaab</td>
</tr>
<tr>
<td>10/8/1997</td>
<td>Hamas</td>
<td>5/14/2009</td>
<td>Revolutionary Struggle (RS)</td>
</tr>
<tr>
<td>10/8/1997</td>
<td>Hizbollah</td>
<td>1/19/2010</td>
<td>al-Qa'ida in the Arabian Peninsula (AQAP)</td>
</tr>
<tr>
<td>10/8/1997</td>
<td>Kahane Chai (Kach)</td>
<td>8/6/2010</td>
<td>Harakat al-Shabaab (IJU)</td>
</tr>
<tr>
<td>10/8/1997</td>
<td>Kurdistans Workers Party (PKK) (Kongra-Gel)</td>
<td>9/14/2010</td>
<td>Ansar al-Shari'a in Tunisia (ASAT)</td>
</tr>
<tr>
<td>10/8/1997</td>
<td>Palestine Liberation Front (PLF)</td>
<td>9/19/2011</td>
<td>Indian Mujahideen (IM)</td>
</tr>
<tr>
<td>10/8/1997</td>
<td>Palestine Islamic Jihad (PIJ)</td>
<td>3/13/2012</td>
<td>Jemaah Ansoruddin Tahid (JAT)</td>
</tr>
<tr>
<td>10/8/1997</td>
<td>Popular Front for the Liberation of Palestine (PFLP)</td>
<td>5/30/2012</td>
<td>Abdullah Azam Brigade (AAB)</td>
</tr>
<tr>
<td>10/8/1997</td>
<td>PFLP-General Command (PFLP-GC)</td>
<td>9/19/2012</td>
<td>Haqqani Network (HN)</td>
</tr>
<tr>
<td>10/8/1997</td>
<td>Revolutionary Armed Forces of Colombia (FARC)</td>
<td>3/22/2013</td>
<td>Anwar al-Din (AAID)</td>
</tr>
<tr>
<td>10/8/1997</td>
<td>Revolutionary People’s Liberation Party/Front (DHKP/C)</td>
<td>11/14/2013</td>
<td>Beko Haram</td>
</tr>
<tr>
<td>10/8/1997</td>
<td>Shining Path (SL)</td>
<td>11/14/2013</td>
<td>Ansar al-Shari'a in Tunisia (ASAT)</td>
</tr>
<tr>
<td>10/8/1999</td>
<td>al-Qa’ida (AQ)</td>
<td>12/19/2013</td>
<td>al-Muhajireen Battalion (AMB)</td>
</tr>
<tr>
<td>9/25/2000</td>
<td>Islamic Movement of Uzbekistan (IMU)</td>
<td>1/13/2014</td>
<td>Ansar al-Shari’a in Afghanistan (AAI)</td>
</tr>
<tr>
<td>5/16/2001</td>
<td>Real Irish Republican Army (RIRA)</td>
<td>1/13/2014</td>
<td>Ansar al-Shari’a in Tunisia (ASAT)</td>
</tr>
<tr>
<td>12/16/2001</td>
<td>Jaish-e-Mohammad (JEM)</td>
<td>1/13/2014</td>
<td>Ansar al-Shari’a in Tunisia (ASAT)</td>
</tr>
<tr>
<td>12/26/2001</td>
<td>Lashkar-e-Tayyiba (LET)</td>
<td>4/19/2014</td>
<td>Hizballah (BH)</td>
</tr>
<tr>
<td>3/27/2002</td>
<td>al-Qa’ida in the Islamic Maghreb (AQIM)</td>
<td>9/30/2015</td>
<td>Jundallah</td>
</tr>
<tr>
<td>8/5/2002</td>
<td>Communist Party of the Philippines/New People's Army</td>
<td>1/14/2016</td>
<td>ISIL-Khorasan (ISIL-K)</td>
</tr>
<tr>
<td>10/21/2002</td>
<td>Jemaah Islamiyya (JI)</td>
<td>5/20/2016</td>
<td>Islamic State of Iraq and the Levant's Branch in Libya (ISIL-Libya)</td>
</tr>
<tr>
<td>7/30/2003</td>
<td>Lashkar-i-Jhangvi (LJ)</td>
<td>6/30/2016</td>
<td>Al-Qa’ida in the Indian Subcontinent (AQIS)</td>
</tr>
<tr>
<td>3/22/2004</td>
<td>Ansar al-Islam (AAI)</td>
<td>8/16/2017</td>
<td>Hizbul Mujahideen (HM)</td>
</tr>
<tr>
<td>7/15/2004</td>
<td>Continuity Irish Republican Army (CIRA)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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/123085.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 source 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.

**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)

Table 1C – Delisted Foreign Terrorist Organizations

<table>
<thead>
<tr>
<th>Table 1c</th>
<th>Delisted Foreign Terrorist Organizations (FTO)**</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date Removed from Designated Listing</td>
<td>Name</td>
</tr>
<tr>
<td>7</td>
<td>10/15/2010</td>
</tr>
<tr>
<td>8</td>
<td>9/28/2012</td>
</tr>
<tr>
<td>9</td>
<td>5/28/2013</td>
</tr>
<tr>
<td>10</td>
<td>7/15/2014</td>
</tr>
<tr>
<td>12</td>
<td>12/9/2015</td>
</tr>
</tbody>
</table>

**Table 1C – Delisted Foreign Terrorist Organizations**

Methodology, Application & Outline

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

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. 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

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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 (**ARSIWA**, 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.”

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. Its practical usefulness lies in the assertion that a State exists by law (de-jure), even if such a State (1) lack 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 of the territory in Palestine and in spite of recent claims and movements in the United Nations’ towards statehood. That remains the case even if it has extraterritorial instrumentalities such embassies and consulates.

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. 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.” In an era increasingly thought to be transformative,
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


86 See Article 12, ARSIWA, Note 21 above.

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
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.”

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. 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.

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 I of the 2001 version provides that “[e]very internationally wrongful act of a State entails the international responsibility of that State.” Article 2 concurs, stating that “[t]here 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."  

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.

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. 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 Qaeda 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. 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.” 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 whatever. 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." The Independent also reported that Israel claimed Lebanon was responsible for the initial Hezbollah attack. 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

113 As the main repository of international law, the UN plays an important role in strengthening legal approaches to terrorism and in the respect adopted a number of resolutions condemning acts of terrorism. For example, after 9/11 the UN Security Council called on states to take action to curb terrorism and established a Counter Terrorism Committee (CTC) to monitor such a progress. Table 2 provides a listing of United Nations countering terrorism efforts from 9/11 through 2013.


116 An umbrella organization of radical Islamic Shiite organizations, Hezbollah is a Lebanese group that opposes the West, and whose avowed purpose to create a Muslim fundamentalist State modelled on Iran, and bitterly opposes Israel’s existence. Hezbollah is believed to be responsible for hundreds of attacks since its 1982 inception, which have killed about 1000 people (see Council of Foreign Relations <Http://www.cfr.org/Publications/9166>). Accessed June 8, 2017.
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-Colombia 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. 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 actions 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

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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><strong>1</strong> 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><strong>2</strong> 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><strong>3</strong> 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><strong>4</strong> 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><strong>5</strong> 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><strong>6</strong> Kahane Chi (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><strong>7</strong> 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><strong>8</strong> 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><strong>9</strong> 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><strong>10</strong> 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.\(^{121}\) 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.\(^{122}\) 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.\(^{123}\)

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

\(^{121}\) 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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124 See United Nations Security Council Resolution 1701, Adopted by the UN Security Council at its 5511th meeting, on August 11, 2006
127 Congo v. Uganda – Note 63 above.
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-

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\(^{129}\) The Economist March 1, 2008, Note 65 above.


State actor. 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

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 planned 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

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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
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. 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. 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. 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. 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” as well as “allow[ing] for the intentional taking of life when absolutely necessary.”

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.

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.” Former President Musharraf also followed suite complaining that the operation violated Pakistan’s sovereignty. 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

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\(^{154}\) and Harold H. Koh\(^{155}\) 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.\(^{156}\) 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.\(^{157}\) 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.”\(^{158}\) Also a *Wall Street Journal* piece of May 5, 2011, confirmed that “U.S. and European

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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

¹⁶⁰ See John Bellinger, Note 99 above.
down considerably, especially during the declared decade of the war on terror.\textsuperscript{162} The bases of such mistrust it has been asserted were often very different and conflicting in expectations and national interests.\textsuperscript{163}

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.\textsuperscript{164} 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.\textsuperscript{165} 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, publicly proclaimed allegiance to US causes while in private acting against US global interests in the war on terror.\textsuperscript{166} 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\textsuperscript{167} put it “a limit to its patience.” Thus, two years after NATO intervention

\textsuperscript{163} See Koehlmoos Note 105 above.
\textsuperscript{164} See Koehlmoos Note 99 above.
\textsuperscript{167} See Carlotta Gall and David D. Kirkpatrick, "Libya Condemns U.S. for Seizing Terror Suspect," http://www.nytimes.com/2013/10/07/, October 6, 2013; also see Peter Baker and David E. Sanger, "Raids Show the Limits of U.S. Military Strikes"
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>
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<tbody>
<tr>
<td>S/PV.7103</td>
<td></td>
<td></td>
</tr>
<tr>
<td>S/PV.7086</td>
<td></td>
<td></td>
</tr>
<tr>
<td>S/RES/1963 (2010)</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/1904 (2009)</td>
<td>17 Dec. 2009</td>
<td>[on authorizing the establishment of an Office of an Ombudsman 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/1822 (2008)</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/1810 (2008)</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/1767 (2007)</td>
<td>10 Dec. 2007</td>
<td>[on extension of Counter-Terrorism Committee Executive Directorate (CTED) mandate]</td>
</tr>
<tr>
<td>S/RES/1735 (2006)</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/1730 (2006)</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/1699 (2006)</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/1673 (2006)</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/1624 (2005)</td>
<td>14 Sept. 2005</td>
<td>[on creation of working group to consider measures against individuals, groups and entities other than Al-Qa’ida/Taliban]</td>
</tr>
<tr>
<td>S/RES/1617 (2005)</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/1566 (2004)</td>
<td>8 Oct 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/1540 (2004)</td>
<td>28 April 2004</td>
<td>[on creation of Counter-Terrorism Committee Executive Directorate (CTED)]</td>
</tr>
<tr>
<td>S/RES/1535/2004</td>
<td>26 Mar. 2004</td>
<td>[on extension of the mandate of the 1540 Committee for a further two years]</td>
</tr>
<tr>
<td>S/RES/1526/2004</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>
</tr>
<tr>
<td>S/RES/1465/2003</td>
<td>13 Feb 2003</td>
<td>[on the bomb attack in Bogota, Colombia]</td>
</tr>
</tbody>
</table>

Table 4: International Counter-Terrorism Conventions, Pre and Post 9/11

<table>
<thead>
<tr>
<th>Convention</th>
<th>Purpose &amp; Date of Passage</th>
<th>Summary of Major content of each instrument</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Convention on Offences and Certain Other Acts Committed On Board Aircraft (1963) (Tokyo Convention on aviation safety; Aircraft Convention)</td>
<td>Applies to acts affecting in-flight safety; Authorizes the aircraft commander to impose reasonable measures, including restraint, on any person he or she has reason to believe has committed or is about to commit such an act, when necessary to protect the safety of the aircraft; Requires contracting states to take custody of offenders and to return control of the aircraft to the lawful commander.</td>
</tr>
<tr>
<td>2</td>
<td>Convention for the Suppression of Unlawful Acts Against the Safety of Aircraft (1970) (Montreal Convention)</td>
<td>Makes it an offence for any person on board an aircraft in flight to [to] &quot;unlawfully, by force or threat thereof, or any other form of intimidation, to seize or exercise control of that aircraft&quot; or to attempt to do so; Requires parties to the convention to make hijackings punishable by &quot;severe penalties;&quot; Requires parties that have custody of offenders to either extradite the offender or submit the case for prosecution; Requires parties to assist each other in connection with criminal proceedings brought under the convention.</td>
</tr>
<tr>
<td>3</td>
<td>Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (1971) (Montreal Convention)</td>
<td>Defines internationally protected person as a Head of State, a Minister for Foreign Affairs, a representative or official of a state or of an international organization who is entitled to special protection from attack under international law; Requires each party to criminalize and make punishable &quot;by appropriate penalties which take into account their grave nature,&quot; the intentional murder, kidnapping, or other attack upon the person or liberty of an internationally protected person, a violent attack upon the official premises, the private accommodations, or the means of transport of such person, a threat or attempt to commit such an attack; and an act &quot;constituting participation as an accomplice;&quot; Requires that any person who seizes or detains and threatens to kill, injure, or to continue to detain another person in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostage within the meaning of this Convention.&quot;</td>
</tr>
<tr>
<td>4</td>
<td>Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons (1983) (Outlaws attacks on senior government officials and diplomats; Diplomatic Agents Convention)</td>
<td>Extends the provisions of the Montreal Convention (see No. 3 above) to encompass terrorist acts at airports serving international civil aviation.</td>
</tr>
<tr>
<td>5</td>
<td>Convention Against the Taking of Hostages (1979) (Rome Convention; Hostages Convention)</td>
<td>Extends &amp; Supplement to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation i.e., (Civil Aviation Convention)</td>
</tr>
<tr>
<td>6</td>
<td>Convention on the Physical Protection of Nuclear Material (1982) (Nuclear Materials Convention)</td>
<td>Criminizes the unlawful possession, use, transfer, etc., of nuclear material, the theft of nuclear material, and threats to use nuclear material to cause death or serious injury to any person or substantial property damage;</td>
</tr>
</tbody>
</table>
### Sources


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 these summaries, most of them provide that state parties to each establish criminal jurisdiction over offenders (where the offences take place, or in some cases, the state of nationality of the perpetrator or victim). Party States are obliged 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 and effective 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.

### 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 detailed 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.

<table>
<thead>
<tr>
<th>8</th>
<th><strong>Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, (1988)</strong>&lt;br&gt;Applies to terrorist activities on ships</th>
<th>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 safe navigation of the ship; to place a destructive device or substance aboard a ship; &amp; other acts against the safety of ships; 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation&lt;br&gt;<strong>Criminalizes the use of a ship as a device to further an act of terrorism;</strong>&lt;br&gt;Criminalizes the transport on board a ship various materials knowing that they are intended to be used to cause, or in a threat to cause, death or serious injury or damage to further an act of terrorism; Criminalizes the transporting on board a ship of persons who have committed an act of terrorism; and introduces procedures for governing the boarding of a ship believed to have committed an offence under the Convention.</th>
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<tbody>
<tr>
<td>9</td>
<td><strong>Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (1988)</strong>&lt;br&gt;Applies to terrorist activities on fixed offshore platforms</td>
<td>Establishes a legal regime applicable to acts against fixed platforms on the continental shelf that is similar to the regimes established against international aviation;</td>
</tr>
<tr>
<td>10</td>
<td><strong>Convention on the Marking of Plastic Explosives for the Purpose of Detection (1995)</strong>&lt;br&gt;<strong>Prohibits the chemical marking to facilitate detection of plastic explosives</strong>&lt;br&gt;<strong>Plastic Explosives Convention</strong></td>
<td>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 obliged 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 and effective 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.</td>
</tr>
<tr>
<td>11</td>
<td><strong>Convention for the Suppression of Terrorist Bombing (1997)</strong>&lt;br&gt;<strong>Terrorist Bombing Convention</strong></td>
<td>Creates 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</td>
</tr>
<tr>
<td>12</td>
<td><strong>Convention for the Suppression of the Financing of Terrorism (1999)</strong>&lt;br&gt;<strong>Terrorist Financing Convention</strong></td>
<td>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. Bank secrecy will no longer be justification for refusing to cooperate.</td>
</tr>
<tr>
<td>13</td>
<td><strong>Convention for the Suppression of Acts of Nuclear Terrorism (2005)</strong>&lt;br&gt;<strong>Nuclear Terrorism Convention</strong></td>
<td>Covers 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; Diplomates 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).</td>
</tr>
<tr>
<td>14</td>
<td><strong>Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (2010)</strong>&lt;br&gt;<strong>Beijing Convention</strong>&lt;br&gt;<strong>Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft; done at Beijing, (September 10, 2010) (Doc 9959).</strong>&lt;br&gt;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 attack 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. Conspicacy to commit an offence, or its equivalence, is punishable.</td>
<td></td>
</tr>
</tbody>
</table>
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-terrorism 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.