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Terrorism:an analysis of the international legal framework, international and regional responses case study: Syria.

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TERRORISM:

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CASE STUDY: SYRIA

A Thesis Submitted to the
Department of Law

In a partial fulfillment of the requirements for LL.M. Degree in International and Comparative Law

By

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ABSTRACT

International law, as a discipline, is obsessed with crises, requiring reinterpretation of its basic principles to cope with them. Through this process of reinterpretation, it also creates new rules. Terrorism is one such 'crisis' which has impacted the international legal framework on the use of force, making it deviate from its basis established by the United Nations Charter. This thesis conducts a macro analysis of the changes in the legal framework for combating terrorism after 9/11 and the Arab Spring. It focuses on the Syrian conflict as a case study, analyzing the major actors and their different legal justifications. The Syrian conflict is a clear prototype of the changes that started to take place after 9/11. The development in the legal framework governing the use of force happened in three dimensions. The first is the broadening of existing rules (such as favoring a purpose-oriented interpretation of self-defense to include new forms such as anticipatory and pre-emptive self-defense). The second dimension is the creation of new rules through state practice that replaced existing codified ones, in an attempt to avoid the deadlock of the Security Council (SC) veto. For example, the "unwilling and unable" standard is used to justify unilateral interventions without the SC authorization to fight terrorists in other states. A third dimension is the gradual decline of the use of collective security under the UN system,[1] giving way to unilateral action by States.

[1]It refers to the United Nations' role to "provide an institutional framework for the collective maintenance of peace and security as well as to "outlaw the unilateral use of force". Simon Chesterma, Michael Byers, *Has US power destroyed the UN?* LONDON REVIEW OF BOOKS, Para 2, (1999).

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I. Introduction

> *"The world had never been witness to such collective phobia of the terrorist others as today."*[2] *Foucault*

Terrorism is a heavily repeated term in today's world. Although terrorism itself is an ambiguous term, whose definition under international law lacks consensus, there is a general consensus that it entails the perception of terror and fear. Therefore, terrorists have been designated internationally as enemies of humanity (*hostis humani generis*).[3]

Since the Second World War, terrorism has been used by states either as a pretext for intervention (on behalf of the government, or without its consent) or as a proxy war strategy.[4] For example, the Afghani communist government invited the USSR to combat Al-Mujahedeen in Afghanistan.[5] By and large, however, terrorism was confronted under what is known as the 'criminal justice model'. The international response to 9/11 went far beyond limited action, affecting the entire legal framework for combating terrorism.[6] It changed the criminal justice model of combating terrorism, which deals with terrorism as a crime, to a military one, which deals with it as a crisis that can only be tackled militarily.[7] It depends on the perception that terrorism should be prevented through other means because prosecution is not effective enough.[8]

This thesis considers how two terrorist 'crises', one international (namely the 9/11 attacks) and the other regional (namely the Arab Spring) have affected the international legal framework on combating terrorism. The significance of 'crises' lies in their creation of new rules of international law and the amendment of existing ones.

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[2]J.Tripathy, *What is a terrorist?* 13 Int. J. Cult. Stud, 221 (2010).
[3]*See*, Elimma C. Ezeani, *The 21st Century Terrorist: HostisHumani Generis?*03 BEIJING LAW REVIEW 158–169 (2012).
[4]Ben Saul, DEFINING TERRORISM IN INTERNATIONAL LAW, Oxford UNIVERSITY PRESS, 2 (2006).
[5]*Ibid*.
[6]Christine Gray, INTERNATIONAL LAW AND THE USE OF FORCE, 195 (2008).
[7]C. J. Tams, *The Use of Force against Terrorists*, 20 EJIL, 373 (2009).*See*, Frederic Megret, War? Legal Semantics and The Move to Violence, EJIL, (2002).
[8]Victor V. Ramraj, et. al, GLOBAL ANTI-TERRORISM LAW AND POLICY, CAMBRIDGE UNIVERSPRESS, 573 (2012).

The consequences of 'crises' can also extend beyond this to include acting outside the law altogether. Sima argued that when changes reach the extent of acting outside the law, the inevitability of action due to moral considerations is the most commonly used justification: "unfortunately there do occur 'hard cases' in which terrible dilemmas must be faced and imperative political and moral considerations may appear to leave no choice but to act outside the law."[9]

The 9/11 'crisis' is a turning point in the evolution of combating terrorism, triggering changes to the existing model for combating terrorism from two perspectives: horizontally in the relations between states and vertically in the relation between states and individuals.[10] In fact, the 9/11 attacks were not the first crisis to affect the structure of international law related to the use of force. For example, the Second World War triggered the establishment of the United Nations that introduced a multilateral use of force authorized by the Security Council in specific cases. The Kosovo 'crisis' laid the basis for the possibility of humanitarian intervention outside UN authorization in the case of grave human rights violations.[11]

Changes to the structure of international law usually coincide with political rhetoric that paves the way for justifiable change. The crisis puts states in a situation whereby they have to do 'something' to halt it or mitigate its consequences. However, this "something" gives discursive power to states to decide what the action is, with no further explanation of why this is the optimal solution. A case in point is when NATO bombed Yugoslavia to end the humanitarian crisis in Kosovo in 1999. The former UK Prime Minister Tony Blair urged action by the international community, stating: "the world must do something or do nothing".[12]

[9]Hilary Charlesworth, *International Law: a Discipline of Crisis*, The Modern Law Review, 387 (2002).
[10]Christopher Greenwood, *International Law and the 'War Against Terrorism'*, International Affairs, 301 (2002).
[11]The Kosovo case triggered the questions of balance between "moral imperative" and legality. This case paved the way for many claims of an establishment of lawful grounds of humanitarian intervention if there are grave human rights violations. *See*, Hilary Charlesworth, *supra* note 9.
[12]*Ibid.*

9/11 is not the first terrorist incident by al Qaida against US interests or on US territory.[13] Moreover, Europe had witnessed terrorist attacks and more deaths a result of terrorism in the 1970s and 1980s than the causalities resulting from the 9/11 attack.[14] Although the international community had experienced terrorism before 9/11, however, this 'crisis' triggered increased calls for the prevention of terrorism internationally. The intensity of this concern of terrorism emerged as a result of the complexity in finding a suitable and effective response to it.[15] The events of 9/11 therefore worked as a catalyst for restructuring international law through introducing terrorism as a new form of threat to international peace and security,[16] triggering the US and international intervention in Afghanistan.[17] Had these attacks not happened, this development would either not have occurred or at least, it would have happened in a 'fitful' and 'piecemeal' manner.[18]

This paper argues that the legal framework of combating terrorism has changed since 9/11 and that this change has been fostered, at the regional level, after the Arab Spring. The crisis of 9/11, which consolidated the military model of combating terrorism, led to their interpretation of the requirements of self-defense (especially imminence) to include new forms such as anticipatory and preemptive self-defense. In addition, the rules of attribution under the law of state responsibility have evolved to include the laxer standard of 'harboring terrorism' as well as the 'unwilling or unable standard'.

Furthermore, this thesis argues that the change triggered by 9/11 established the foundation for further change, at the regional level, in response to the Arab Spring, transforming the legal framework for combating terrorism in the Arab region.

[13]Christine Gray, *supra* note 6 at 194.
[14]The Threat Is Already Inside | Foreign Policy, https://foreignpolicy.com/2015/11/20/the-threat-is-already-inside-uncomfortable-truths-terrorism-isis/?utm_content=buffer60819&utm_medium=social&utm_source=facebook.com&utm_campaign=buffer (last visited Nov 27, 2015).
[15]Victor V. Ramraj, et. al, *supra* note 8 at 1.
[16]Mary Buckley, Robert Singh, THE BUSH DOCTRINE AND THE WAR ON TERRORISM: GLOBAL REACTIONS, GLOBAL CONSEQUNCES, ROUTLEDGE, 14 (2006).
[17]*Ibid.*
[18]*Ibid.*

National 'Wars on Terror' have emerged on the scene as regional responses to terrorism in Arab states. This paper focuses specifically on Syria as a case study. The uniqueness of the Syrian crisis is not only that it still faces a prolonged civil war, but that it embodies the whole evolution of international law and collective security in one setting. In addition, the national War on Terror led by Bashar Al Assad's regime has been extended to benefit other regional and international actors.[19]

In addition, the paper argues that the 9/11 'crisis' triggered two contradictory developments in collective security in terms of the role played by the UN: first, expanding the role of the Security Council (SC) to include legislative and administrative authorities; and second, marginalizing the UN's role at the expense of unilateral action by states, where SC authorization of individual or collective security takes place.

Part one of this thesis deals with the development of the international law framework prohibiting terrorism. First, it analyzes the pre-9/11 legal framework and the challenges precluding the agreement on an international definition of terrorism within the UN. Second, it discusses the development of so-called 'sectoral treaties' that recognize certain acts as terrorism. Third, it analyzes the criminal justice model for combating terrorism, based on the 'prosecute or extradite' system, as the main system that addressed terrorism before 9/11.

Part two analyzes the military mode of combating terrorism introduced after the 9/11 'crisis'. It begins with a brief overview of the international legal framework governing the use of force before 9/11. Then, it analyzes the development of this system after 9/11 through analyzing the shift in the scope and implementation of the right to self-defense and the law of state responsibility. It argues that the declared post-9/11 'War on Terror' favors a more lenient interpretation of the right to self-defense, while broadening the principles of attribution under the law of state responsibility to include 'harboring terrorism' and the 'unwilling or unable' standard.

[19]For example, after the incident of burning of the Jordanian Pilot Maaz el Kasasbah by ISIS troops, Jordan used airstrikes against the Syrian territory without seeking the consent of the Syrian regime. Although Jordan violated the sovereignty of Syria, their airstrikes were met with no condemnation from the international community. This international acquiescence is based on the fact that ISIS is a terrorist group and that Jordan can therefore benefit from the declared war on terror in Syria. Another example for international actors is the US led coalition and Russia's airstrikes in Syria.

Part three analyzes the simultaneous change in the collective security system under the UN framework. It argues that the UN Charter's collective security system has been restructured after the adoption of Security Council Resolution (1373) of 2001, recognizing terrorism as a threat to international peace and security.[20] It analyzes the authority of the SC to determine what constitutes a threat to international peace and security, in light of 9/11. It also tackles the evolving role of the SC after 9/11 which experienced two phases: the first involved a rise in collective security through expanding the SC's functions to include being legislator and *quasi* administrator; and the second phase involved the marginalizing of collective security altogether and favoring unilateral actions by states.

Part four addresses the influence of the Arab Spring on the legal framework for combating terrorism, through a case study on Syria's national "War on Terror" and its legal implications. The Arab Spring is analyzed as another 'crisis', constituting a landmark incident in the contemporary legal framework for combating terrorism. This chapter draws a link between the international "War on Terror" declared by the US after 9/11 and the nationalized ones declared after the Arab Spring. It argues that this nationalized War on Terror has been appropriated to the Syrian regime and other international actors, including the US-led coalition, Russia, and France. It emphasizes this understanding through analyzing the perspectives of the major actors involved in the War on Terror, namely the Syrian regime, the US-led Coalition, Russia and the UN Security Council. The main argument is that fighting terrorism is a shared base, which all of the recent actors in the conflict–in spite of their differences– used to justify the legality of their actions.

[20]Ben Smith, Arabella Thorp, *The legal basis for the invasion of Afghanistan*, LONDON: HOUSE OF (2010), http://194.109.159.7/ukparliament/20100423142209/http://www.parliament.uk/commons/lib/research/briefings/snia-05340.pdf (last visited Nov 22, 2015).

II. The Development of the International Law's Framework Prohibiting Terrorism After 9/11

For the purpose of analyzing how the international legal framework for combating terrorism has changed since 9/11, it is important to begin with the evolution of efforts to combat international terrorism. This evolution is reflected in two models, namely the criminal justice model and the military model.

This chapter begins with analyzing the challenges facing having a universally agreed upon definition of terrorism as well as a discussion of the international attempts to define terrorism. Finally, the chapter discusses the criminal justice model of confronting terrorism that is a model refers to terrorism as a crime; whoever commits this crime should be prosecuted or extradited. It aims at law enforcement through incorporating provisions of criminal codes related to terrorism, which requires an agreed upon definition of the crime for legal purposes.

A. Definition of Terrorism

The definition of terrorism has a long history and continues to defy agreement. The term "terror" was introduced in the West's political dictionary through the French revolutionaries describing the actions against their domestic enemies in 1793 and 1794.[21] This revolutionary perception of terrorism was short-lived. It was replaced in 1930 by a new perception entailing terrorism representing oppression by authoritarian regimes against their people.[22] For example, Japan used the bombings in Burma during World War II in order to "spread panic and alarm among the civilian population."[23] With time, the notion of terrorism was stretched to include "non-state practices".[24]

[21]Charels, Tilly, Terror, Terrorism, Terrorists, Sociological Theory, Vol. 22, No. 1, Theories of Terrorism: A Symposium (Mar., 2004), American Sociological Association, 5-13 (2015).
[22]Ben Saul, *supra* note 4 at 278.
[23]*Ibid.*
[24]*Ibid* at 2.

For example the Russian revolutionaries in the late nineteenth century were generally designated as "terrorists".[25] On the international level, the term became *widely* used starting with the *Lockerbie* incident.[26] This was the first incident that signaled that terrorism was no longer a national issue because; it displayed the international potentials of the crime.[27]

The introduction of the term 'terrorism' in international law has been a debated topic among scholars. There are those who believe that terrorism should not be a separate crime such as Tripathy. In contrast, others such as James A. Green and Tom Ruys believe that it is necessary to distinguish terrorism from other crimes that resemble it. However, there is little literature concerning the necessity of treating terrorism as a separate crime. Tripathy argues that there is no need for including terrorism as a new crime for two reasons. First, most of the acts that –in contemporary international law-are usually described as terrorism are already criminalized under national criminal codes such as murder and abduction, if they occur in peace time.[28] For example, the 9/11 attacks including "hijacking of the four aircraft and the subsequent killing of those on board and those who died in the World Trade Center and the Pentagon all are crimes under US criminal law."[29]

[25]Ben Saul, *supra* note 4 at 2.
[26]In 1988, a Pan Am flight was destroyed by a bomb while flowing over Lockerbie, Scotland. Two armed Libyan intelligence services officers were charged with "the commission of terrorism", International Court of Justice, http://www.icj cij.org/docket/index.php?sum=460&code=lus&p1=3&p2=3&case=89&k=82&p3=5 (last visited Nov 23, 2015). *See*, Robert Black, THE LOCKERBIE CASE: FROM THE BEGINNING WE HAVE ALL SOUGHT JUSTICE AND TRUTH THE LOCKERBIE CASE (2015), http://lockerbiecase.blogspot.com.eg/2015/11/from-beginning-we-have-all-sought.html (last visited Nov 23, 2015). *See also* Robert Black, THE LOCKERBIE CASE: LOCKERBIE PROSECUTION LEAVES A "GAPING HOLE" THE LOCKERBIE CASE (2015), http://lockerbiecase.blogspot.com.eg/2015/11/lockerbie-prosecution-leaves-gaping-hole.html (last visited Nov 23, 2015).*See*, Rosalyn Higgins, Mourice Flory, TERRORISM AND INTERNATIONAL LAW, 20 (1997), http://public.eblib.com/choice/publicfullrecord.aspx?p=170071 (last visited Nov 23, 2015).
[27]In 1992, the Security Council Resolution 731, concerning the Lockerbie case considered attacking civil aviation to be an act of terrorism. According to the resolution, the Security Council "*Deeply concerned* by all illegal activities directed against international civil aviation, and affirming the right of all States in accordance with the Charter of the United Nations and relevant principles of international law, to protect their nationals from acts of international terrorism that constitute threats to international peace and security" UNSC Resolution 731 (1992), Para 2 available at , http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/731(1992) (last visited Nov 23, 2015).*See*, YONAH ALEXANDER, INTERNATIONAL TERRORISM: POLITICAL AND LEGAL DOCUMENTS (1992).
[28]J. Tripathy, *Supra* note 2, at 222.
[29]Christopher Greenwood, *supra* note 10 at 302.

Furthermore, most of these actions are also prohibited under International Humanitarian Law (IHL) that applies to both regular armed forces and non-state actors, if they occur during armed conflicts either of an international or non-international character.[30]

The second reason Tripathy gives for justifying why terrorism should not be a separate crime is that criminal law generally attempts to avoid any term that generates emotion in order to prevent the accuser's prejudice.[31] For Tripathy, terrorism is an empty notion and functionally unnecessary as it gives states discursive power for defining for themselves who they consider terrorists to be.[32] This power allows those who wield it to draw a fine line between who stands outside the law and who stands inside the law.[33] To illustrate, this discursive power sets the standards distinguishing between terrorists and "freedom fighters" based on interests. For example the U.S. recognized the Taliban as "freedom fighters" during their resistance to Russian forces, and then the US described them as terrorists when the Taliban emerged against the US.[34]

On the other hand, for those who believe that terrorism should be a separate crime, they argue that such introduction is compatible with the emerging powers and dangers of non-state actors.[35] However, they disagreed over having a generally accepted definition.

[30]Challenges for IHL - terrorism: overview - ICRC, Para 1, https://www.icrc.org/eng/war-and-law/contemporary-challenges-for-ihl/terrorism/overview-terrorism.htm (last visited Nov 23, 2015).
[31]Ben Saul, *supra* note 4 at 4.
[32]J.Tripathy, *Supra* note 2, at 222.
[33]*Ibid* at 223.
[34]*Ibid* at 223.In addition, terrorism based on this understanding is merely "an emotionally charged morally laden and political continuous concept, which has nevertheless emerged as a critical and unavoidable feature of the legal landscape, both internationally and domestically." Victor V. Ramraj, et. al, *supra* note 8 at 5.
[35]The debate over defining terrorism emerged after the end of the Cold War, especially with the emergence of terrorist acts by non-state actors. Bruce Hoffman, *Inside Terrorism*, Columbia University Press, Para 38, available at, https://www.nytimes.com/books/first/h/hoffman-terrorism.html (last visited Dec 20, 2015).Non-State actors "is a category comprising of individuals or groups that are not part, or acting on behalf, of a State." James A. Green, *Tom Ruys, "Armed Attack" and Article 51 of the UN Charter*, JOURNAL OF CONFLICT AND SECURITY LAW,7 (2011). This heated debate coincided with several changes on the international sphere that included "the upsurge in terrorist incidents directed against the United States, fears associated with the dissolution of the Soviet Union (USSR), the possibility that nuclear, chemical, and biological weapons were no longer under strict control, and the appearance of Osama Bin Laden and his transnational network." Boulden, Jane, and Weiss, Thomas George, eds. Terrorism and the UN : Before and After September 11, *Wither Terrorism and The United Nations*?, Indiana University Press, 6, (2004). (ProQuest ebrary Web. 23 May 2015).

For those who believe that there should not be a separate crime, they argue that it is preferable to deal with terrorism in a pragmatic way through agreeing upon "norms".[36] This point of view attempts to avoid the controversy of reaching an agreed upon definition through suggesting another pragmatic alternative that is "norms". However, this suggestion would not solve the problem of reaching an agreed upon definition. It only shifts it to another sphere that is "norms", taking into account the perception of the gap of norms between first and third world states.[37] For those who believe that there should be an agreed upon definition, they claim it is necessary for the international criminalization of terrorism which firstly, reflects the international community's desire to deal with terrorism beyond the borders of the national criminal codes.[38] This opinion claims those national criminal codes' differences of defining terrorism halt tackling terrorism. Therefore, there should be a universally agreed upon definition for better combating the phenomenon. The second reason is that lacking a comprehensive definition violates the principle of legality, which requires that a perpetrator not to be prosecuted for a crime unless it is clearly defined under the laws before the crime is committed.

To conclude, although having an agreed upon definition cannot avoid all the abuses of the term,[39] it does at least limit them. For example, "terrorism" was used in Northern Ireland in 1990 in order to "placate the electorate" rather than achieving law enforcement purposes.[40] In addition, a definition can be useful in controlling to whom the use of force is directed and by whom? This clarifies the legal consequences of such usage.[41]

[36]Rosalyn Higgins, Mourice Flory, *supra* note 26 at 14.
[37]*Ibid*.
[38]Here is a point outside the research questions, which is who is this international community; according to Kennedy and I agree with him it is " 'a fantasy' of objective agreement , when it is really the product of a small bureaucratic technical class" which Abi-saab, affirmed that "Rather than referring to a group as a community in general, it is better, for the sake of precision , to speak of the degree of community existing within the group in relation to a given subject , at a given moment" *See*, Ben Saul, *supra* note 4 at 11.
[39]A case in point, if there is no evidence of the intent of the crime of 'genocide' it "erodes its descriptive utility." *See*, *Ibid* at 22.
[40]*Ibid* at 25.
[41]Rosalyn Higgins, Mourice Flory, *supra* note 26 at 14.

It can serve in limiting the use of force by governments against their political opposition and protecting the application of human rights as well as states' manipulation to intervene in other states under the umbrella of terrorism.[42]

B. International Attempts to Define Terrorism

There have been many attempts by international organizations to reach an agreed definition of terrorism.[43] The various attempts to define terrorism starting with the attempts by the League of Nations in 1937,[44] to the UN General Assembly's attempts in 1994,[45] have failed to reach an agreed definition of terrorism. The first international attempt to legally approach the phenomenon of international terrorism through international organizations started during the era of the League of Nations on the occasion of the assassination of the King Alexander I of Yugoslavia in France by a Croatian separatist.[46] Following this, the League on Nations called upon states to criminalize terrorism in the 1937 Convention for the Prevention and Punishment of Terrorism.[47] The next step to define terrorism was made by the International Law Commission (ILC) in its 1954 Draft Code of Offences against Peace and Security of Mankind. In this code terrorism was associated with aggression.[48] There was no concept of terrorism outside of armed conflict and "terrorists" were those who acted on behalf of a state but not acts by non-state actors.[49]

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[42]Ben Saul, *supra* note 4 at 12.
[43]Bruce Hoffman, *supra* note 35 at Para 38.
[44]It defined terrorism as "all criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a groups of persons or the general public.", Carlyle A. Thayer, "Political Terrorism and Militant Islam in Southeast Asia" (2003), Rommel C. Banlaoi, Counter-Terrorism Measures in Southeast Asia: How Effective Are They? (Manila:Yuchengco Center, 2009)], Available at http://declassifiedrommelbanlaoi.blogspot.com/2011/01/defining-terrorism-conceptual problems.html (26th May 2015).
[45]It defined terrorism as *"*criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes*."* General Assembly Res 49/60, Para 3(1994), available at, http://www.un.org/documents/ga/res/49/a49r060.htm.
[46]Ben Saul, *supra* note 4 at 171.
[47]This treaty sought to define terrorism as "all criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public." It is important to note that the problem of tackling terrorism as a crime in this convention was not mainly reaching a definition beyond, but rather the extradition of criminals. *Ibid* at 173, 176, *See,* League of Nations Convention for the Prevention and Punishment of Terrorism - Council on Foreign Relations, http://www.cfr.org/terrorism-and-the-law/league-nations-convention-prevention-punishment-terrorism/p24778 (last visited Nov 22, 2015).
[48]Ben Saul, *supra* note 4 at 180.
[49]*Ibid at* 176.

There are other efforts by the General Assembly to tackle terrorism. Since the 1970s, the General assembly has contended that terrorism is a threat to international peace and security and to friendly relations.[50] The year 1972 was a determining point in the timeline of these efforts, starting with the language used by the GA. For example, the term "increasing acts of violence" has been replaced with the term "terrorism", the phrase "deep concern" has been replaced with condemnation, and general recommendations have been replaced with specific ones.[51] In addition, the General Assembly established an *Ad Hoc* Committee on Terrorism in response to the emerging threat of terrorist incidents, specially the massacre of Israeli athletes at the 1972 Munich Olympics.[52] The General Assembly in its 1985 Resolution 40/61 "unequivocally condemn[ed], as criminal, all acts, methods and practices of terrorism wherever and by whomever committed,"[53] by referring to the specific criminal acts in the sectoral conventions.[54] These specific conventions consider the actions that fall under them as terrorist acts irrespective of their motivations.

There are eleven United Nations' multilateral conventions that have been widely ratified condemning terrorist actions. The 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons,[55] and the International Convention against the Taking of Hostages are examples.[56] Later emerges the role played by the *Ad Hoc* Committee, which was established by the General Assembly in 1996 in the drafting of several international conventions.[57]

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[50]Ben Saul, *supra* note 4 at 46.
[51]Edward Mc Whinney, *The International Legal Response to Terrorism: A Reevaluation*, U. Colo. L. Rev, 538(1987).
[52]The initiative was undertook by the United Nations Secretary-General Kurt Waldheim undertook in order to to bring the issue of international terrorism before the General Assembly. *Ibid* at 536.
[53]*Ibid* at 539.
[54]However, GA Res 49/60 in 1994 signals a consensus on the prohibition of acts of terrorism 'irrespective of their motivation', Andrea Bianchi, Yasmin Naqvi, Terrorism in The Oxford Handbook of International Law in Armed Conflict, , Andrew Clapham and Paola Gaeta (eds) 580 (2014).
[55] The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, https://treaties.un.org/doc/db/Terrorism/english-18-7.pdf(last visited 25/5/2015).
[56]UN Conventions on Terrorism, UNTC, https://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2_en.xml , (last visited 25/5/2015).
[57]For example, the International Convention for the Suppression of Terrorist Bombings in 1997, the International Convention for the Suppression of the Financing of Terrorism in 1999, and the International Convention for the Suppression of Acts of Nuclear Terrorism in 2005. *See*, Ben Saul, *supra* note 4 at 184.

Although these sectoral conventions criminalize certain and limited actions irrespective of any justification as terrorist acts,[58] they are ratified by a limited number of states.[59] In addition, they only apply when the act has an international dimension. For example, the International Convention for the Suppression of Terrorist Bombings in 1997 and the International Convention for the Suppression of the Financing of Terrorism in 1999 do not apply if the acts are committed in one state and the terrorist is from the same state and no other state has jurisdiction over it.[60] However, both the Convention on the Physical Protection of Nuclear Material and the Protocol on Continental Platforms are the only treaties that apply to acts committed within the territory of a state by a national of the same state.[61] This does not mean that the act should be committed in more than one state in order to fulfill the international dimension, but rather there are other determining factors. These factors include the effect and gravity of acts. If an act happens in one state and affects international peace and security like crimes against humanity, it includes an international dimension.[62] Furthermore, these types of crimes included in sectoral treaties 'can' constitute terrorism by taking into consideration other determining factors and circumstances.[63] It is not sufficient to consider an act resembles those in the sectoral treaties as a terrorist action unless it includes an international dimension.

The problem of lacking a definition is a political rather than a legal /technical one.[64] This dilemma is based on the inability of the Western and Third World states to reach a compromise. This gap concerns what constitutes terrorism,[65] especially the status of liberation movements.

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[58]Ben Saul, *supra* note 4 at 186.
[59]Rosalyn Higgins, Mourice Flory, *supra* note 26 at 33.
[60]Ben Saul, *supra* note 4 at 13. According to Article 3 of the 1997 International Convention for the Suppression of Terrorist Bombings " This Convention shall not apply where the offences is committed within a single State, the alleged offender and the victims are nationals of that state, the alleged offender is found in the territory of that State and no other State has a basis…"
[61]Daniel O'Donnell, *International treaties against terrorism and the use of terrorism during armed conflict and by armed forces*, 88 INTERNATIONAL REVIEW OF THE RED CROSS, 860 (2006). "The penal provisions of these instruments are applicable to the acts committed within the territory of a state by a national, regardless of the nationality of the victim, if any."Articles 2(1) and 2(1), respectively.
[62]Ben Saul, *supra* note 4 at 13.
[63]Rosalyn Higgins, Mourice Flory, *supra* note 26 at 15.
[64]*Ibid* at 33.
[65]*Ibid* at 14.

The concern of the Western states has been the fear of the inclusion of 'state terrorism', [66] as well as all acts of terrorism being criminalized regardless of their motives with no exception. To illustrate, the US Army Command,[67] the US Department of Defense,[68] UK Terrorism Act (2000),[69] and UN SC Resolution 1566 (2004)[70] condemn terrorism in all its forms and regardless of its motives, which implies that acts that serve political, religious or ideological aims can equally be considered terrorist acts. In contrast, the Council of the League of Arab States[71] considers national liberation movements worthy of exclusion because their practices are an exercise of "the legitimate right of peoples to struggle against occupation,"[72] such as the Israeli occupation of Palestine.[73] This missing compromise is based on the lack of clear criteria of the elements of terrorism.[74] Furthermore, the subjectivity in the understanding or the implementation of the term hinders having a universal definition. For example, the US considers that a terrorist incident is not only what jeopardizes American citizens or American Service personnel, but also American interests, which is different than other states' interests.[75]

A considerable body of scholarly work, supported by Ben Saul, David N. Gibbs, and J. Tripathy justifies the problem of the lack of a criterion of the "terrorist' by basing it on the power of hegemony "to demonize the other".[76]

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[66]Israel has distinguished between' permitted' and 'forbidden' terrorism while Norway take a med point definition that consider national liberation movement as terrorism but' justified' in certain cases, *See*, Rosalyn Higgins, Mourice Flory, *supra* note 26 at 16.

[67]Laura Clarke, Why has Defining Terrorism Proved so Difficult?, E- international Relations studies, (2009) available at http://www.e-ir.info/2009/05/14/why-has-defining-terrorism-proved-so-difficult/,(24th May 2015), Alan O'Day (ed.), Dimensions of Terrorism (UK: Ashgate Publishing Limited, 2004).

[68]*Ibid.*

[69]*Ibid*.

[70]"Condemns in the strongest terms all acts of terrorism irrespective of their motivation, whenever and by whomsoever committed, as one of the most serious threats to peace and security;" Available at http://www.state.gov/j/ct/rls/other/un/66959.htm.

[71]Syria was one of those states that called for excluding national liberation movements from a definition of terrorism. *See*, Rosalyn Higgins, Mourice Flory, *supra* note 26.

[72]Laura Clarke, *supra* note 67.

[73]Schmid, Alex, ed. Handbook of Terrorism Research 51 (2011). (ProQuest ebrary. Web. 24 May 2015).

[74]This was affirmed in Mexico's observation concerning the dilemma of a reaching an agreed upon definition of terrorism: "The basic problem which has arisen in tackling the question of terrorism is the lack of a single criterion determining the fundamental component elements of the definition of the term. Only the adoption of such a criterion would make it possible to establish mechanisms to help eliminate the practices of terrorism." Rosalyn Higgins, Mourice Flory, *supra* note 26. at 16.

[75]Charels, Tilly, *supra* note 21 at 11.

[76]J.Tripathy, *Supra* note 2, at 222.

The significance of this hegemony over concepts is that it paves manipulations that are based on these created concepts for the interest of whom craved them.[77] This is highlighted by Kimberly Trapp's observation that shows how a lack of a definition leads to confusion allowing "opportunistic appropriation"[78]:

> [a]ccepting in principle that support for lawful acts of war should not be criminalized as acts of terrorism when those acts are carried out against our enemies, but prosecuting support for such acts when they are carried out against our own troops is the height of hypocrisy..[79]

Finally, although the criminal justice model is justified legally to track a crime, its success on the ground is not justifying reaching an agreed upon definition.[80] Regardless of the problem of definition, it is now clear that this term has legal consequences that, when used, take advantage of the perception of the 'public panic' that the term itself lends.[81]

C. The Criminal Justice Model of Confronting Terrorism

A criminal justice model generally is concerned with denouncing crimes. Under the criminal justice model of confronting terrorism, states are required to prosecute terrorists on their territory or extradite them to other states to face prosecution (*aut dedere aut judicare*). This model was generally the most recognized and followed model for combating terrorism for a long time,[82] while the military model, which includes extraterritorial use of force, remains exceptional.[83]

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[77]This was affirmed in Mr David Anderson QC's report, one of two successive Independent Reviewers of the Terrorism Act appointed under section 36 of the 2006 Act: "the current law allows members of any nationalist or separatist group to be turned into terrorists by virtue of their participation in a lawful armed conflict, however great the provocation and however odious the regime which they have attacked" .R v Gul (Appellant), UK Supreme Court, Para 61 (2013) *EWCA Crim 280*.
[78] Ben Saul, *supra* note 4 at 3.
[79]Kimberley Trapp, EJIL: Talk! – R v Mohammed Gul: Are You a Terrorist if You Support the Syrian Insurgency? http://www.ejiltalk.org/r-v-mohammed-gul-are-you-a-terrorist-if-you-support-the-syrian-insurgency/#_edn1 (last visited Nov 16, 2015). This is seen in a recent case before the UK Court of Appeal in *Regina v Mohammed Gul, Regina v Mohammed Gul*, UK Court of Appeal, Para 2 (2012) *EWCA Crim 280*.
[80]Rosalyn Higgins, Mourice Flory, *supra* note 26 at 30.
[81]Ben Saul, *supra* note 4 at 5.
[82]C. J. Tams, *supra* note *7 at* 372.
[83]*Ibid* at 373.

This obligation to prosecute or extradite has been included in all sectoral conventions against international terrorism since 1970.[84] This model seeks to criminalize terrorist actions and foster cooperation among states in their fight against terrorism,[85] which has been of interest to international organizations starting with the League of Nations. This part tackles the principle of *aut dedere aut judicare*, the problem of the political offence exception, and the evolution of the principle through case studies of *Lockerbie* and *Bin Laden* cases, respectively.

1. The Principle of *aut dedere aut judicare*

This principle is the modern version of *aut dedere aut punier* introduced by Grotius in 1625,[86] which provides that whenever a perpetrator commits a crime and flees to another state; this state has a duty either to extradite or to punish him.[87] *Aut dedere aut judicare* refers to an obligation of states to either prosecute domestically or extradite to another state perpetrators of international crimes.[88] It aims at tracing criminals to apply justice and fight immunity where perpetrators escape criminal responsibility.

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[84]The obligation to extradite or prosecute (*aut dedere aut judicare*), Final Report of the International Law Commission, *Yearbook of the International Law Commission,2 (2014).* The 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention), the 1971Convention for the Suppression of Unlawful Acts Against Safety of Civil Aviation (Montreal Convention), the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, the 1979 Convention on the Physical Protection of Nuclear Material., the 1979 International Convention Against the Taking of Hostages, the 1988 - Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, the 1988 Convention for the Suppression of Unlawful Acts Against Safety of Maritime Navigation, 1988 - Protocol for the Suppression of Unlawful Acts Against the Safely of Fixed Platforms Located on the Continental Shelf, the 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection, the 1997 International Convention for the Suppression of Terrorist Bombings, the1999 - Convention for the Suppression of Terrorist Financing, the 2005 International Convention for the Suppression of acts of Nuclear Terrorism UNTC,https://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2_en.xml (last visited Dec 25, 2015).

[85]C. J. Tams, *supra* note *7 at* 372.

[86]Aut Dedere Aut Judicare - International Law - Oxford Bibliographies, http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0023.xml (last visited Dec 25, 2015).

[87]Usman Hameed, *Aut Dedere Aut Judicare (Extradite or Prosecute) Obligation- Whether a Duty Rooted in Customary International Law*, *International* Journal of Humanities and Social Science, *240(2015).*

[88]Colleen Enache-Brown & Ari Fried, *Universal Crime, Jurisdiction and Duty: The Obligation of Aut Dedere Aut Judicare in International Law*, 43 MCGILL, LJ 613 (1997). The nature of this obligation is debatable. *See, Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports (2012)*, p. 422. According to this case, the court found out that "extradition is an option offered to the State by the Convention[torture], whereas prosecution is an international obligation under the Convention", Para 95. *See also*, M. Cherif Bassiouni, International *Extradition: United States law and Practice* 22-24 (1987), Zdzislaw Galicki, 4th report on the obligation to extradite or prosecute submitted in the 63rd session of the ILC. Claire Mitchel, *Aut Dedere, Aut Judicare: The Extradite or Prosecute Clause in International Law* , The Graduate Institute of International and Development Studies,(2009). Usman Hameed, *supra* note 87 at *242.*

Furthermore, it aims at securing cooperation for the suppression of terrorism. This obligation should be distinguished from the universal jurisdiction that introduces the legal basis for prosecution without reference to further obligations such or prosecution or extradition.[89] It is not sufficient for an act to be considered terrorist in order to fit with the scope of the principle, but also must include an international dimension constituting a violation of international law.[90] This obligation was highlighted in the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft.[91] Following this, the principle of prosecute or extradite has been included in almost all sectoral conventions against international terrorism[92] as well as several SC resolutions such as resolutions 1373 (2001),[93] 1456(2003),[94] and 1566(2004).[95]

The scope of this principal generally implies that a victim state is not permitted to intervene militarily in a state where terrorists are, but rather it can seek their extradition in case they have not been prosecuted domestically.[96]

[89]Miša Zgonec-Rožej& Joanne Foakes, *International Criminals: Extradite or Prosecute?*, 1(2013), https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/0713bp_prosecute.pdf (last visited Dec 25, 2015).
[90]Sarah L. Nagy, *Political Offense Exceptions to United States Extradition Policy: Aut Dedere Aut Judicare (Either Extradite or Prosecute)*, 1 IND. INT'L & COMP. L. REV. 109 (1991).
[91]Also is known as the (Hague Formula). "The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State". Article (7), the Multilateral Convention for the Suppression of Unlawful Seizure of Aircraft (1970), United Nations Treaty Series, 109 (1973).*See generally*, M. Cherif Bassiouni, Edward Martin Wise, AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PTOSECUTE IN INTERNATIONAL LAW,Martinus Nijhoff , 12 (1995).
[92]For example, article 9 (4) of the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism, which states "Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 in cases where the alleged offender is present in its territory and it does not extradite that person to any of the State Parties which have established their jurisdiction in accordance with paragraph 1 or 2 of the present article."
[93]Security Council Res 1373, Article 2 (c), (e), (2001), available at http://www.unodc.org/pdf/crime/terrorism/res_1373_english.pdf(20th may 2015).
[94]Security Council Res 1456, Article 3, available at http://daccess-ods.un.org/TMP/4717646.24118805.html
[95]Security Council Res 1566, Article 2, available at http://www.cfr.org/international-organizations-and-alliances/un-security-council-resolution-1566-terrorism/p11223.
[96]Usman Hameed, supra note 87 at 242.

2- Political Offence Exception

The Political offence is one of the exceptions to the principle of prosecute or extradite,[97] which justifies states' refusal to extradite a political refugee.[98] It is traced back to the nineteenth century and is justified by supporting the resistance and political opposition against dictatorships, especially if it is non-violent opposition.[99] Those who fight for the sake of democracy should be protected from the suppression of authoritarian regimes whenever they seek an asylum in a foreign state. This state can legitimately refuse to extradite them.[100] However, the political offence defies an agreed upon definition.[101] It is a subjective notion which differs from a state to another and from time to time, as "each society tolerates different levels of political dissidence."[102] Most of the definitions of "political offence" are "tautologous rather than explanatory", because mostly they either highlight the "political motivation" or the "political context" with no further explanation of what the "political" element itself means.[103] It raises the problem of what constitutes a political offence is, considering the elasticity of the concept.[104] A case in point is the bombing of a governmental owned television station by a liberation movement seeking self-determination, which could be viewed either a political offence or an ordinary crime depending on states' understanding of the "political" element.[105]

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[97]There are other exceptions such as Fiscal offence, which is gradually disappearing specially in terrorism sectoral treaties, Jae-myong Koh , SUPRESSING TERRORIST FINANCING AND MONEY LAUNDERING, Springer, 59 (2006).
[98]*Ibid*.
[99]Nevertheless, the controversy emerges if this opposition tends to commit violent acts that include attacks against persons or property. Report of UNODC: The Treatment of the Political Offence Exception in International Anti-Terrorism Legal Instruments, 2(2004), available at http://www.unodc.org/tldb/bibliography/Biblio_Pol_Off_Exception_UNODC_Report_Interpol_2004.doc . *See also*, Ethan A. Nadel mann, *Role of the United States in the International Enforcement of Criminal Law, The*, 31 HARV. INT'L. LJ 37 (1990).
[100]*See*, C. Van Den Wijnoaert, THE POLITICAL OFFENSE EXCEPTION TO EXTRADITION, KLUWER- DEVENTER, 1-231(1980).
[101]Mr Masaaki Yoshiura, Keiichi Aizawa& Hiroshi Tsutomi, *REFUSAL OF MUTUAL LEGAL ASSISTANCE OR EXTRADITION*, ANNUAL REPORT FOR 1999 AND RESOURCE MATERIAL SERIES NO. 57 189 (2001).
[102]Sarah L. Nagy, *supra* note 90 at. 110, 114.
[103]C. Van Den Wijnoaert, *supra* note 100 at 95, Sarah L. Nagy, *supra* note 90 at110.
[104] See generally, *supra* note 100.
[105]Christopher C. Joyner, INTERNATIONAL LAW IN THE 21ST CENTURY: RULES OF GLOBAL GOVERNANCE, ROWMAN AND LITLEFILED, 67-68 (2005).

However, with the emergence of transnational terrorism, there is a growing tendency to eliminate gradually this exception, in general, in the sectoral treaties relevant to the suppression of terrorism in order to avoid creating a safe heaven of terrorists.[106] One example is article (11) of the 1997 International Convention for the Suppression of Terrorist Bombings that does not recognize political offences as an exception to the prosecute or extradite obligation, if one of the terrorist acts included in the convention is committed.[107]

Finally, Security Council resolution 1373 of 2001 affirms this approach through expanding non recognition of the political exception in the context of terrorist acts to include generally all terrorist acts; according to article 3(g) "…..claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists".[108]

3-The Evolution of the Principle *aut dedere aut judicare*

Eliminating the exception of the political offence is not the only evolution of prosecute or extradite principle, but there are further evolutions. According to the principle of *aut dedere aut judicare* extradition is only an option whenever a state where the perpetrator resides does not prosecute him. However, the *Lockerbie case* suggests that there is a deviation from this principle.[109] According to the facts of the case, two Libyan intelligence officers were accused of downing a Pan Am flight flying over Scotland.[110]

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[106]*See generally*, Phillips R. Stuart, *The Political Offense Exception and Terrorism: Its Place in the Current Extradition Scheme and Proposals for its Future*, Dickinson Journal of International Law, (1997).

[107]"….a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence inspired by political motives." Article 11, The International Convention for the Suppression of Terrorist Bombings(1997), available at http://www.un.org/law/cod/terroris.htm. This has been affirmed in The 2010 Protocol of the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft of , Article 8 *bis* which states*:* "None of the offences set forth in Article 1 shall be regarded, for the purposes of extradition or mutual legal assistance, as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives." Available at, https://www.unodc.org/tldb/en/2010_protocol_convention_unlawful_seizure_aircraft.html.

[108]Security Council Res 1373, Article 3 (g) (2001), available at http://www.unodc.org/pdf/crime/terrorism/res_1373_english.pdf at Article 3 (g).

[109]*Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, International Court of Justice (ICJ), 10 September 2003, available at: http://www.refworld.org/docid/414ad6104.html [accessed 27 December 2015].

[110]*Ibid.*

The US, UK, France, Northern Ireland, and Libya are parties to the 1971 Montreal Convention which under article 7 includes the obligation of prosecute or extradite. Despite Libya's investigations of the incident, the US and UK informally requested the extradition of the perpetrators, but Libya refused their request.[111] As a result, the SC issued resolution 731 of 1992, which strongly condemns Libya's non- compliance with the requests, considering that it "has not yet responded effectively" to the requests and in "establishing responsibility for the terrorist acts".[112] In a further escalation, the SC issued resolution 748 of 1992 that considers as a "threat to international peace and security" the Libyan failure to demonstrate "by concrete actions it renunciation of terrorism" as well as "the continued failure to respond fully and effectively to the requests".[113] Therefore, it imposed economic sanctions on Libya under Chapter VII of the UN Charter. The significance of this resolution is that it could be interpreted as a deviation from the prosecute or extradite obligation under the Montreal Convention through the introduction of a third path that is (extradite or extradite),[114] especially since SC's resolutions have a prevailing effect over any other international treaty according to article (103) of the UN Charter.[115] This interpretation raises a question whether the principle of *aut dedere aut judicare* has turned into *aut transferere* that includes a delivery to a third state (*de facto extradition*), which entails the Security Council as the principle "enforcer", complying with its authority under chapter VII when an act constitute a threat to international peace and security.[116]

However, it was argued that the resolution fits with the existing law of extradition, as under exceptional circumstances "the law merely operates at a different level through the internationally sanctioned ways and means of the United Nations."[117]

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[111]Michael Plachta, *The Lockerbie case: The Role of the Security Council in Enforcing the Priciple Aut Dedere Aut Judicare*, EJIL, 126,127(2001).
[112]Security Council Resolution 731 (1992), Para 8, Available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/731%281992%29.
[113]Security Council Resolution 748(1992), Para 7, Available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/748%281992%29.
[114]Michael Plachta, *supra* note 111 at 129.
[115]*Ibid* at 129, 130.
[116] Michael Plachta, *supra* note 111 at 129, 136.
[117]Christopher C. Joyner & Wayne P. Rothbaum, Libya and the Aerial Incident at Lockerbie: What Lessons for International Extradition Law? 14 Mich. J. Int'l L. 222, 256 (1993).As cited in Michael Plachta, *supra* note 111 at 129, 136.

This could be understood through considering Libya's failure to act as a threat international peace and security under SC Res 748of 1992, which permits the SC to work under Chapter VII of the Charter.

Although the *Lockerbie case* is a unique one according the previous interpretation, it is not the only case that followed this interpretation. According to the SC Res 1267 of 1999, the SC demands that the Taliban turn over Usama bin Laden "to appropriate authorities in a country where he has been indicted, or to appropriate authorities in a country where he will be returned to such a country, or to appropriate authorities in a country where he will be arrested and effectively brought to justice".[118] At the same time this resolution considers the failure of the Taliban to "bring the indicted terrorists to justice"[119] as a threat to international peace and security. Therefore, the SC decided to impose economic sanctions on the Taliban under Chapter VII of the UN Charter.

This case is different from the *Lockerbie* case, as the perpetrators were not transferred to a third state for prosecution, but rather after the 9/11 attacks the US traced them back in Afghanistan as one of declared goals of the *Operation Enduring Freedom*.[120] The US demanded-including others-turning over Bin laden, offering two choices for the Taliban either "[t]hey will hand over the terrorists, or they will share in their fate."[121]

[118]Security Council Resolution 1267 (1999), Para 2, Available at http://daccess-ods.un.org/TMP/1735865.17572403.html.
[119]Security Council Resolution 1214 (1998), Para 13, Available at http://daccess-ods.un.org/TMP/6015123.72493744.html.
[120]There is other main goal that is the declared "pre-emptive self-defense" by reference to SC Res 1373. Operation Enduring Freedom, http://www.globalsecurity.org/military/ops/enduring-freedom.htm (last visited Dec 27, 2015).*See*, Operation Enduring Freedom Fast Facts - CNN.com, CNN, http://www.cnn.com/2013/10/28/world/operation-enduring-freedom-fast-facts/index.html (last visited Nov 30, 2015).
[121]Selected Speeches of President George W. Bush (2001 – 2008), Address to the Joint Session of the 107th Congress, *68(September 20, 2001), available at https://www.google.com.eg/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0ahUKEwjuv7Ov6PzJAhVIRBQKHZbnA6sQFggpMAI&url=http%3A%2F%2Fgeorgewbushwhitehouse.archives.gov%2Finfocus%2Fbushrecord%2Fdocuments%2FSelected_Speeches_George_W_Bush.pdf&usg=AFQjCNFGyewtD8NgSGsatebAdOQ9jLMY-g&bvm=bv.110151844,d.bGQ&cad=rja*.

Since neither of the demands was met,[122] among other reasons,[123] the US launched its military operation *Enduring Freedom*. According to President Bush "[n]one of these demands were met. And now the Taliban will pay a price. By destroying camps and disrupting communications, we will make it more difficult for the terror network to train new recruits and coordinate their evil plans."[124] This reflects the fact that the principle *aut dedere aut judicare* is diminishing. It is not only replaced with *aut transfere*, but rather, diminished for the favor of a military model as will be elaborated further in the next chapter.

[122] The US demands that were to; "[c]lose terrorist training camps; hand over leaders of the al Qaeda network; and return all foreign nationals, including American citizens, unjustly detained in your country." Selected Speeches of President George W. Bush, (2001 – 2008), Address to the Nation on Operations in Afghanistan, *75(October 7, 2001), available at https://www.google.com.eg/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0ahUKEwjuv7Ov6PzJAhVIRBQKHZbnA6sQFggpMAI&url=http%3A%2F%2Fgeorgewbushwhitehouse.archives.gov%2Finfocus%2Fbushrecord%2Fdocuments%2FSelected_Speeches_George_W_Bush.pdf&usg=AFQjCNFGyewtD8NgSGsatebAdOQ9jLMY-g&bvm=bv.110151844,d.bGQ&cad=rja*.

[123] There is other main goal that is the declared "pre-emptive self-defense" by reference to SC Res 1373.

[124] Selected Speeches of President George W. Bush, *supra* note 122.

III. The Military Model for Combating Terrorism

The 9/11 attacks paved the way for the military model of combating terrorism to replace the criminal justice model. This shift impacts the existing rules on the use of force, specially the right to self-defense and the rules governing state responsibility. It triggered a debate on how combating terrorism militarily fits within contemporary international law on the use of force and state responsibility. In addition, it has triggered the debate on whether terrorist attacks qualify as armed attacks that give states the right to respond in individual or collective self-defense? This section tackles how the shift has been introduced. This is followed by a macro analysis of the effect of this shift on the application of the right to self-defense and state responsibility respectively. This chapter concludes that the legal framework of the use of force has recognized more flexible interpretation of the principles on the use of force ,such as a more lenient application of self-defense as well as introduced new principles, such as the unwilling or unable standard.

A. The International Legal Framework of the Use of Force

The international legal system on the use of force was established under the United Nations Charter, which prohibits the use of force under article 2(4). In analyzing the international legal system on the use of force, international law is concerned with terrorism when it crosses borders, as it adds, *inter alia*, the international element to terrorism.[125] For the purpose of this chapter**,** I refer to cross-border terrorist groups. The problem with the use of force after 9/11 is the extent of state involvement when combating non-state actors. It reflects the facts that states are increasing military involvement based on lenient interpretations of the legal framework on the use of force.

Since the United Nations is "a unique partner in troubled times," terrorism has been on the agenda of the United Nations as a threat to international peace and security since the1970s.[126]

[125]Rosalyn Higgins, Mourice Flory, *supra* note 26 at 30.
[126]Ben Saul, *supra* note 4 at 46. *See also*, Boulden, Jane, and Weiss, Thomas George, *supra* note 35 at 6. Note by the President of the Security Council (S/23500), January, 1992.

Introducing terrorism as a main concern to UN organs has also affected the principles of the UN Charter, namely the prohibition on the use of force. This principle, as clarified under article 2(4) of the Charter,[127] is customary international law principle and is binding on all states. However, there are two exceptions to this binding rule, which are collective security contained in art 42 and contained in self-defense art 51 under the UN Charter.[128] The development of this principle has stretched the exceptions of the use of force through flexible interpretation of the Charter. According to Tams "the international community has not formally amended the Charter rules, but has re-appraised them through interpretation."[129]

The right to self-defense has been stretched after 9/11 based on both the 2001 SC Res 1368 and SC Res 1373, which affirm the individual and collective right to self-defense. However, Res 1373 has not explicitly authorize the use of force, but rather under art 2 (b), it permits "[t]ak[ing] the necessary steps to prevent the commission of terrorist acts".[130] Nevertheless, a broad interpretation of this resolution has been reflected in state practice that has gone far beyond this by introducing other forms of this right, which are anticipatory and preemptive self-defense. These forms changed or mitigated the strict requirements of the presence of this right, especially the imminence of armed attack.[131] For instance, the US uses this resolution to legalize the use of preemptive self-defense attacks in Afghanistan even in the absence of an immediate attack or threats of one.

Finally, there is a broadening of state responsibility to include acts of "harboring terrorism" with a more mitigated threshold of the "effective control" standard.[132] To illustrate, states are no longer responsible solely in case they participate, assist, or encourage terrorist acts.

[127]"members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any other state, or in any other manner inconsistent with the Purposes of the United Nations." https://treaties.un.org/doc/publication/ctc/uncharter.pdf(last visited 25/5/2015)
[128]Utley, Rachel E., ed. 9/11 Ten Years After: Perspectives and Problems. Ashgate Publishing Group,180 (2012). ProQuest ebrary. Web. 25 May 2015.
[129]C. J. Tams, *supra* note *7 at* 360.
[130]*Supra* note 108 at Article 2 (b).
[131]Boulden, Jane, and Weiss, Thomas George, *supra* note 35 at 11.
[132]This standard has been referred to in Armed Activities on the Territory of the Congo (*Democratic Republic of the Congov.Uganda*),Judgment, I.C.J. Reports 2005, p.168, Para 99.

This participation is either explicitly such as the *Lockerbie* incident,[133]or implicitly as was seen in *Iran vs. Us Hostage case*.[134] On contrary, states can also be responsible but when they 'harbor' terrorist groups and by doing nothing to combat them. Although harboring terrorism constitutes a failure of an international duty according to the non-binding Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States, states' responsibility is another field that is based on an effective control standard, which is not fulfilled by only harboring terrorism.[135]

B. Military Mode Operation

The military mode operation involves a state intervening in another state where terrorists reside to suppress those terrorists under the umbrella of the *War on Terror*. Military mode operation triggers clarifying the relationship between the international law on terrorism and international humanitarian law, which arises in limited circumstances, namely in 'armed conflicts' that require a threshold of intensity.[136] Furthermore, in peace time, the sectoral treaties that deal with certain types of terrorism should theoretically apply.[137] For example, article 19(2) of the 1997 International Convention for the Suppression of Terrorist Bombings excludes the terrorist activities during armed conflict from being governed by the convention, leaving them to be governed by IHL.[138] The significance of this distinction lies in events of non-international armed conflicts "where a 'terrorist' designation may act as an additional disincentive for organized armed groups to respect IHL,"[139] especially if they can already be prosecuted under national criminal codes.

[133]This is highlighted in *Lockerbie* incident when two Libyan intelligence officers were accused of downing a Pan Am flight flying over Scotland, as they are agents to the state; their acts are attributable to this state.
[134]*Case Concerning the United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)* Judgment, I.C.J. Reports 1980, p. 3.
[135]Frederic Megret, *supra* note 7 at 382.
[136]Andrew Clapham, Paola Gaeta, The Oxford Handbook of International Law in Armed Conflict, terrorism, 574 (2014).
[137]Such as the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons 1973, the International Convention against the Taking of Hostages can be found at www.un.org/terrorism/instument. *Ibid* at 578.
[138]Kimberley Trapp, *supra* note 79.
[139]*Ibid*.

Many authors, such as Tams and Megret, criticize the shift in dealing with terrorism as a phenomenon from the *criminal justice strategy* in which states criminalize and consider some acts to fall under the description of terrorism to "a military mode operation" which is the War on Terror.[140] This military mode is based on propagating the phobia of terrorism. To illustrate, by manipulating the discourse of terrorism, states stretch the boundaries of exceptions under international law on the use force to legalize their actions. In support of this argument, other authors such as Pillay Navanethem and Susan Marks argue that not only has the military strategy overridden the criminal one, but it has also introduced itself as the only viable option to deter the spreading phenomenon of terrorism. This means that the introduction of 'no other alternatives' rather than the military model paves the way for changing the structure of international law and permits the acceptance of military actions. The language of this exceptionality implies the normality of state behavior whatever its limits.[141]

In addition, basing the justification for the military model on exceptionalism entails that any abuse to come will be random, not deliberate, aberrant and arbitrary.[142] It immunizes states from being blamed or exposed to criticism.[143] This exceptionalism not only leads to "uncritical acceptance of excessive and even illegal state responses,"[144] but also helps to sustain the circumstances on which the violations have been committed through blurring the distinction between the default and the exception.[145] This means that the exception that is the military model will turn into being the default owing to its introduction as an inevitable shift.

Other scholarly work supported by Megret and Gred Oberleitner is evidence-based on state practice in Afghanistan after the declared War on Terror claims that the military operation of the War on Terror is mere a "political phraseology".[146]

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[140]Tim Stephens, *International Criminal Law and the Response to International Terrorism*, 27 UN SWLJ, 373. (2004).
[141]Susan Marks, *Apologizing for Torture*, 73 NJIL, 384 (2004) W. Benjamin, 'Theses on the Philosophy of History', Thesis VIII, in *Illuminations*, H. Arendt, ed.; H. Zorn, trans. (1999).
[142]Susan Marks, *Human rights and root causes*, 74 THE MODERN LAW REVIEW, P 78 (2011).
[143]Susan Marks, *Supra* note 141 *at* 384.
[144]Pillay Navanethem, Freedom of Speech and Incitement to Criminal Activity: A Delicate Balance, 14 New Eng. J. Int'l & Comp. L. 203 (2007-2008).
[145]Susan Marks, *supra* note 141 *at* 384.
[146]*See*, Frederic Megret, *supra* note 7 at 395. *See also*, Gerd Oberleitner, *A just war against terror?* 16 PEACE REVIEW 263–268 (2004).

It is about condemning terrorist attacks in newspapers as much it is about fighting a very real war. Using the legal language of war with all its consequences aims to extend a legal legitimatization to actions.[147] It gives discursive power to states to decide who falls under the umbrella of a 'terrorist'.

C. The Right to Self Defense

The right to self-defense is an exception to the prohibition of the use force under the UN Charter in 1945. In order to analyze the developments of the legal framework for combating terrorism, it is important to reassess its starting-point, which is the right to self-defense. The inherent right of self-defense under article (51) of the UN Charter was recognized before 1945, under customary international law.[148] According to the Caroline incident, customary international law recognized this right irrespective of the gravity of the armed attack.[149] Customary international law crystallized the conditions governing the lawful practice of this right.[150] According to article 51 of the UN Charter, self-defense is confined to the existence of a 'prior armed attack' and the absence of the Security Council's response.[151]

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[147] *See*, Gerd Oberleitner, *supra* note 146.

[148]"Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security", Charter of the United Nations: Chapter VII: Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression, , http://www.un.org/en/documents/charter/chapter7.shtml (last visited Mar 29, 2015).

[149]Nicholas Tsagourias, *Non-State Actors and the Use of Force*, PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM: MULTIPLE PERSPECTIVES ON NON-STATE ACTORS IN INTERNATIONAL LAW, J. D'ASPREMONT, ED., ROUTLEDGE, 7 (2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1856566 (last visited Nov 26, 2015).

[150]Christopher Greenwood, *International law and the pre-emptive use of force: Afghanistan, Al-Qaida, and Iraq*, 4 SAN DIEGO INT'L LJ 7, 11, (2003).

[151]There are two turning points in the history of the right to self-defense; these are the 1967 war between Israel and the Arab States and the 1981 Israeli attack on Iraq's nuclear reactor. These events challenged the implementation of anticipatory self-defense. For the first event, it is a controversial one, Israel's attack on Egypt was either interpreted as "anticipation of an armed attack" or as "a reaction" to it. Further, a SC resolution that would have condemned Israel attacks for "an unlawful resort to force" did not reach the required majority for decision making.[151]While for the second event, the Security Council in Res 487 of 1981"[s]trongly condemned" Israel's "premeditated aerial strike against an Iraqi nuclear reactor on 7 June 1981" as a "clear violation of the Charter of the United Nations and the norms of international conduct". *See*, *Ibid*.

In discussion of the right to self-defense after 9/11, the starting point is the adoption of both Resolutions 1368 and 1373. The plain reading of both resolutions suggest that they did not explicitly authorize the extraterritorial use of force within the context of self-defense against non-state actors. However, resolution 1373 did affirm the 'inherent' right of self-defense. The interpretation of SC resolutions 1368 and 1373in 2001, triggers a controversy. A heated debate about the legality of stretching the right to self-defense to include preemptive and anticipatory self-defense has emerged. This can be framed as a controversy between a positivist and a purpose oriented interpretation of the UN Charter concerning the right to self-defense.[152] The positivists argue that according to the Charter there should be a prior armed attack (*DRC v. Uganda).*[153] On the other hand, those who interpret the Charter purposively argue that an imminent threat is sufficient to trigger the practice of this right (anticipatory self-defense). Some views go even further than this, especially after the declared War on Terror, to exclude the imminence of such a threat by considering preemptive self-defense.[154]In a further development, Yoram Dinstein introduced the concept of "interceptive self-defense", in response to a situation where a state has "committed itself to an armed attack in an ostensibly irrevocable way",[155] a state has the legitimate right to use force.

One of the problems, which arises when applying a purpose-oriented interpretation of article (51) is stretching of the practice of the right to self-defense before terrorist groups. This practice will invoke the sovereignty of the states where these groups are located, especially since the War on Terror has "no geographical or temporal boundaries".[156] This means that if a state claims a right to self-defense against a terrorist group, which resides in more than one country, it can argue that it has the right to intervene in those countries where the terrorists reside.

[152]Mathew Carven, Susan Marks, Gerry Simpson, and Ralph Wild, We are Teachers of International Law, Leiden Journal of International Law, 17, P 368(2004).
[153]*Supra* note 132.
[154]The preemptive self-defense existed before the 9/11 such as in the Osirak attack and arguably the 1967 war. But it was not widely accepted.
[155]Christopher Greenwood, *supra* note 150 at 15.
[156]Rosa Ehrenreich Brooks, *War everywhere: rights, national security law, and the law of armed conflict in the age of terror*, UNIVERSITY OF PENNSYLVANIA LAW REVIEW 745 (2004).

Finally, this can lead to expanding the exceptions to the prohibition of the use of force in international law and especially the conditions,[157] the temporal scope and necessary threshold required for practicing self-defense.[158]

In addition, since reprisals are prohibited under international law, broadening the parameters of self-defense can be used as a substitute for use of force practices.[159] At the same time, it could serve international law enforcement purposes such as the Russian attack on Georgia in 2008.[160] This state practice supports Christine Gray's description of the right to self-defense as a "ritual incantation of a magic formula,"[161] as well as Daniel Bethlehem's statement on"[t]he reliance by States on self-defense in virtually every conceivable circumstance, which in turn had led to normative drift, as attempts have been made to stretch the concept".[162] Both arguments highlight the manipulation of self-defense as an exception to the prohibition of the use of force, through expanding its boundaries.

In the following analysis of the development of the right to self-defense, I analyze the two main requirements in terms of their application to the War on Terror, namely the existence of an armed attack and the absence of Security Council measures.

1. The Existence of an Armed Attack

The existence of armed attack is the first of two requirements for the right to self-defense. In order to decide whether a situation triggers the right to self-defense, there are two questions to be answered: first, whether there is an armed attack and second, who launched this "attack"-*a state or non-state actor*?[163]

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[157]Frederic Megret, *supra* note 7 at 375.*See*, C. J. Tams, *supra* note *7.*
[158]Antonio Cassese, Terrorism is Also Disrupting Some Crucial Legal Categories of International Law, EJIL, Vol. 12 No. 5, 996, (2001).*See*, Frederic Megret, *supra* note 7 at 375.*See also*, C. J. Tams, *supra* note *7.*
[159] This was affirmed under SC Res 188 of 1964 in occasion of the British attacks on Yemen. Security Council Resolution 188 - UNSCR, , http://unscr.com/en/resolutions/188 (last visited Nov 26, 2015).Christine Gray, *supra* note 6 at 198.
[160]C. J. Tams, *supra* note *7 at* 382.
[161]*Ibid* . *See also*, C. Gray, *supra* note 6.
[162]C. J. Tams, *supra* note *7 at* 383, Bethlehem, 'International Law and the Use of Force: the Law as It Is and as It Should Be' (written evidence to the Select Committee on Foreign Affairs – Minutes of Evidence, 8 June 2004), available at: www.publications.parliament.uk/pa/cm200304/cmselect/cmfaff/441/4060808.htm, at para. 21.
[163]Christopher Greenwood, *supra* note 150 at 16.

Although article 51 of the UN Charter does not include a definition of what constitutes an 'armed attack' in the context of practicing the right to self-defense, the ICJ in its judgments has adopted the "scale and effect" of the attack as the determining factors.[164] The concept of 'armed attack' according to article 51 of the UN Charter implies a specific scale that has been crystallized in judicial precedents of the ICJ. According to these precedents, the scale of use of force should be grave 'enough' and not only a minor threat *Oil Platforms case,*[165] *DRC v. Uganda,*[166] *Nicaragua case.*[167] In addition, the Boundary Commission of Eritrea/Ethiopia affirmed the same scale by differentiating between "geographically limited clashes" and armed attacks that trigger right of self-defense.[168] However, the interpretation of an 'armed attack' still triggers a controversy. Professor Henkin considers an "actual armed attack [to be] unambiguous, subject to proof, and not easily open to misinterpretation or fabrication."[169]

Moreover, there is an emerging opinion, expressed by the Special Rapporteur on Extrajudicial Executions in 2013, that "the level of violence necessary to justify a resort to self-defense ought to be set higher when it is in response to an attack by non-State actors than to an attack by another State."[170] This point of view is compatible with sovereignty, a cornerstone of international law as well as limiting the manipulation of the discourse of terrorism. It is important to note that it is not only the nature of the act that determines its gravity, but also its impact. Some incidents might not appear grave on the surface, but their impact might be grave enough to qualify them as armed attacks. That is why determining the severity of the attack is one of the challenging dimensions of the right to self-defense.

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[164]Nicholas Tsagourias, *supra* note 149 *at* 6, *Nicaragua v. United States of America*, Judgment, I.C.J. Reports 1986, p. 14. Paras 195, 210, *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, I.C.J. Rep. (2003), p. 161, Paras 51, 64, 77, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports 2004, p. 136 Para. 139;*Supra* note 132 at Para 147.

[165]Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I. C. J. Reports 2003, p. 161, Para191.

[166]*Supra* note 132 at Para 191.

[167]*Nicaragua v. United States of America*, *supra* note 164.

[168]C. J. Tams, *supra* note *7 at* 378.

[169]Frederic Megret, *supra* note 7 at 373. L. Henkin, How Nations Behave, 142 (1979).

[170]Jonathan Ulrich, *Gloves Were Never On: Defining the President's Authority to Order Targeted Killing in the War against Terrorism, The*, 45 VA. J. INT'L L. 17 (2004), Parliamentary Assembly, Council of Europe, Recommendation 1580, The Situation in Georgia and Its Consequences for the Stability of the Caucasus Region (2002), *available at* http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta02/EREC1580.htm. Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, *Report*, ¶ 89, U.N. Doc.A/68/382 (Sept. 13, 2013) (by ChristofHeyns).

(i) Method of Delivery

The method of delivery also is an important factor for qualifying a right to self-defense. The criterion for defining the term terrorists suggest a debate over whether terrorists' actions qualify as a justification for practicing the right to self-defense or not. The method of delivering terrorism could be a state, state representative, a group effectively controlled by a state *DRC v. Uganda,*[171] *Nicaragua case,*[172] *and Iran hostage case,*[173] or non-state actors such as terrorist / rebel groups. Although the plain meaning of article 51 of the United Nations Charter does not specify that the attack or threat must be attributable to "a state" in order to trigger the practice of self-defense,[174] the ICJ in its Advisory Opinion on the Israeli Security Wall, clarified that the right to self-defense can only be practiced by a state in response to an attack by another state, "by one State against another State."[175]

However, much earlier than the United Nations Charter, in the year 1837, the Caroline incident involved British colonists fighting against Canadian rebels (non-state actors).[176] This incident reveals how the right to self-defense was recognized in response to attacks by non-state actors Canadian rebels.[177] This position has evolved to include *quasi* states. A case in point is the fact finding mission on conflict between Georgia, Russia and the autonomous areas of South Ossetia and Abkhazia. The commission found that Article 51 of the Charter applicable to the situation without any reference to further agreements between the parties.[178] The reasoning of the mission seems to consider both Abkhazia and South Ossetia as *quasi-States.*[179]

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[171]*See, Supra* note 132.
[172]*Nicaragua v. United States of America, supra* note 164.
[173]*See, Supra* note 134.
[174]*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. *supra* note 164 at Para. 139.
[175]*Ibid*.
[176]NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS, 207 (2010).
[177]*Ibid*.
[178]Olivia Flasch, *The Exercise of Self-Defense Against ISIL in Syria: New Insights on the Extraterritorial Use of Force Against Non-State Actors*, Journal on the Use of Force and International Law,*14 (2015).*
[179]*Ibid* .It can also be argued that this term might refer to terrorist group which reached a level of organization that resembles states core authorities. A case in point can be ISIL, which its statehood is under controversy until now up till now. *See,* Charles C. Caris , Samuel Reynolds, Midd le East Security Report 22*:ISIS Governance in Syria*, the Institute for the Study of War(2014).

In addition, when Russia attacked the Chechens rebels in Georgia most of the third states neither condemned nor accepted the Russian actions despite the fact that the Russian territory did not suffer from an imminent armed attack.[180]

For the international community, this response to incidents of state practice involving extraterritorial use of force attempts to assess whether the incident fits into the parameters of necessity and proportionality of the right to self-defense rather than debating its existence itself.[181] One example is the mixed states' response to the Israeli claim when it attacked Lebanon in 2006. There was broad agreement that Israel's response had been disproportionate, while a considerable number of states recognized -in principle- the right to use force against Hezbollah.[182] This example shows the shift to assessing the scope of self-defense compared to the condemnation of similar actions in the 1970s and 1980s.[183] This reflects the relaxed application of the right to self-defense after 9/11 to the extent that the questions shifted from whether there is right to self-defense against non-state actors to whether the response is proportionate and necessary enough or not?

(ii) Proof of Imminence

Proof of imminence is another requirement for the right to self-defense. In order to define "if an armed attack occurs" under article 51 of the UN Charter, the imminence of the armed attack must be determined. There must be clear, decisive, and transparent evidence of such immediacy and not non-evidence based on expectations. For example, the US depended on CIA investigations that suggested that there "might" be an attack before its attacks on Afghanistan.[184]

[180]Olivia Flasch, *supra note 178 at 14.*
[181]C. J. Tams, *supra* note *7 at* 379.
[182]*Ibid*. *See*, Zimmermann, 'The Second Lebanon War: Jus ad bellum, jus in bello and the Issue of Proportionality', 11 *Max Planck Yrbk UN L* (2007).
[183]C. J. Tams, *supra* note *7*. For example, irrespective of debates concerning the conditions of self-defense of the Operation Enduring freedom in Afghanistan, after 14 years the core concern become that Operation Enduring Freedom "overstretched the limits of self-defense".
[184]Frederic Megret, *supra* note 7 at 373.

In this case, the CIA should have been transparent in disclosing relevant and sufficient evident before a higher entity such as the Security Council for evaluation. This would avoid the manipulation and personal assessment of threats and thereby respects the sovereignty of states.

The concept of imminence was defined under the Caroline incident as "instant and overwhelming, and leaving no choice of means and no moment for deliberation."[185] For example, the acquisition of weapons of mass destruction, chemical weapons, or a nuclear program in itself cannot be an imminent threat unless there is credible evidence that these weapons will be used in a specific, imminent attack. Although it is important to secure the source of evidence for security purposes, "one official argument for not disclosing the proof allegedly held by US authorities cannot extend to withholding crucial evidence used to justify the massive bombing of a state."[186] This is to say that the right to security of a state that has chosen not to disclose the evidence used to justify attacking other states is not an acceptable reason to prove the imminence of threats.

Finally, the use of military force even for combating terrorism should be under explicit authorization from the Security Council in cases that fit within the permissible boundaries of the use of force. Thus, any military use of force without such authorization is unlawful. Unfortunately, this has not always been the case.

2. The Absence of Security Council Measures

The absence of the SC's measures is the other pillar for the right to self-defense. According to understanding of the right to self-defense under article 51 of the United Nations Charter, self-defense is an interim measure,[187] in the absence of the Security Council measures. This point questions whether SC Res 1373 is a sufficient measure. This Resolution involves obligations to freeze terrorist assets and calls upon member states to create a committee for monitoring its implementation.

[185]Edward Gordon, *Article 2 (4) in Historical Context*, 10 YALE J. INT'L L. 271, p 227, 228 (1984).
[186]Frederic *Megret, supra* note 7 at 381.
[187]*Ibid.*

Although these Measures do not include military measures, there is nothing in the Charter that only recognizes military measures as being adequate to handle threats to international peace and security.[188] In addition, there is nothing in the Charter that prevents the Security Council from explicitly mandating the use of self-defense.[189] For example, after the Iraqi invasion of Kuwait, the SC authorized the coalition to use "all necessary means to uphold and 'implement' a previous resolution recognizing a right to self-defense."[190] Self-defense in this context serves as a mechanism for combating a violation of international peace and security.[191]

Irrespective of the debate that emerged after this Resolution, it is clear from its language that it was precise and explicit in its authorization of the practice of the right to self-defense. This was not the case in resolutions 1368 and Resolution 1373.[192] Considering the significance and impact of these two resolutions, they do not explicitly include authorization of a right to self-defense. Thus, many questions on the legality of the use of force of subsequent military operations that were based on those resolutions such as Operation *Enduring Freedom* are raised.

D. Terrorism and State Responsibility

Since states can only be responsible for the acts of their agents, the interrelation between terrorism and state responsibility is debatable within the context of the War on Terror.[193] Attributing the acts of a state's agents to states was clear in Libya's responsibility for the *Lockerbie* incident in 1988, because the persons responsible for the attack were working for Libyan intelligence services.[194] This was also affirmed by the ICJ judgments in the *Iran Hostage* case.[195]

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[188]Frederic *Megret, supra* note 7 at 381.
[189]*Ibid.*
[190]*Ibid.*
[191]*Ibid.*
[192]*Ibid.*
[193]*Ibid.*
[194]*Ibid.*
[195]When weighing the approval of Iranian authorities for the students' taking of the hostages in the US embassy. These students were treated as state agents. *See, Supra* note 134. *See also,* Frederic *Megret, supra* note 7 at 382.

Not only has the contemporary international law on the use of force changed, but also the international law on state responsibility for terrorism since 9/11. The threshold of state responsibility was an effective control of terrorist groups combined with participation on the states side through assisting them financially or militarily, committing, facilitating, or inciting, which conforms to the general rules of state responsibility. However, after the SC Res 1373, a state can be held responsible for terrorist acts perpetrated in other states by a terrorist group residing in its territory, even if the state lacks effective control over this group. This is seen as harboring terrorism, specifically a change in the rules of attribution.[196]

1. Attribution

Attribution is a core element for states' responsibility that is interrelated with the right to self-defense. Generally, the right to self-defense can be triggered against another state whenever the later exercises "effective control" over non- state actors residing on its territory who mount an attack on another state.[197] In a further development, there are other arguments that also consider the "overall control" standard as a trigger for self-defense.[198] This is to say that it is sufficient to trigger a responsibility of a state whenever it exercises overall control over terrorists. There is a point of view that favors the application of one of those previous standards over the other according to the level of organization of the non-state actors.[199] To illustrate, if the non- state actors have a high level of organization with an identified leader it tends to fall under the 'overall control' test.[200] This is because an "unorganized" group would require more direct state involvement that qualifies "effective control" as a higher standard of attribution than the overall standard.[201]

[196]Benjamin J. Priester, *Who is a Terrorist-Drawing the Line between Criminal Defendants and Military Enemies*, UTAH L. REV. 1255 (2008).
[197]Nicholas Tsagourias, *supra* note 149 *at 8.*
[198]*Ibid.*
[199]*Ibid.*
[200]*Ibid.*
[201]*Ibid.*

This distinction seems plausible, especially since the phenomenon of terrorism affects many parts of the whole world. Therefore, if it is opened to the state to decide which standard is applicable, the door to manipulations is open. In addition, adopting the "overall control" will generally jeopardize the sovereignty of states as well as threaten the principle of the prohibition on the use of force.

After 9/11 attacks the US launched operation *Enduring Freedom* against Al Qaida in Afghanistan. The reasoning behind such operation was that the Taliban regime was "sponsoring and sheltering and supplying terrorists' and that Al Qaeda had "great influence in Afghanistan and support[ed] the Taliban regime in controlling most of that country."[202] This incident is significant because it introduced new rules of attribution than those of state responsibility under contemporary international law. Its consideration was affirmed by Tams when he stated that: "[s]tates invoking self-defense do make an effort to identify links between the territorial state and the terrorist organization in question."[203]

In a further development to the rules of attribution, a more flexible standard has been introduced which is "harboring" terrorism. This standard excludes the direct relationship between a state and non-state actor as a basis for state responsibility. It adopts a lower standard which is merely harboring the presence of the terrorists. This means that the effective control standard is replaced with a more mitigated version of attribution that is harboring.[204] For example, the US, with the assistance of the UK intervened in Afghanistan based on the Taliban regime's refusal to surrender Bin Laden.[205] The coalition considered such refusal as falling under 'harboring terrorism', and thus, invoked the right to self-defense.[206]

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[202]Olivia Flasch, *supra* note 178 at 35, George W Bush, 'of Congress and the American People" (Press Release) (20 September 2001) http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html.
203*Ibid* at 35, Christian J Tams, *supra* note *7 at* 359, 385.
[204]This standard has been introduced in regional organization. For example, the African Union's 2005 defense Pact defines "aggression," to include "the encouragement, support, harboring, or provision of any assistance for the commission of terrorist acts and other violent transnational organized crimes against a Member State." Jonathan Ulrich, *supra* note 170 at 14. African Union, African Union Non-Aggression and Common Defence Pact art.1(c)(xi), Jan. 31, 2005, *available at* http://www.africancourt.org/en/images/documents/Other_Relevant_Instruments/AU%20Non%20Agression%20and%20Common%20Defence%20Pact.pdf.
[205]Christine Gray, *supra* note 6 at 197.
[206]*Ibid*.

Although this was not the first use of force against terrorists, it is the first not to be condemned.[207] A case in point is Israel's use of force in Lebanon in 1968, which was justified on the grounds that Lebanon had allowed terrorists to train on their territory and thus, was harboring terrorism. In spite of the Israeli's and the US interpretations, the Israeli attacks were condemned by the SC Res 262 in 1968.[208] Furthermore, similar actions took place in 1985 in Tunis, which were described as acts of aggression by 14 out of 15 of the members of the SC in Res 573 in 1985.[209]

Unlike in the past when these actions were condemned, this time both France and the UK and the U.S vetoed the resolution condemning their actions.[210] Therefore, here lies the shift from condemnation of similar action to their tolerance and finally adoption of new rules that place "a face of legitimacy" over state practice; that is the new concept of "harboring terrorism". Attributing terrorist action to a state based on the "harboring terrorism" standard is usually associated with triggering the right to self-defense. For this reason, this responsibility of a state harboring terrorism as a wrongful act allows another state to defend itself when these terrorist acts occur on their soil.[211] In other words the UK Attorney General pointed out that "self-defense can be used against those 'who plan and perpetrate [terrorist] acts and against those who harbor [terrorists] if that is necessary to avert further such terrorist acts."[212] This opinion has been 'implicitly' affirmed by the ICJ in its judgments in *the Armed Activities* case,[213] when it considered the Congolese inaction concerning the attacks by the rebel group against Uganda as not reflecting toleration for those actions, because Congo was unable to halt these attacks.[214]

[207]Christine Gray, *supra* note 6 at 197.
[208]It is important to note that the U.S joined such condemnation but on a different basis. It based its condemnation that first, Israel actions lacks proportionality (there is right to self-defense). Second, that Lebanon has not participated in the attacks on the Israeli air craft (the attacks are not attributable to Lebanon. *Ibid* at 198.United Nations Official Document, http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/262(1968) (last visited Nov 26, 2015).
[209]United Nations Official Document, http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/573(1985) (last visited Nov 26, 2015).
[210]Nicholas Tsagourias, *supra* note 149 at 9.
[211]*Ibid.*
[212]*Ibid*.
[213]*Supra* note 132 at Para. 301.
[214]*Ibid*.

This discussion of the inaction of states leads to the case of failed states. A failed state **"**can no longer perform basic functions such as education, security, or governance, usually due to fractious violence or extreme poverty."[215] For these reasons, a failed state leaves a "power vacuum" that is easily exploited by non-state actors that can lead to the launch of attacks against other states.[216] When this occurs, attribution becomes pointless because a failed state has neither effective nor overall control over the rebels/terrorists.[217]

2. Unable or Unwilling

The concept of being unwilling or unable is a new introduced standard of attribution justifying extra territorial use of force. These incidents of states practice suggest that there is a tendency to replace the rules of state responsibility, especially the ones on attribution to the "unwilling or unable" standard.

This means that if a state cannot or is not willing to prevent terrorist attacks operating from its territory, the victim state is authorized to intervene in order to combat terrorists.[218] The problem with this new standard is that it lowers the existing standard of attribution as well as leaves a state no choice but to cooperate with the aggressor or be found unwilling.[219] Introducing this new applicable standard of unwilling or unable coincides with states' flexibility in tolerating military operations whenever they are conducted under the 'unable or unwilling' standard. At the same time, tolerance does not usually reach the level of "actively" supporting or legitimizing these military operations.

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[215]Failed States, https://www.globalpolicy.org/nations-a-states/failed-states.html (last visited Nov 27, 2015).
[216]Nicholas Tsagourias, *supra* note 149 at 14.
[217]*Supra* note 139 at Para. 301.
[218] Olivia Flasch, *supra* note 178 at 36.
[219]This was affirmed by Mary Ellen O'Connell when she stated that "[a]ttacking [non-State actors] on the territory of another state is attacking that state." Jonathan Ulrich, *supra* note 179 at 7. Mary Ellen O'Connell, *Dangerous Departures*, 107 AMERICAN JOURNAL OF INTERNATIONALLAW 380-383 (2013). Other regional organizations followed the same argument. For example, Organization of American States (OAS) note that "a violation of the Sovereignty and territorial integrity of Ecuador and of principles of international law." It emphasized that: "principle that the territory of a State is inviolable and may not be the object, even temporarily, of . . . measures of force taken by another State, directly or indirectly, on any grounds whatsoever." Jonathan Ulrich, *supra* note 170 at 7. Organization of American States [OAS] Commission, *Report of the OAS Commission that Visited Ecuador and Colombia* 10, OEA/Ser.F/II.25 RC.25/doc. 7/08 (Mar. 16, 2008).

Thus, it suggests that many states might tolerate operations under an unable or unwilling standard without positively endorsing these operations.[220] However, it may be too early to tell whether this tolerance constitutes *opinio juris* amending the existing standard through customary international law, because state practice has not reached a *sufficient* level of consistency.[221] Tracing the evolution of the rules of attribution after 9/11 as we have done here, it is clear that the legal rules have begun to lean toward "a more lenient standard of attribution."[222]

E. The War on Terror

After analyzing the developments in the right to self-defense and state responsibility, it is important to determine whether the declared War on Terror only mirrors these changes or has moved beyond it. This declared "War on Terror" is a war where only the defendants are known while terrorists can be whoever the defendants choose them to be through the "demonizing and dehumanizing of anyone declared to be a possible terrorist."[223] For example, the US response after 9/11 was to announce "a different kind of war against a different kind of enemy".[224] This means that the war has no geographical or temporal scope, according to ex-President Bush who has said that, "[o]ur war on terror begins with al Qaeda, but it does not end there".[225]This reflects a shift towards expanding the right to self-defense to an extreme where a declared War on Terror is given '*carte blanche'* to act as a state deems "necessary". Using the word "war" to describe military operations under the term War on Terror suggests a tendency to escape the actual constraints of international law. This happens through revisiting "the temporal and spatial coordinates" of the right to self-defense through loosening the framework of "collective security".[226]

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[220]Jonathan Ulrich, *supra* note 170 at 4.
[221]C. J. Tams, *supra* note *7 at* 391.
[222]*Ibid* at 384.
[223]Susan Marks, *supra* note 141 *at* 384.W. Benjamin, *supra* note 141 at P 379, S. Sontag, 'What have we done?', *The Guardian*, 24 May 2004.
[224]Christine Gray, *supra* note 6.
[225]Selected Speeches of President George W. Bush, *supra* note 121.
[226]Frederic Megret, *supra* note 7 at 361.

It serves to "distort" any of the other alternatives to terrorism, especially through a criminal justice model.[227] This shift to the 'War on Terror' seeks to avoid the veto dilemma that reflects the conflicting interests of the five permanent member of the SC.[228] This means that it happens that the contracting interests of the P5 impedes the issuance of a SC resolution through a veto power, but under the carte blanch of the War on Terror, state escape this problem through acting unilaterally. For example, it was argued that because the SC sometimes gets paralyzed by the veto, states could act unilaterally under the claim of urgency to tackle a threat to international peace and security.[229] This might create a parallel system that subordinates the SC's expected role.

In addition, it avoids the strict requirements of self-defense under customary international law which requires the occurrence of an armed attack or an imminent threat of an armed attack as well as restricts states' practice of self-defense to that of absolute necessity. This is after the heated debate against the legality of preemptive self-defense credo of the Bush doctrine.[230] In this way, this new war has moved beyond expanding the scope of the right to self-defense to further legitimizing the unilateral military acts.

This shift as was analyzed in this chapter portrays a linear development, starting with condemnation of acts, then silence or a 'muted response' sometimes combined with tolerance and finally 'positive endorsement' of the actions.

To illustrate, one example of condemnation is when the US attacked a pharmaceutical plant in Sudan and in Afghanistan in the response to the 1998 attacks on the American embassies in both Kenya and Tanzania, claiming that they were exploited by terrorists.[231] The US justified its attack by referring to the right to self-defense under article 51 of UN Charter.[232]

[227]Frederic Megret, *supra* note 7 at 361.
[228]Robert Knox, *Civilizing interventions? Race, war and international law*, 26 CAMBRIDGE REVIEW OF INTERNATIONAL AFFAIRS, 111 (2013).
[229]*Ibid*.
[230]*See*, Mary Buckley, *supra* note 1.
[231]C. J. Tams, *supra* note *7 at* 379.
[232]*Ibid.*

The U.S did not address whether there was any involvement on the part of Sudan in the attack on the American embassies. The attacks on the embassies were not attributed to Sudan in any way. This is despite the fact that the US violated Sudan's sovereignty by launching an attack on a pharmaceutical plant on Sudanese territory.[233] States' reactions to the attacks were mixed. Mostly the acts were condemned, especially the ones occurring in Sudan or tacitly approved.[234]

Further, one example of the " muted response" was in the 1990s when Iran used the same basis that is article 51 of the UN Charter to attack Iraqi territory in the fight against the Mujahedin-E Khalq Organization (MKO) that resided in Iraq. There was little evidence that the terrorist actions were attributable to Iraq.[235] Although Iraq considered these attacks as an act of aggression by Iran, a considerable number of states did not condemn them.[236] Furthermore, a few years after the 9/11 attacks, namely in 2004, Russia used extraterritorial force against Chechen rebels in Georgia. Although this action was a controversial one, there was "no principled condemnation that would have denied Russia's right to use force extraterritorially."[237]However, this muted response has been further developed to "positive endorsement" after 9/11. This is to say that many third States have "affirmatively endorsed" several operations such as the US intervention in Afghanistan (2001), the Israeli intervention in Lebanon (2006), the Ethiopian intervention in Somalia (2006), and recently the French intervention in Mali (2012).[238]

These incidents, irrespective of the debates on their legality and the different facts on grounds, reflect the fact that the majority of states' reactions today are accepted as a matter of principle, states can invoke the principle of self-defense against terrorist attacks not imputable to another state."[239]

[233]C. J. Tams, *supra* note *7 at* 379.
[234]*Ibid.*
[235]*Ibid.*
[236]*Ibid.*
[237]*Ibid.*
[238]Jonathan Ulrich, *supra* note 170 at 14.
[239]C. J. Tams, *supra* note *7 at* 380.

To conclude, the change in the legal framework for combating terrorism by the 9/11 is significant to the extent that it can be described as a new era. This era changed what were previously exceptions to defaults. This is not a positive turn as "the last thing international law needs at this stage is more exceptions to the principle that less not more war is the best way to achieve international peace and security."[240] This era is still open to ongoing evolution, especially in a world full of complicated international relations confused and governed by competing interests. That is why it would be disastrous in case "the dangers associated with non-state actors were used as a pretext to pry open the corpus of inter-state rules, without replacing these rules with anything more sensible."[241]The next chapter analyzes these changes, especially those that grown to affect collective security.

[240]Frederic Megret, *supra* note 7 at 397.
[241]*Ibid.*

IV. Collective Security and the War on Terror

The United Nations is the core actor of collective security, but lacks the characteristics of world government.[242] The effect of the declared War on Terror has extended to diminish collective security.[243] I address the literature on the effect of the War on Terror on collective security through international law mechanisms, namely SC Res 1373 of 2001.[244] Understanding this resolution through the lens of international law, on the one hand reveals that the fight against terrorism has become a "catalyst" for broader interpretation of the Security Council's functions.[245] On the other hand, in the long run it can arguably lead to a diminished role for the United Nations to play in collective security. The following sections discuss how the War on Terror has considerably influenced collective security through the legitimate mechanisms of international law.[246] First, the Security Council is no longer– in practice- the only authority determining what constitutes a threat to international peace and security. Second, the SC went beyond its mandate through legislating under SC Res 1373 of 2001 as well as became *stronger executive* through establishing the Counter Terrorism Committee (CTC).[247] Finally, there is a tendency of a deviation from the collective security created by the UN.

[242]*See*, Ramesh Thakur, *The United Nations in global governance: Rebalancing organized multilateralism for current and future challenges*, 3 HTTP:/WWW. UN. ORG/EN/GA/PRESIDET/65/INSTITUTIONS/GLOBALGOVERNANCE ACCESSED (2012),http://www.un.org/en/ga/president/65/initiatives/GlobalGovernance/Thakur_GA_Thematic_Debate_on_UN_in_GG.pdf (last visited Jan 4, 2016).
[243]It refers to the United Nations' role to "provide an institutional framework for the collective maintenance of peace and security as well as to "outlaw the unilateral use of force". Simon Chesterman, *supra* note 1.
[244]*Supra* note 108.
[245]C. J. Tams, *supra* note *7 at* 377.
[246]Utley, Rachel, *supra* note 128 at 179.
[247]Ricardo Sousa da Cunha, *The Security Council s Chapter VII action on Terrorism in Light of the United Nations normative powers*, TÉKHNE-REVISTA DE ESTUDOS POLITÉCNICOS 178 (2010).

The first time the SC used the term "terrorism" was Resolution 579 of 1985.[248] In 1989, the Security Council issued Resolution 635 on the occasion of the Lockerbie case, putting terrorism on top of the Security Council's agenda.[249]

Although SC resolutions before 9/11 had described some incidents as terrorism, they did not impose measures against terrorism on states.[250] For example, there were grave actions like the hijacking of an Air France flight to Entebbe in 1976 and the attack on Israeli athletes at Munich.[251] However, none of these incidents triggered SC action like 9/11 has.[252] Before 9/11, the sanctions remained the most recognized response of the Council to terrorism such as sanctions in the 1990s imposed against Libya, Sudan, and Afghanistan. Since 9/11, the Council has not used sanctions in response to terrorism, except for the continuation of the previously imposed ones such as sanctions against members of al Qaeda.[253] This shift can arguably be justified considering that sanctions ultimately work better against states, while their application against transnational terrorist networks seems to be less effective because the "target" is most of the time moving.[254]

[248]Ref world | Resolution 579 (1985) Adopted by the Security Council at its 2637th meeting, on 18 December 1985, REF WORLD, http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3b00f17370 (last visited Nov 29, 2015). It was in occasion of Palestinian suicide bombers who killed 22 persons at Rome and Vienna airports. The importance of this resolution is based on its condemnation of "all acts" of hostage taking and abduction. It lays general rules that frame these actions under terrorism irrespective of their motives. Ben Saul, *supra* note 4 at 217. Several incidents that recently described as terrorist acts, the Council did not describe them as terrorism before 1985. For example, the Council did not use the term terrorism to describe the Iran Hostage incident. Instead it used consular and diplomatic immunities as well as state responsibility. *See*, *supra* note 134.Ben Saul, *supra* note 4 at 217.

[249]The Security Council was encouraged to put the matter on its agenda owing to new developments that can be seen in increasing the number of attacks by non-state actors, increasing the number of casualties per incident, terrorism is becoming global, the threat of falling chemical, biological, or nuclear weapons in hands of terrorists. Hilde Haaland Kramer, Steve A. Yetiv, *The UN Security Council's Response to Terrorism: Before and after September 11, 2001*, Academy of Political Science, 412 (2007). Furthermore, mainly three incidents have urged the SC to put terrorism on top of its agenda, namely "the downing of Pan Am and UTA flights, the attempted assassination of Mubarak, and the bombings of American embassies." Boulden, Jane, and Weiss, Thomas George, *supra* note 35 at 11.

[250]Ben Saul, *supra* note 4 at 214.

[251]*Ibid* at 216.

[252]*Ibid.*

[253]Hilde Haaland, Kramer, Steve A. Yetiv, *supra* note 249 at 421.

[254]*Ibid* at 422.

A. Collective Security and Threats to International Peace and Security

A "threat to international peace and security" is a purely political question and is not a legal one.[255]A threat to peace reflects a "judgment based on factual findings and the weighing of political considerations that cannot be measured by legal criteria."[256]According to Article 39 of the UN Charter the SC "determine[s] the existence of any threat to the peace, breach of the peace, or act of aggression and [to] make recommendations, or decide what measures shall be taken . . . to maintain or restore international peace and security".[257] As a result, the SC is empowered to issue binding resolutions on member states to confront these types of threats in order to maintain international peace and security. Hans Kelsen argues that the term "threat to peace [...] allows[s] a highly subjective interpretation".[258] Nevertheless, he contends that "it is completely within the discretion of the Security Council as to what constitutes a threat to the peace".[259]

The concept of "threat to peace and Security" is evolving under the UN system.[260] The drafting history of article 39 reflects an understanding of threats to peace and security in a narrow sense, including use of force by an organized military force in the context of armed conflict.[261] However, the changing environment including the emergence of non-state actors expanded the interpretation of threats to international peace and security under article 39 of the UN Charter.[262] This was affirmed by the president of the Security Council in 1992, when he declared that "[t]he absence of war and military conflicts among States does not in itself ensure international peace and security.

[255]Ben Saul, *supra* note 4 at 51.
[256]René Värk, *Terrorism as a Threat to Peace*, 14 JURIDICA INTERNATIONAL, 218 (2009).
[257]M. Heupel, *Adapting to Transnational Terrorism: The UN Security Council's Evolving Approach to Terrorism*, 38 SECURITY DIALOGUE, 482 (2007).
[258]René Värk, *supra* note 256 at 218. *See*, H. Kelsen. *Collective Security and Collective Self-Defense under the Charter of the United Nation*, American Journal of International Law 733-737(1948).
[259]René Värk, *supra* note 256 at 218.
[260]For example, SC Resolutions 1422 and 1487 resolutions were widely criticized by UN member states for not referring to a threat to the peace and security as a prerequisite for acting under Chapter VII. These two resolutions addressed a general request to the ICC to "defer, for a twelve-month period, investigation or prosecution of any case involving current or former officials or personnel from a contributing state not a party to the Rome Statute of the ICC, over acts or omissions relating to a United Nations–established or –authorized operation". *See*, Stefan Talmon, *The Security Council as World Legislature*, 99 THE AMERICAN JOURNAL OF INTERNATIONAL LAW.175-193(2005).
[261]Ben Saul, *supra* note 4 at 51.
[262]*Ibid* at 53.

The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security."[263] For example, under specific circumstances, failure to extradite designated persons is considered a threat to international peace and security.[264] Starting from 2003, the Security Council considered "all acts" of "terrorism" irrespective of being qualified 'international' as threats to international peace and security.[265] It equalizes international and national terrorist acts as being threats to international peace and security. This tendency of the Security Council implies that "any act" falling under the notion of terrorism is a threat to international peace and security. However, there is no agreed upon definition of terrorism and even the Security Council itself has not adopted an exact definition of terrorism. This leaves one of two possible interpretations. The first, the plain reading of the adopted Security Council resolutions,[266] whenever the Council describes an act as terrorism it is a threat to international peace and security. The second uses a the broader understanding of the language of the resolutions,[267] by considering "any act" terrorism regardless of who designates it as such- whether the Security Council or states - as a threat to international peace and security. The first interpretation of the Council's practice seems more plausible rather than the second for two reasons. First, lacking an agreed upon definition of terrorism leaves relative interpretation of the notion by states open. Second, states can take advantage of the subsequent legal consequences of considering "all acts" as threats to international peace and security without Security Council resolutions.

[263]Stefan Talmon, *supra* note 260 at 180.
[264]René Värk, *supra* note 256 at 220.
[265]Ben Saul, *supra* note 4 at 47. SC Res 1516 (2003), Para, 4, Ref world | Security Council Resolution 1516 (2003) on the bomb attacks in Istanbul, Turkey, on 15 and 20 November 2003, REF WORLD, http://www.refworld.org/docid/3fdb07ec7.html (last visited Nov 29, 2015). SC Res 1530 (2004) , Para 1,SECURITY COUNCIL CONDEMNS MADRID TERRORIST BOMBINGS, URGES ALL STATES TO JOIN SEARCH FOR PERPETRATORS | Meetings Coverage and Press Releases, http://www.un.org/press/en/2004/sc8022.doc.htm (last visited Nov 29, 2015).SC Res 1526 (2004).Bureau of Public Affairs Department Of State. The Office of Website Management, UNITED NATIONS SECURITY COUNCIL RESOLUTION 1526U.S. DEPARTMENT OF STATE (2004), http://www.state.gov/j/ct/rls/other/un/66955.htm (last visited Nov 29, 2015).
[266]*Ibid.*
[267]*Ibid.*

To illustrate, if there is no agreed upon definition of terrorism, considering that all acts of terrorism are threats to international peace and security according to the SC, states can shares in a way the absolute authority of the SC of what constitute a threat to international peace and security, which implies grave legal consequences. These legal consequences can extend to the use of extraterritorial force without the Security Council's authorization, which neutralizes the role played by the SC.[268] As a result, creates a parallel system to the UN embodied in the fall of collective security favoring unilateral use of force without the SC authorization.

B. Expanding the Security Council's Competences

The dispute over expanding the Security Council's competences heavily emerged after 9/11,[269] namely after SC Res 1373of 200.This resolution as the "single most powerful response,"[270] in the fight against terrorism added a global perspective to the fight, broadened its implementation, created more blurred boundaries between national and international issues, and obligated all member states to take measures to fight terrorism including amending criminal codes in order to forestall terrorist actions in a way that copes with this resolution.[271] It is argued that the collective security system created by the UN has positively developed in an unprecedented way right after 9/11 through developing tools that were "hardly conceivable" before 9/11.[272]

[268]A recent example could be France joining the international coalition fighting in Syria after Paris attacks in 13th November 2015 without the explicit authorization from the Security Council. Mark Tran & agencies, *Syrian troops could be used to help fight Isis, France's foreign minister says*, THE GUARDIAN, November 27, 2015, http://www.theguardian.com/world/2015/nov/27/russia-will-pull-out-of-syria-coalition-if-downing-of-jet-is-repeated-says-putin (last visited Nov 29, 2015).

[269]However, the quasi-judicial competence of the SC was previously disputed before 9/11, when it has established judicial organs such as International Court for the former Yugoslavia (ICTY) and the International Court for Rwanda (ICTR). *See*, Tetsuo Sato, *The Legitimacy of Security Council Activities under Chapter VII of the UN Charter since the End of the Cold War*, UNU Press, 309-352(2001).

[270]Described by John Negroponte the U.S. permanent representative to the Security Council, Boulden, Jane, and Weiss, Thomas George, *supra* note 35 at 6.

[271]*Ibid*.

[272]Nico Krisch, *The rise and fall of collective security: Terrorism, US hegemony, and the plight of the Security Council*, TERRORISM AS A CHALLENGE FOR NATIONAL AND INTERNATIONAL LAW: SECURITY VS. LIBERTY 3 (2004).

These tools include establishing the CTC that is strong *executive machinery* targeting both states and individuals.[273] In addition to this, imposing general obligation on states implies a "legislative" character that transformed the Council into a world legislator.[274]

1. The Security Council's Administrative Role

The SC Res 1373 established the CTC in order to serve three purposes. First, it strengthens the counter-terrorism capacity of the member states, as it adds an administrative role to the Security Council, which is following up on the implementation of the resolution. Second, it offers technical assistance to states carrying out counter-terrorism mandates through acting as a "broker" for facilitating the implementation of the resolution.[275] Finally, it monitors the implementation of the resolution through calling states to submit reports displaying their fulfillment of the obligations under the resolution.[276] This administrative role has developed the Sanctions Committee established under 1999 SC Res 1267 through following up the listing system that addresses specific individuals and organizations on the ground of both SC resolutions 1269 and 1373.[277] These functions of the CTC altogether with the sanctions committee are considered as a "novelty" in the face of the traditional actions of the SC, which suggest that the Security Council is becoming a *stronger executive*.[278]

2. The Security Council as a "Legislator"

The Security Council as a legislator means creating new, general, and mandatory norms under chapter VII of the Charter.[279] Both resolutions1368 and 1373, emerge from the UN Security Council powers to issue mandatory resolutions grounded in Chapter VII of the Charter.[280]

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[273]Nico Krisch, *supra* note 272 at 3.
[274]*See*, S.Talmon, *supra* note 260.
[275]Andrea Bianchi, *Assessing the Effectiveness of the UN Security Council's Anti-terrorism Measures: The Quest for Legitimacy and Cohesion*, 17 EUROPEAN JOURNAL OF INTERNATIONAL LAW, 900 (2006).
[276] Hilde Haaland Kramer, Steve A. Yetiv, *supra* note 249 at 414.
[277]Ricardo Sousa da Cunha, *supra note 247 at* 179.
[278]*Ibid* at 178.
[279]Victor V. Ramraj, et. al, *supra* note 8 at 23.
[280]*Ibid* at 19.

The language of Security Council Res 1368[281] paved the way for obligations under Security Council Res 1373.[282] It used "threat to peace" instead of "armed attack". However, it affirms the "inherent" right of self-defense in the context of combating terrorism.[283] Two results emerged from chapter VII in response to terrorism, namely sanctions lists,[284] and legislative action.

For the legislative actions, Resolution 1373 of (2001) meets the criteria of legislation in the sense of law making.[285] According to Ramraj et. al, these criteria are: the unilateral action of the Council while legislating, the intention of creating mandatory norms under Chapter VII of the Charter, norms being general and not relating to a specific incidents and finally new norms.[286] The plain reading of Resolution 1373 and specifically the preamble shows that it adopted general rules. It refers to "such attacks" instead of "these attacks".[287] It also included three sets of general obligations that require states to refrain from providing support to terrorists.[288]

[281]SECURITY COUNCIL CONDEMNS, "IN STRONGEST TERMS", TERRORIST ATTACKS ON UNITED STATES | Meetings Coverage and Press Releases, http://www.un.org/press/en/2001/SC7143.doc.htm (last visited Nov 29, 2015).
[282] *Supra* note 108.
[283]Ben Saul, *supra* note 4 at 233.
[284]It is a mechanism that results in imposing sanctions on individuals and entities, which started before 9/11, and can be seen in SC Res 1267of 1999when imposed sanctions on entities tied to the Taliban regime. Listing has been under review for many years. For example, SC Res 1822 of 2008 has obliges states to inform listed persons of their status "if possible", to facilitate access to information as well as the delisting procedures. The most important reform was in 2009 based on SC Res 1904. This reform established the office of Ombudsperson, to deal with appeals of listed persons. It is an independent office of the Security Council that "reviews requests from individuals, groups, undertakings or entities seeking to be removed from the Al-Qaida Sanctions List of the Security Council's Al-Qaida Sanctions Committee", The Office of the Ombudsperson of the Al-Qaida Sanctions Committee | United Nations Security Council Subsidiary Organs, https://www.un.org/sc/suborg/en/ombudsperson (last visited Nov 30, 2015). *See*, Victor V. Ramraj, et. al, *supra* note 8. Security Council's resolution 1822 (2008) on Threats to international peace and security caused by terrorist acts, , http://www.unrol.org/doc.aspx?d=2955 (last visited Nov 30, 2015).
[285]*Supra* note 108. SC Res 1540 of 2004 also meets a legislation criteria, SECURITY COUNCIL DECIDES ALL STATES SHALL ACT TO PREVENT PROLIFERATION OF MASS DESTRUCTION WEAPONS | Meetings Coverage and Press Releases, http://www.un.org/press/en/2004/sc8076.doc.htm (last visited Nov 30, 2015).
[286]Victor V. Ramraj, et. al, *supra* note 8 at 23.
[287]*Ibid* at 25.
[288]For example, States shall (a)Prevent and suppress the financing of terrorist acts;(b) Criminalize the willful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carryout terrorist acts;(c) Freeze without delay funds and other financial assets or economic resources of ….(d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets …. *Supra* note 108. *See*, Ben Saul, *supra* note 4.

The binding nature of the resolution is affirmed though the establishment of the Counter Terrorism Committee (CTC).[289] The Security Council used the Committee to monitor the implementation of binding and non-binding resolutions on terrorism.[290]

The uniqueness of Security Council Res 1373 under Chapter VII of the UN Charter is that it is the first resolution to establish an "anti-terrorism agenda" that addresses all member states.[291] Literature on the implications of UN Security Council Res 1373 concerns placing obligations on member states to fulfill. However, less has been said on the competence of the Security Council to issue such a resolution that entails a legislative nature.[292] Andrea Bianchi argues that the Security Council has gone beyond its original mandate as "a peace enforcer under Chapter VI or a dispute settler under Chapter VII" through laying down legal obligations of a general character that are *quasi* legislation.[293] This argument is supported by Judge Fitzmaurice's dissenting opinion in the ICJ's Advisory Opinion on Namibia, who stated that, the Security Council's mandate: "was to keep the peace and not to change the world order."[294] In addition, Bianchi contends that the quasi-legislative nature of the Security Council has continued to be practiced by the Security Council in other resolutions such as Res 1540 of 2004 concerning the proliferation of weapons of mass destruction.[295] The existence of restrictions on the Security Council's action was emphasized in 1995 in the *Tadi*c case when the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) held that: "there exists no corporate organ formally empowered to enact laws directly binding on international legal subjects".[296]

[289]Victor V. Ramraj, et. al, *supra* note 8 at 26.
[290]*Ibid.*
[291]*Ibid* at 4.
[292]*See*, S.Talmon, *supra* note 260.
[293]Andrea Bianchi, *supra* note 275 at 886.
[294]*Ibid* at 887, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Dissenting Opinion of Judge Sir Gerald Fitzmaurice, [1971] ICJ Rep 291, at 294, Para. 115.
[295]1540 Committee, available at, http://www.un.org/en/sc/1540/ (last visited Nov 29, 2015).
[296]*Prosecutor v. Tadic*, Appeal on Jurisdiction, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Para. 43 (1995) available at http://www.icty.org/x/cases/tadic/acdec/en/51002.htm (last visited Jan 6, 2016).

At the same time, there are contending arguments that the legislative authority by the Security Council is compatible with the UN Charter because there is nothing that prohibits this authority or limits the measures taken by the Security Council to tackle threats to peace and security.[297] This opinion is based on the perception that what is not prohibited is generally allowed. It is also justified based on the fact that the powers of the Council are not exhaustive and that the obligations under Res 1373 fit within state obligations to implement mandatory resolutions.[298] This was supported by the ICTY in the *Tadic* case when it stated that the Council "has a broad discretion in deciding on the course of action and evaluating the appropriateness of the measures to be taken."[299] The Court emphasized that "[i]t is evident that the measures set out in Article 41 are merely illustrative examples which obviously do not exclude other measures. All the Article requires is that they do not involve "the use of force."[300] This means that the legislative resolutions by the Council do not contradict the authority given to it under the Charter, because it leaves the choice of the suitable means to the Security Council itself, which involves "political evaluation of highly complex and dynamic situations".[301]

There are several problems with Security Council Res1373. First, the plain reading of the Charter suggests that the Security Council has not explicitly been mandated to use a legislative authority, especially the Council as a legislator is not similar to other "institutionalized forms of decision making" at a universal level.[302] To illustrate, the difference exist in the lack of the ability to "opt out" which is found in a treaty that confirms that states cannot be bound unless they agree. This is not the case if the Security Council is legislating because the United Nation Charter does not permit member states to opt out from the application of decisions under chapter VII of the Charter.[303]

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[297]Edward Grodin, Making the World Safe for Democracy": UN Security Council Resolution 1373, the International Imposition of Counterterrorism Policies, and the 'Arenas of Power' Model, Para30, available at http://blogs.cornell.edu/policyreview/2012/03/15/making-the-world-safe-for-democracy-un-security-council-resolution-1373-the-international-imposition-of-counterterrorism-policies-and-the-arenas-of-power-model/ (20th May 2015),Article 24.2 UN Charter.
[298]Ben Saul, *supra* note 4 at 239.
[299]*Prosecutor v. Tadic*, *supra* note 296 at Para. 31.
[300]*Ibid* at Para. 35.
[301]*Ibid* at Para. 39.
[302]Victor V. Ramraj, et. al, *supra* note 8 at 28.
[303]*Ibid* .

Second, the resolution's legislative nature contradicts with the legality principle, as it creates new rules that the member states should know before they decide to join the UN Charter.[304] Third, the CTC has left a space for states to carve out their own definition of terrorism unilaterally, which allows manipulation.[305]

Forth, the unbalanced structure of the Security Council, which has permanent members with a veto power, implies that the resolution will never be 'at odds' with any of their interests.[306] That is to say, the lack of representation in the Security Council under the hegemony of the five permanent members, who are in charge of monitoring the implementation of Resolution 1373, gives these members the authority to redraw the uses of collective security based on their own interests.[307] Fifth, there is no international mechanism for reviewing the legality of Council's resolutions especially since when the Security Council legislates depends mainly on 'unstated premises' that any action taken during the fight against terrorism is inevitably "legitimate".[308]

Finally, although the resolution has obligatory nature vis-à-vis state members according to the UN Charter, the Security Council mandatory decisions are not one of the formal sources creating international law under art 38 of the ICJ Statute.[309] However, Security Council Res 1373 and the subsequent resolution 1540 of 2004 may reflect state practice *opnio juris* on the grounds that they were adopted unanimously as well as they have been accepted and supported by the General Assembly.[310]

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[304]Victor V. Ramraj, et. al, *supra* note 8 at 28.
[305]Ben Saul, *supra* note 4 at 49.
[306]Victor V. Ramraj, et. al, *supra* note 8 at 28.
[307]Luis M. Hinojosa-Martínez, A CRITICAL ASSESSMENT OF THE IMPLEMENTATION OF SECURITY COUNCIL RESOLUTION 1373, available at http://digibug.ugr.es/bitstream/10481/31650/1/SC%20Res%201373%20Chapter.pdf(19th May 2015). In addition, it also negatively affects the coherence between the UN organs, namely the General assembly and the SC. A case in point, India opposed such legislative power of the SC noting that; " the exercise of legislative function by the security council ,combined with the recourse to Chapter VII mandates , could disrupt the balance of power between the general assembly and the security council, as enshrined in the charter.", [307] *See also*, Victor V. Ramraj, et. al, *supra* note 8 at 31.
[308]Victor V. Ramraj, et. al, *supra* note 8 at 48.
[309]Ben Saul, *supra* note 4 at 214.
[310]Luis Miguel Hinojosa Martínez, *THE LEGISLATIVE ROLE OF THE SECURITY COUNCIL IN ITS FIGHT AGAINST TERRORISM: LEGAL, POLITICAL AND PRACTICAL LIMITS*, 57 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 335 (2008).

As a result, this might assert the interpretation of the Council is a world legislator. Furthermore, applying the rules included in the resolution over time could establish 'precedent' that constitutes the specificity which is important to provide effective implementation mechanism.[311]

C. Diminishing Collective Security After the War on Terror

The role of the United Nations in maintaining security is a unique one as it has established a collective security system. This system has been at stake several times since 9/11.[312] Although the language of Res 1373 favors the criminal justice model rather than the military one while fighting against terrorism, as it did not explicitly authorized military force, it recognized the inherent right to self-defense.[313] The collective security has been neutralized in the War on Terror[314] while unilateral action has prevailed.[315] The various interpretations of the recognition of the right to self-defense in Security Council resolution 1373 triggered a controversy.

On the one hand, it is argued that Res 1373 has not authorized the use of force against terrorists, because there is no explicit authorization under Chapter VII of the Charter, the recognition of the right to self-defense is included in the preamble of the resolution and not in its operative part.[316] In addition, the expression "combat by all means" exists in the context of cooperation and coordination between states involving non use of force measures. This is not the case of the formula of acting under Chapter VII which was clearly seen in the Gulf and Korean wars, where the Council explicitly referred to North Korea and the Iraq as the "target" of military use of force.[317]

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[311]Ben Saul, *supra* note 4 at 215.
[312]*See generally*, *supra* note 259.
[313]*Supra* note 108.
[314]Mary Buckley, *supra* note 1 at 177.
[315]Ben Saul, *supra* note 4 at 235. Compared to the UN reaction when Iraq invaded Kuwait in 1991, UN Security Council Resolution 678, Iraq / Kuwait, COUNCIL ON FOREIGN RELATIONS, http://www.cfr.org/international-organizations-and-alliances/un-security-council-resolution-678-iraq-kuwait/p11205 (last visited Nov 30, 2015).
[316]Carsten Stahn, *Collective Security and Self-Defense after the September 11 Attacks*, 10 TILBURG FOREIGN L. REV. 36 (2002).
[317]*Ibid* at 37.

On the other hand, it can be argued that the mere inclusion of the recognition of the right to self-defense in the resolution implies exemption from the prohibition on the use of force by the Council.[318] In addition, it also means that in critical situations, the resolution serves as a guideline for legalizing the use of force.[319] This argument is supported by a precedent established by Security Council Resolution 661 of 1990 on the occasion of Iraq's invasion of Kuwait, in which the right to self-defense is included in the preamble and not in the operative part. However, the council admitted third states' use force against Iraq in an application of collective self-defense.[320]

Although unilateral use of force has been a highly contested feature of international relations before 9/11, such as for example, in relation to the US interventions in Panama, post-9/11 has witnessed "less disputed" examples of state practice indicating that force is being used unilaterally. A case in point is the US' *Operation Enduring Freedom,*[321] which was neither an example of explicit authorization of the use of force by the Security Council, nor "an enforcement action of collective security",[322] but rather the US justified the operation on the grounds of lenient interpretation of the right to self-defense as referred to in Res 1373 to include preemptive self-defense.[323] However, the same argument was rejected by the Council as a legal foundation for invading Iraq in 2003. This distinction reflects that the Council is becoming "a forum for debating self-defense issues, even though its imprimatur was not needed for the use of force by member states".[324]

[318]Carsten Stahn , *supra* note 316 at 38.
[319]*Ibid* at 38.
[320]*Ibid* at 38.
[321]Operation Enduring Freedom Fast Facts - CNN.com, CNN, http://www.cnn.com/2013/10/28/world/operation-enduring-freedom-fast-facts/index.html (last visited Nov 30, 2015).
[322]Nico Krisch, *supra* note 272 at 17.
[323]*See generally*, Christopher Greenwood, *supra* note 150 at 7.*See*, Christian J. Tams, *supra* note *7* .See also, Was the NATO Invasion of Afghanistan Legal?, E-INTERNATIONAL RELATIONS, http://www.e-ir.info/2013/11/06/was-the-nato-invasion-of-afghanistan-legal/ (last visited Nov 30, 2015).
[324]Hilde Haaland Kramer, Steve A. Yetiv, *supra* note 249 at 414.

There are other examples of state practice in the post-9/11 period, which indicates the force is being used unilaterally when the Security Council is marginalized. In 2004 and 2007, Russian forces used force extraterritorially in Georgia unilaterally in their fight against Chechen rebels without Security Council authorization.[325] In 2008, Colombia followed the same strategy in Ecuador in order to combat terrorists.[326] Finally, the US led coalition against the Islamic State of Iraq and the Levant (ISIL) in Iraq is not backed by Security Council authorization, but is justified based on the Iraqi president's invitation.[327]According to Gray,[328] the consent of a state is not enough to legalize the use of force extraterritorially in civil wars except under the Security Council authorization or counter interventions.[329] Therefore, 9/11 has introduced a new form of legalizing intervention beyond the Security Council's authorization. These practices suggest a deviation from the collective security framework of the UN in confronting threats to international peace and security, including terrorism. This is clear through the Security Council's responses to terrorism where it deals with "travel bans but not with criminal prosecution; with the freezing of funds but not with the identification of the targets; with arms embargoes but not with the sharing of intelligence…..it is excluded from the military action taken against terrorism".[330] This leaves the UN in a position to play a 'cosmetic' role in legitimizing unilateral actions, which threatens the legitimacy of the Security Council itself.[331]

To sum up, Security Council Res 1373 has become the new version of international governance through the obligatory nature of Security Council resolutions under Chapter VII of the United Nations Charter.[332] In addition, the international system has paved a new way to "forcibly export and import law, and thus policy via international institutions."[333]

[325]Christian J. Tams, *supra* note *7 at* 380.
[326]*Ibid.*
[327]Dapo Akande, Zachary Vermeer, The Airstrikes against Islamic State in Iraq and the Alleged Prohibition on Military Assistance to Governments in Civil Wars, EJIL: TALK!, http://www.ejiltalk.org/the-airstrikes-against-islamic-state-in-iraq-and-the-alleged-prohibition-on-military-assistance-to-governments-in-civil-wars/ (last visited Nov 30, 2015).
[328]*See,* CHRISTINE GRAY, *supra* note 6.
[329]*See, supra* note 327.
[330]Nico Krisch, *supra* note 272 at 17.
[331]Ben Saul, *supra* note 4 at 235.
[332]Edward Grodin, *supra* note 297.
[333]*Ibid.*

This legislative power adds a third dimension to the power matrix that allows policies "to flow from an international level to the national level, and vice versa."[334] Some authors such as Scheppele go further than this by describing the impact of the UNSC Res 1373 as "international state of emergency,"[335] owing to the power extracted from the Resolution to the UN Security Council. It seems plausible to observe the implications of this resolution including the expansion of the extraterritorial use of force against terrorists as not only tolerable, but as inevitable.[336] This change in the collective security system reflects a deviation from the multilateral system created by the United Nations in 1945 in favor of powerful states.[337] This change preceded harbingers of changes such as the 1999 NATO bombing in Kosovo. It represents a deterioration of the system created by the UN Charter for Simon Chesterman and Michael Byers who note that:

> Global situation has begun to resemble that of previous centuries, where military force was the preferred tool of the powerful, and the less powerful sought protection in alliances of convenience rather than international institutions and international law. Most disturbingly, the system created in 1945 to preserve peace and security has been seriously compromised.[338]

[334] Edward Grodin, *supra* note 297.

[335] Scheppele, *The Migration of Anti-Constitutional Ideas*: the post-9/11 globalization of public law and the international state of emergency, Vlad F. Perju, *The Migration of Constitutional Ideas.*, 7 INT J CONSTITUTIONAL LAW 17 (2009). Edward Grodin, *supra* note 297 at Para 27.

[336] Nico Krisch, *supra* note 272 at 25.

[337] Mary Buckley, *supra* note 1 at 200.

[338] Hilary Charlesworth, *supra* note 9 at 380. *See also*, Simon Chesterman, *supra* note 1.

V. The Development of the International Law's Framework for Combating Terrorism After the Arab Spring

Case Study: Syria

Since crisis can trigger a change in the structure of international law[339] especially when security is at stake, it is insightfully important to analyze how the Arab Spring[340] generally and the Syrian case specifically has affected the structure of international law governing terrorism. The changes in the legal framework for combating terrorism as demonstrated in previous chapters are embodied in the Syrian case. It is a case where every involved actor appropriated these changes to justify its position on the ground that these changes become acceptable through state practice since 9/11. These actors are the Syrian regime, US led Coalition, and Russia. Each of the actors in the conflict has its own conceptualization of who "the terrorists" are. In this chapter, I will not analyze all of the rebel groups that fall under the definition of terrorism. I will thus use ISIL as a model that has been recognized by many states including, by all of the actors in the conflict, as a terrorist organization.[341] This will allow analyzing how the War on Terror discourse has been appropriated in the Syrian conflict.

Although the Arab Spring began with high hopes of democracy, the outcome is far from ideal.[342] The evolution of the Arab Spring's developments has not been the same for all countries; some states have reached closer towards democracy, while others have turned to civil war. From the perspective of international law, some states, like Tunisia and Egypt, have not gone through military interventions by other states. Thus, they are not- in principle- of a concern to international law.

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[339] *See*, Hilary Charlesworth, *supra* note 9. There are many events that affected the rules of international law and the global governance at the same time, in 1941 the Japanese bombings of Pearl Harbor, the crisis of the Cuban missile, the NATO intervention in Kosovo in 1999, and the 9/11 attacks. *See also*, Mary Buckley, *supra* note 1 at 1.

[340] *See*, The Arab Spring at One, FOREIGN AFFAIRS, https://www.foreignaffairs.com/articles/syria/2012-01-24/arab-spring-one (last visited Dec 1, 2015).

[341] *See*, Al-Qaeda in Syria: A Closer Look at ISIS (Part I), http://www.washingtoninstitute.org/policy-analysis/view/al-qaeda-in-syria-a-closer-look-at-isis-part-i (last visited Dec 4, 2015). There is a debate whether ISIS is a state according to international law. Although ISIS enjoys some of the characteristics of a state such as governmental authority, population, it is not a state yet. There is a continuous fighting against ISIS either by international and regional forces, ISIS has not acquired a specific and constant territory yet, which exclude one of the core elements of the statehood. In addition, ISIS acquired the territory it controls in unlawful way. Finally, more likely states will not be willing to enter into relations with it (recognition). Olivia Flasch, *supra* note 178 at 16.

[342] *See*, Has it failed?, THE ECONOMIST, 2013, http://www.economist.com/news/leaders/21581734-despite-chaos-blood-and-democratic-setbacks-long-process-do-not-give-up (last visited Dec 3, 2015).*See also*, After the Arab Spring: The Uphill Struggle for Democracy | Freedom House, https://freedomhouse.org/report/algeria/overview-essay (last visited Dec 3, 2015).

On the other hand, states like Yemen, Libya, Iraq, and Syria are engulfed in the turmoil of civil wars that have triggered in a way military intervention. This is to say, "[w]hat began as another Arab Spring uprising against an autocratic ruler has mushroomed into a brutal proxy war that has drawn in regional and world powers."[343] These four conflicts raise many legal questions, such as the legality of the NATO intervention in Libya,[344] the legality of operation "Decisive Storm" in Yemen in a challenge to the "negative equality" doctrine,[345] the extraterritorial use of force in Iraq based on invitation by the government,[346] and the extraterritorial use of force in Syria with or without state consent, in the absence of Security Council authorization. The ongoing turmoil in these four countries has paved the way for the emergence of terrorist groups which take advantage of the power vacuum. In addition, "Western states" War on Terror has extended to those countries by taking advantage of this turmoil. Their intervening in other states is justified on different legal basis such as state invitation, fighting terrorism, or humanitarian intervention. The significance of these cases is that they have 'skewed' the 'normative understanding'[347] of some core international law principles such as the prohibition of the use of force and the negative equality doctrine.

Building on the evolution of the legal framework for combating terrorism discussed in the previous chapters, the Syrian conflict is instructive, in this regard.[348] The uniqueness of the Syrian case stems from the exploitation of the War on Terror either at the national level by the Syrian regime and at the international level by states intervening in Syrian territory particularly, the international US led Coalition and Russia. However, each one of these actors justifies its resort to the War on Terror on a different legal basis.

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[343]Syria: The story of the conflict, BBC NEWS, http://www.bbc.com/news/world-middle-east-26116868 (last visited Dec 4, 2015).
[344]*See,* Assessing NATO's involvement in Libya - United Nations University, http://unu.edu/publications/articles/assessing-nato-s-involvement-in-libya.html (last visited Dec 1, 2015). *See also*, Geir Ulfstein, Hege Fosund Christiansen, *THE LEGALITY OF THE NATO BOMBING IN LIBYA*, 62 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 159–171 (2013). See also, Robert Booth, *Libya: Coalition bombing may be in breach of UN resolution's legal limits*, THE GUARDIAN, March 28, 2011, http://www.theguardian.com/world/2011/mar/28/libya-bombing-un-resolution-law (last visited Dec 1, 2015).
[345]*See,* Sara Hassan, *IS THE PRINCIPLE OF NEGATIVE EQUALITY IN CIVIL WARS STILL VALID? AN ANALYSIS OF "DECISIVE STORM" UNDER THE LAW OF ARMED CONFLICT*, LAW OF ARMED CONFLICT AND THE USE OF FORCE BLOG, https://law5211.wordpress.com/2015/05/08/is-the-principle-of-negative-eequality-in-civil-wars-still-valid-an-analysis-of-decisive-storm-under-the-law-of-armed-conflict/ (last visited Dec 1, 2015).
[346]*See,* Dapo Akande, Zachary Vermeer, *supra* note 327.
[347]Alia Makady, *ON RECOGNITION: HOW THE ARAB SPRING SKEWED A NORMATIVE PRACTICE*, LAW OF ARMED CONFLICT AND THE USE OF FORCE BLOG, https://law5211.wordpress.com/2015/05/14/on-recognition-how-the-arab-spring-skewed-a-normative-practice/ (last visited Dec 1, 2015).
[348] Kimberley N Trapp, *Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors*, International and Comparative Law Quarterly, 2 (2007).

This variation in legal argument justifies analyzing the Syrian case to test the legality of this reasoning, based on the change of the rules on the use of force, state responsibility, and collective security. I argue in this case study that the War on Terror discourse has been "appropriated" to the Syrian conflict. Fighting terrorism is a shared base, which all of the recent actors in the conflict–in spite of their differences– used to justify the legality of their actions. The following sections analyze the Syrian case based on the major actors involved, which are the Syrian regime, the international coalition, and Russia, followed by an analysis of the Security Council's position regarding the Syrian Conflict. It begins with a brief overview of the conflict, followed by analyzing the legal position of the major actors involved as well as the role played by the Security Council in the conflict.

A. Background and Conflict Classification

At the outset, it is important to begin with a brief overview of the Syrian conflict. The Syrian revolution started like that in Arab Spring states with pro-democracy demonstrations in March 2011. Eventually, protesters heightened their demands by calling for President Assad's resignation following violent treatment by the police forces.[349] The opposition started to take up arms either in order to defend itself, or to expel regime forces from their local area.[350] The ethnic divisions later pushed the Syrian conflict beyond a "battle" between supporters and opponents of President Al Assad, into a civil war fueled by different regional and international agendas.[351] The emergence of jihadist groups such as El Nusra Front (*Jabhat El Nusra*) and ISIL has complicated the scene. In 2014, the US-led coalition began strikes in Syria, targeting terrorist groups. In 2015, Russia also began airstrikes in Syria on invitation from the Syrian regime. France joined the US-led coalition in Syria by the end of 2015 after the Paris attacks.[352]

[349]The Deputy High Commissioner of the Human Rights Council criticized the unjustifiable level of force being used by government forces, including: [T]he widespread use of live fire against protestors; the arrest, detention and disappearance of demonstrators, human rights defenders, and journalists; the torture and ill-treatment of detainees; the sharp repression of press freedoms and other means of communication; and attacks against medical personnel, facilities and patients.", Special session of the Human Rights Council on 'The situation of human rights in the Syrian Arab Republic', 29 April 2011. Louise Arimatsu, Mohbuba Choudhury, *The Legal Classification of the Armed Conflicts in Syria, Yemen and Libya*, Chatham House,7, (2014).
[350]Syria: The story of the conflict, *supra* note 343.
[351]*Ibid.*
[352]Mark Tran & agencies, *supra* note 268.

Qualifying the conflict in Syria depends on the level of external state involvement in the conflict.[353] First, I will briefly tackle the classification of the conflict in Syria without outlining the applicable laws to decide whether the negative equality doctrine is applicable. Before the emergence of ISIL in Syria, the conflict between the Syrian regime and the opposition –noting its scale and intensity - was clearly a civil war.[354] The dilemma emerged after the intervention of ISIL; whose extensive control in the Syrian territory creates an international dimension to the conflict.[355] Furthermore, both opposition groups and the regime receive either political or material support from other states.[356] As a result, this qualifies the conflict initially as international armed conflict(IAC).To illustrate, the Syrian regime has been sustained mainly from weapons from Russia and forces deployed by Iran through Hezbollah.[357] On the other hand, other states have sustained the opposition through providing army supplies or trainings.[358] For example, the US has offered training to "moderate" rebels. Moreover, after September2014, when the US-led coalition extended its operations to Syria the conflict turned into an international armed conflict (IAC).[359] Therefore, the fight between the Syrian regime and the rebels is still a civil war, while the fight against ISIL is an international war, especially after the intervention of the US led coalition.[360] In short, Syria witnesses two types of conflicts: international and non-international, depending on the involved actors. In other words, "[w]hat started as a popular uprising against the Syrian government four years ago has become a proto-world war with nearly a dozen countries embroiled in two overlapping conflicts."[361] In the following sections, I will analyze the legal justifications invoked by different actors involved in the conflict; the Syrian regime, the US-led coalition, Russia,[362] and the Security Council respectively.

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[353]Louise Arimatsu, Mohbuba Choudhury, *supra* note 349 at 15.
[354]ISIS, Syria, the Rebels and the US-Led Coalition: What Governs Who? | Duck of Minerva, , http://duckofminerva.com/2014/09/isis-syria-the-rebels-and-the-us-led-coalition-what-governs-who.html (last visited Dec 8, 2015).
[355]*Ibid.*
[356]Marc Weller,Striking ISIL: Aspects of the Law on the Use of Force | ASIL,https://www.asil.org/insights/volume/19/issue/5/striking-isil-aspects-law-use-force#_edn5 (last visited Dec 4, 2015).
[357]*Ibid.*
[358]*Ibid.*
[359]Louise Arimatsu, Mohbuba Choudhury, *supra* note 349 at 15.
[360] *Supra* note 365.
[361]Sergio Peçanha Sarah Almukhtar, K. k Rebecca Lai, *Untangling the Overlapping Conflicts in the Syrian War*, THE NEW YORK TIMES, October 18, 2015, http://www.nytimes.com/interactive/2015/10/16/world/middleeast/untangling-the-overlapping-conflicts-in-the-syrian-war.html (last visited Dec 4, 2015).
[362]The Syrian conflict has put the United States and Russia as enemies concerning supporting the Syrian regime, while they are 'nominal allies in the other' which is the fight against ISIS. *Ibid.*

B. The Syrian Regime

During the sessions of the Security Council in 2002 (in the aftermath of 9/11), when Syria was a non-permanent member of the Council[363] it was in favor of adopting an international definition of terrorism. It argued that lacking a definition could allow for human rights violations and "selective accusations of terrorism".[364] Syria was determined to keep itself away from the "enemy listing" through cooperating with the US against Al Qaeda, the Taliban, and other terrorist organizations in the global War on Terror that became likely polarized with an "either you are with us or you are the enemies" mentality.[365] This became especially true after the invasion of Iraq and the emergence of the Bush doctrine.[366]

Syria followed a criminal justice model by recognizing terrorism as a separate crime under the Syrian Penal Code.[367] Although the definition of terrorism under the Syrian penal code meets the criteria of SC Res 1373,[368] according to the CTC report,[369] it imposes "severe penalties for all acts relating to terrorism."[370] This was short lived however. After the eruption of the Syrian revolution and especially after June 2012 when President Assad acknowledged Syria's state of war,[371] Syria witnessed changes to its anti-terrorism polices, and moved towards a military model. This shift was officially declared by the Syrian government in the 2014 UNSC Verbatim Record: "[w]e are combating the terrorist threat posed by the Islamic State in Iraq and the Levant… as well as other terrorist groups".[372] (emphasis added)

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[363] UNSC, 4512th and 4513th meetings, PR SC/7361, (2002).Ben Saul, *supra* note 4 at 49.
[364] *Ibid.*
[365] "Syria was instrumental in returning a sought-after terrorist planner to US custody. Since the end of the war in Iraq, Syria has made efforts to tighten its borders with Iraq to limit the movement of anti-Coalition foreign fighters into Iraq, a move that has not been completely successful." Bureau of Public Affairs Department Of State, Report: *Patterns of Global Terrorism*, 93, 2003, available at http://www.state.gov/j/ct/rls/crt/2003/c12153.htm (last visited Jan 6, 2016).
[366] Victor V. Ramraj, et. al, *supra* note 8 at 638.
[367] Art (304)of the Syrian Penal Code defines terrorism as : Terrorist acts means all acts intended to create a state of fear which are committed by means such as explosives, military weapons, inflammable materials, poisonous or burning products or epidemic or microbial agents likely to cause public danger. Terrorism Legislation Database, https://www.unodc.org/tldb/showDocument.do?documentUid=1480&node=docs&cmd=add&country=SYR (last visited Dec 4, 2015).
[368] Victor V. Ramraj, et. al, *supra* note 8 at 641.
[369] Second report of Syria to the CTC: UN Doc.s/2002/1046, 3 (2002), Victor V. Ramraj, *supra* note 8 at 640.
[370] *Ibid.*
[371] Louise Arimatsu, Mohbuba Choudhury, *supra* note 349 at 12.'Syria in state of war', says Bashar Al Assad', BBC News, 27 June 2012, http://www.bbc.co.uk/news/world-middle-east-18598533.
[372] Olivia Flasch, *supra* note 178 at 18.

However, the Syrian regime manipulated the War on Terror by expanding the status of 'other terrorist groups' to include all the opposition groups.[373] The vague language of the War on Terror that Syria has rejected since 9/11 attacks is now being appropriated by the Syrian regime to suit its interests. It includes violent repression of the opposition, irrespective of its affiliation to terrorist groups. This affects civilians and causes collateral damage.

Revisiting the problem of defining who a terrorist is re-raises the question of how to qualify the rebel groups fighting in Syria. Are they all terrorists? Or only some of them? If yes, who are the terrorist then? Who decides?

The armed opposition in Syria is composed of more than 1,000 armed groups, commanding more than 100,000 fighters.[374] These groups vary in their size and scale of operations.[375] The major ones include the Supreme Military Council of the Free Syrian Army, the Islamic Front, Syrian Islamic Liberation Front, Al Nusra Front, and the Islamic State of Iraq and the Levant (ISIL).[376]According to the Syrian regime, all rebels fighting on ground in Syria can be assimilated to ISIL and other 'undefined' terrorist groups.[377] This leaves discretion to the state to carve its own secret list of terrorists with no censorship over this authority.

On the other hand, the United Nations and the U.S consider both ISIL and El Nusra Front as terrorist groups,[378] whereas they consider the other groups such as the Syrian Opposition Coalition to be the legitimate opposition to the Syrian regime.[379]

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[373]This was affirmed in Res 66/253 adopted by the GA that condemned "the continued widespread and systematic violations of human rights and fundamental freedoms by the Syrian authorities, such as the use of force against civilians, arbitrary executions, the killing and persecution of protestors, human rights defenders and journalists, arbitrary detention, enforced disappearances, interference with access to medical treatment, torture, sexual violence, and ill-treatment, including against children" Louise Arimatsu, Mohbuba Choudhury, *supra* note 349 at 8. A/RES/66/253, 21 February 2012, Para. 2. In addition, Amnesty international reported many violations by the Syrian regime varying from forced disappearance, indiscriminate raids on civilians, and arbitrary detentions. Amnesty International, *Syria: Government bombs rain on civilians*, https://www.amnesty.org/en/documents/mde24/009/2013/en/ (last visited Dec 4, 2015).

[374]Guide to the Syrian rebels, BBC NEWS, http://www.bbc.com/news/world-middle-east-24403003 (last visited Dec 4, 2015).

[375]*Ibid.*

[376]Harakat Ahrar al-Sham al-Islamiyya -Martyrs of Syria Brigades-Northern Storm Brigade-Ahrar Souriya Brigade-Jaysh al-Islam-Suqour al-Sham-Liwa al-Tawhid-Liwa al-Haqq KataibAnsar al-Sham Kurdish Islamic Front-Ahfad al-Rasoul Brigades-Asalawa al-Tanmiya Front-Durou al-Thawra –CommissionTajammu- Ansar al-Islam-Yarmouk Martyrs' Brigade National Unity-Jaysh al-Muhajirinwa al-Ansar Brigades- Popular Protection Units (YPG), *Ibid.*

[377]Olivia Flasch, *supra* note 178 at 18.

[378]*See*, Jabhat al-Nusra, Mapping Militant Organizations, https://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/493 (last visited Dec 4, 2015). SU.S. State Department Foreign Terrorist Organizations: considered it a terrorist group since December 11, 2012 to present, while the UN considered it since May14, 2014 to present. *See also*, Ahmed S. Hashim, *The Islamic State: From al-Qaeda Affiliate to Caliphate*, 21 MIDDLE EAST POLICY 69–83 (2014). The US Department of State Terrorist Organizations enlisted it as a terrorist group since December 2004 to present. "Individuals and Entities Designated by the State Department Under E.O. 13224: Bureau of Counterterrorism." The US Department of State. June 17, 2014, retrieved

C. The US's Involvement in Syria

The US involvement in Syria can be seen from two dimensions; an indirect involvement through arming the *moderate rebels* as well as a direct one through the US-led Coalition.

1. Indirect Involvement Through Arming the 'Moderate Rebels'

The lack of a definition for who the terrorists are in Syria raises another problem related to the US arming of 'moderate rebels'. In September 2014, the US Congress approved the training and arming of about 5, 000 'moderate Syrian rebels' to fight ISIL[380] and to promote "the conditions for a negotiated settlement to end the conflict in Syria."[381] However, the US has not given many details about who the 'moderate' Syrian opposition's members are. The criteria adopted to distinguish between 'moderates' and 'extremists' or the types of the weaponry they receive, and through which channels, and what the guarantees are for monitoring the disposition of equipment.[382] According to the US National Security Council spokeswoman Bernadette Meehan the US does not plan to give much information about the process of the rebels armament:"[t]he United States is committed to building the capacity of the moderate opposition….we are not going to detail every single type of our assistance."[383] In October 2015, the U.S conducted a strategic change in the program by supplying the leaders of existing forces with weapons and military supplies instead of equipping and training "new Syrian rebels".[384]

June 23, 2014 from http://www.state.gov/j/ct/rls/other/des/143210.htm. The UNSC Al Qaeda Sanctions List added it since October 18, 2004 to present. Al-Qaida Sanctions Committee. "The List established and maintained by the Al-Qaida Sanctions Committee with respect to individuals, groups, undertakings and other entities associated with Al-Qaida." The United Nations. June 2, 2014, retrieved June 25, 2014 from http://www.un.org/sc/committees/1267/pdf/AQList.pdf Department of Public Information. "Security Council Al-Qaida Sanctions Committee Amends Entry of One Entity on its Sanctions List." The United Nations. May 30, 2013, retrieved June 25, 2014 from http://www.un.org/News/Press/docs/2013/sc11019.doc.htm.

[379]Obama recognizes Syrian opposition coalition - CNN.com, CNN, http://www.cnn.com/2012/12/11/world/us-syria-opposition/index.html (last visited Jan 6, 2016).

[380]U.S. Congress approves arming Syrian rebels, funding government, REUTERS, September 19, 2014, http://www.reuters.com/article/us-iraq-crisis-congress-vote-idUSKBN0HD2P820140919 (last visited Dec 4, 2015). This program comes as a further development after a nonlethal assistance program to opposition groups in Syria. *See*, Christopher M. Blanchard, Coordinator, Carla E. Humud, Mary Beth D. Nikitin, *Armed Conflict in Syria: Overview and U.S. Response*, Congressional Research Service, 22 (2015).

[381]*Ibid* at 23.

[382]*Ibid* at 23.

[383]In 2015, "a range of opposition groups largely affiliated with the Free Syrian Army movement has published videos that purport to depict their personnel firing U.S.-origin anti-tank weapons." *Ibid* at 23.Tom Bowman and Alice Fordham, "CIA Is Quietly Ramping Up Aid To Syrian Rebels, Sources Say," National Public Radio (Online), (2014).

[384]U.S. suspending program to train Syrian rebels – CNNPolitics.com, CNN, http://www.cnn.com/2015/10/09/politics/us-syria-rebels-arms-program-suspended/index.html (last visited Dec 4, 2015).

This shift came as a result of the failure of the old strategy that resulted in the takeover of the U.S weaponry supplied to the trained groups by Jabhat El Nusra and other terrorist groups.[385] This lead to further expectation of the failure of this new strategy by Lindsey Graham- the GOP presidential candidate, when he noted that, "[n]o one in Syria is going to just fight ISIL, they want to take Assad on, who has massacred their family, so it was doomed to fail with these restrictions."[386] The question arises as to, who bears the responsibility for this failure in the US's strategy.

The legality of arming the moderate rebels is related to the US involvement in Syria. There is very little literature on this topic. However, a potential argument could be that the US arming those rebels falls under the 'necessary measures' for fighting ISIL justified by the inability of the Syrian regime to combat them. This argument is supported by the unwilling or unable standard. Another argument is because Syria has been designated by the US as "a safe heaven" for terrorist groups, the US armament of the rebels does not violate the sovereignty of Syria.

In contrast, another valid argument is that the US arming of the rebels violates international law due its violation of the prohibition of the use of force and non-interference in the internal affairs of other sovereign states (the Nicaragua test),[387] by violating the sovereignty of Syrian territory. However, in order to establish US responsibility for the actions of the rebels, it must be proved that the US has exercised effective control over them as required by the ICJ in the Nicaragua case.[388]

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[385] Christopher M. Blanchard, supra note 380 at 22.
[386] *Ibid.*
[387] " …that the United States of America, by training, arming, equipping, financing and supplying the *contra* forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to intervene in the affairs of another State". *Nicaragua v. United States of America*, *supra* note 164 at 146.
[388] *Ibid*. "For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed."

2. Direct Involvement Through the US-led Coalition[389]

This section tackles the possible justifications for the US direct involvement in Syria started that started September 2014.[390] These potential justifications can be the use of force in Syria that are: collective self-defense on behalf of Iraq, the extraterritorial use of force against terrorists, humanitarian intervention, and the inability and unwillingness of the Syrian government to act against terrorists.

(i) Collective Self-Defense on Behalf of Iraq

After ISIL attacked Iraq, the Iraqi government requested the assistance of the US to fight against this terrorist group.[391] The US, as well as other states such as United Arab Emirates, Saudi Arabia, Qatar, and Jordan expressed its willingness to assist Iraq through establishing a coalition to fight ISIL in Iraq. It was justified as collective self-defense on behalf of the Iraqi government.[392]However, the US-led coalition has extended its airstrikes to Syria when ISIL has conducted some operations from within Syrian territory. This involvement includes targeting ISIL through the US-led coalition and targeting the Khorasan terrorist group.[393] According to Marc Weller if the Iraqi government has the right to self-defense against ISIL operating in Syria, the government also "has the legal right to ask its allies for collective self-defense to support it".[394] This can be true if the UN Security Council explicitly authorized the use of force under a collective self-defense measure similarly to what it did during Iraq's invasion of Kuwait. However, this is not the case here, as the legality of the extraterritorial use of force against Non-State Actors under self-defense is still a debatable issue.[395]

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[389]It is a multinational coalition against ISIL in Iraq and Syria since September 2014. It is led by the US militants. It constitutes of about 60 countries such as the UK and France. Who's doing what in US-led coalition against Islamic State?, BBC NEWS, http://www.bbc.com/news/world-middle-east-35102555 (last visited Jan 6, 2016).
[390]Monica Hakimi, *Defensive Force against Non-State Actors: The State of Play*, 2 (2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2550782 (last visited Dec 6, 2015).
[391]Olivia Flasch, *supra* note 178 at 3.
[392]*Ibid* at 4.
[393]The group was described by the U.S as "a small but extremely dangerous unit of seasonedal Qaeda veterans who are plotting attacks against the United States and other Western targets." Monica Hakimi, *supra* note 390 at 30.
[394]Russia Says Its Airstrikes In Syria Are Perfectly Legal. Are They?,THE HUFFINGTON POST, http://www.huffingtonpost.com/entry/russia-airstrikes-syria-international-law_560d6448e4b0dd85030b0c08 (last visited Dec 8, 2015).
[395]*See generally*, Kimberley N Trapp, *supra* note 348. *See also*, Olivia Flasch, *supra* note 178.

According to this understanding, the US-led coalition's airstrikes are lawful as long as they are confined to Iraq and not extended to Syria. According to the US, more than forty states have provided assistance in the fight against ISIL both in Iraq and Syria.[396] However, this participation varies from the use of force by states such as the United Kingdom and France which, at the outset of the coalition's operations in 2014 was confined to Iraq, and then later extended to Syria,[397] to other states such as Jordan, UAE, and KSA which extended the use of force to Syria since launching first airstrikes against ISIL.[398]

Although France was the first to join the US-led coalition in Iraq as well as to "provid[e] logistical support to the anti-Assad Syrian rebels it considers moderate", it had not extended its airstrikes to Syria, favoring pushing for diplomatic endeavors, until the occurrence of Paris attacks in November 2015.[399] The French president's office stated that:"[w]e will strike whenever our national security is at stake."[400] It emphasized that airstrikes were justified on the ground of on "intelligence gathered from air surveillance operations conducted over Syria during the past two weeks".[401] These statements reflect the fact that France justifies its participation in the US-led airstrikes in Syria based on the right to self-defense. Moreover, the French Prime Minister Manuel Valls referred to the humanitarian intervention' justification as a subordinate reason for targeting ISIL in Syria. He noted that the airstrikes comes in response to the refugee crisis that includes thousands of civilians who have been derivn out of Syria: "[w]e're not going to receive 4 to 5 million Syrians, so the problem has to be dealt with at the source".[402] The significance of this change in France's strategy comes in response to a crisis that is less in intensity and scale than other terrorist incidents; this crisis introduced the extension as inevitable and legitimate (self-defense).

[396]Monica Hakimi, *supra* note 390 at 22.
[397]*See*, Britain joins Syria air war; Putin vows more sanctions on Turkey | Reuters, http://www.reuters.com/article/us-mideast-crisis-syria-britain-idUSKBN0TL00M20151204 (last visited Dec 8, 2015).
[398]Monica Hakimi, *supra* note 390 at 22.
[399]Ian Black, *France more active than rest of the west in tackling Syria*, THE GUARDIAN, November 14, 2015, http://www.theguardian.com/world/2015/nov/14/france-active-policy-syria-assad-isis-paris-attacks-air-strikes (last visited Jan 7, 2016).*See*, Ben Brumfield and Margot Haddad, France launches first airstrikes against ISIS in Syria - CNN.com, CNN, http://www.cnn.com/2015/09/27/middleeast/syria-france-isis-bombing/index.html (last visited Jan 6, 2016).
[400]Ben Brumfield and Margot Haddad, *supra* note 399.
[401]*Ibid.*
[402]*Ibid.*

This extension has been met with no condemnation from states, as it is a result of accumulated changes in the legal framework for combating terrorism discussed in previous chapters that facilitates normalizing such action as well as fostering these changes.

(ii) Extraterritorial Use of Force Against Terrorists

The extraterritorial use of force against terrorists by the US without the consent of the territorial state and not condemned started earlier than the Syrian case.[403] For example, the extraterritorial operation in Yemen in 2002 targeting al Qaida elements was not met with condemnation.[404] When the US-led coalition started its operations in Syria, it revived the scholarly debate about the legality of using force against non- state actors in other states.[405]

When the operations in Syria began, this area of law was still unsettled and 'fairly open' to interpretation.[406] For this reason, states "could plausibly invoke or apply any of these positions in the Syrian case."[407]Some states, such as China and India, tolerated the operation despite their previous condemnation of similar operations based on their appreciation of the international fight against terrorism supported by the international community. This is to say, "[m]ost States tolerate operations that they are not yet willing to validate with legal language."[408]

In contrast, other states such as Russia and Iran condemned the operations based on the 'absolute' prohibition of using force against non-state actors.[409] Some states went further, with the Argentinean President Cristina Fernandez de Kirschner noting that the ineffectiveness of the UN's response allows military interventions: "if the UN General Assembly is actually allowed to serve its mandate, despite the lack of observance by some nations,…we could actually have international law and order built on dialogue and peace instead of military intervention."[410]

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[403]Andrew Clapham, *supra* note 136 at 582.
[404] *Ibid*.
[405] *See*, C. J. Tams, *supra* note *7 at* 373, *See also*, *supra* note 7,Christopher Greenwood, *supra* note 10 at 505.
[406]Monica Hakimi, *supra* note 390 at 29.
[407]*Ibid*.
[408]*Ibid* at 22.
[409]Although this claim is becoming less acceptable but it is not yet dead. *Ibid* at 24.
[410]Whitney Eulich, *No 'Devil' at UN Summit, but Latin American Leaders have Lots to Say*, CHRISTIAN SCIENCE MONITOR (Sept. 25, 2014), http://www.csmonitor .com/World/Americas/Latin-America-Monitor/2014/0925/No-devil-at-UN-summit-but-Latin-American-leaders-have-lots-to-say-video; *cf*. Julia Leite, Raymond Colitt, *Bra-zil'sRousseff Tells UN that Force No Solution in Middle East*, BLOOMBERG NEWS (Sept. 24, 2014), http://www.bloomberg.com/news/2014-09-24/brazil-s-rousseff-tells-un-that-forc e-no-solution-in-middle-east.html (reporting on Brazilian President Rousseff's statement that the situation in Syria cannot be resolved with force). Monica Hakimi, *supra* note 390 at 25.

Furthermore, the UN Special Envoy for Syria stated that the U.S.-led coalition's operations in Syria are based on SC Res 2170.[411] According to the language of SC Res 2170, member states were to "suppress the flow of foreign fighters, financing and other support to Islamist extremist groups in Iraq and Syria…" However, it did not explicitly authorize the use of force.

The airstrikes targeting the Khorasan groups were justified based on anticipatory self-defense. According to a Pentagon official, the airstrikes "were undertaken to disrupt imminent attack plotting against the United States and western targets".[412] He emphasized that according to the intelligence reports, the group "was in the final stages of plans to execute major attacks."[413] For this reason, the US launched its airstrikes targeting the Khorasan groups.

The anticipatory self-defense argument, as based on the Caroline incident, can only be lawful when an attack is imminent.[414] This imminence is understood as "instant and overwhelming, and leaving no choice of means and no moment for deliberation."[415] In addition, most mainstream scholars argue that a state cannot rely on the right to self-defense against non-state actors in another state unless there is proof of the exercising of 'effective control' by the host state over those non- state actors.[416]

However, many scholars argue that these rules on attribution were relaxed after 9/11, as was discussed in chapter two.[417] However, since the U.S has described Syria as a 'safe heaven' for terrorists, it tends to use a new standard which is 'harboring terrorism' to legalize its operations over the Syrian territory. The US has asserted that "[i]n the fight against ISIL, [it] cannot rely on an Assad [*sic*] regime that terrorizes its own people".[418]

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[411]Security Council Adopts Resolution 2170 (2014) Condemning Gross, Widespread Abuse of Human Rights by Extremist Groups in Iraq, Syria | Meetings Coverage and Press Releases, http://www.un.org/press/en/2014/sc11520.doc.htm (last visited Dec 6, 2015).Monica Hakimi, *supra* note 390 at 23.

[412] Lieutenant General William Mayville, Director of Operations J3, & Rear Admiral John Kirby, Press Secretary, Department of Defense Press Briefing in the Pentagon Brief-ing Room (Sept. 23, 2014), *transcript available at* http://www.defense.gov/Transcripts/ Transcript.aspx?TranscriptID=5505 (emphasis added). Monica Hakimi, *supra* note 390 at 29.

[413] *Ibid.*

[414]Christopher Greenwood, *supra* note 150 at 12.

[415]Edward Gordon, *supra* note 185 at 271, 227, 228.

[416]Nicholas Tsagourias, *supra* note 149 at 8.

[417]*See generally*, *supra* note 150. *See*, Christian J. Tams, *supra* note *7*. *See also*, CHRISTINE GRAY, *supra* note 6.

[418] *See* eg, Barack H Obama, 'Address to the Nation on United States Strategy to Combat the Islamic State of Iraq and the Levant Terrorist Organization (ISIL)', Daily Comp Pres Docs, 2014 DCPD No 00654, "…ISIL is certainly not a state. It was formerly Al Qaida's affiliate in Iraq and has taken advantage of sectarian strife and Syria's civil war to gain territory on both sides of the Iraq-Syrian border. It is recognized by no government, nor by the people does it subjugate. ISIL is a terrorist organization, pure and simple." Olivia Flasch, *supra* note 178 at 24.

(iii) Humanitarian Intervention

Another argument could be humanitarian intervention. It is argued that because of the Security Council's failure to fulfill its role in Syria by taking action to save people from the oppression of their governments due to the Security Council veto, states unilaterally replace the role that should be played by the Security Council. This argument was used to justify the US led coalition in Syria because of the repression and human tragedy perpetrated in Syria by the regime.[419] This raises the dilemma of favoring *moral imperative* over legality.[420] This dilemma has been further developed under a new form that is unwilling or unable standard. It was argued if the Syrian regime is unable to suppress ISIL and protect its population, "international action should be undertaken on behalf of that population, rather than its abusive government."[421] In addition, the unwillingness of the Syrian regime to suppress terrorists is debated based on "its passive toleration of the establishment of ISIL on its territory for many months, failing in its responsibility to protect."[422]

(iv) The Syrian Government is Unable and Unwilling to Act Against Terrorists

The US argues that the inability and the unwillingness of the Syrian regime to suppress terrorists legitimize the US led coalition's intervention in Syria. According to the US report to the Security Council, it argues that that self-defense is triggered where the "government of the state where the threat is located is unwilling or unable to prevent the use of its territory for such attacks".[423] This standard can be viewed as an indirect link between states and the acts of non-State actors in order to establish attribution ignoring the "effective control" standard as a pre-requisite for State involvement.[424]

[419]For example, the displacement of population, the arbitrary executions and detentions as well as the crimes committed by ISIS such as widespread killings. *Supra* note 405.
[420]*See*, Hilary Charlesworth, *supra* note 9.
[421]*Supra* note 394.
[422]Marc Weller, *supra* note 356.
[423]*Ibid.*
[424] Olivia Flasch, *supra* note 178 at 31.

In order to analyze Syria's position, it can be argued that the Syrian case is more compatible with this perception that assumes a lower standard of attribution to the state. According to the US arguments, Syria has lost control of many parts of the country and is unable to suppress terrorists. For this reason, it has been contested that it should be up to the victim state (Iraq) to decide on the level of unwillingness or the inability of the state from which the attacks are launched (Syria).[425] However, this also leaves the potential for the victim state to manipulate this discursive authority based on its own interests. Another point of view argues that the Security Council should be the entity that decides whether a state is suppressing terrorists in its territory or tolerating their existence in order to avoid manipulation.[426] For example, the origin of this standard stems from the Rome Statute of the ICC, where it is the court which determines whether sates are unwilling or unable to prosecute or conduct the necessary investigations.[427]

The inability of the Syrian regime to suppress terrorism was stated outright in the U.S letter to the UNSC, "[the] Syrian regime has shown that it cannot and will not confront these *safe havens* effectively itself."[428] Using the term 'safe heaven' implies the inability of the government to suppress terrorists.

In addition, the UN Secretary General Ban Ki-moon in his speech concerning the US-led coalition's airstrikes in Syria stated that: "….[the]strikes took place in areas no longer under the effective control of [the Syrian] Government."[429] These words suggest implicit acceptance of the US-led coalition's operations justified by the inability of the Syrian regime to suppress terrorists.

[425]*See*, Ashley Deeks, 'Pakistan's Sovereignty and the Killing of Osama Bin Laden' *ASIL Insights* (5 May 2011), www.asil.org/sites/default/files/insight110505.pdf; Yoram Dinstein, *War, Aggression and Self-Defense* (5thedn, CUP 2011), 275; Deeks "Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense' (2012) 52 *Virginia Journal of International Law* 483, Olivia Flasch, *supra* note 178 at 28.
[426]*See*, Dawood I Ahmed, 'Defending Weak States' (2013) 9 *Journal of International Law and InternationalRelations*1, 23. *See also*, Olivia Flasch, *supra* note 178 at 29.
[427]Olivia Flasch, *supra* note 178 at 30.
[428]UNSC, the US letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General' (23 September 2014) UN Doc S/2014/695, Olivia Flasch, *supra* note 188 at 37.
[429] Ban Ki-moon, 'Remarks at the Climate Summit Press Conference (Including Comments on Syria)' (UN Headquarters, 23 September 2014), www.un.org/apps/news/infocus/sgspeeches/statments_full.asp?statID=2356#.VLKuY8YqYpE>. Olivia Flasch, *supra* note 178 at 25.

Moreover, SC Res 2170 refers explicitly to the territories controlled by ISIL in Syria, which also suggest that Syria is no longer the governing authority in the region.[430] Although the US led coalition strikes in Syria suggest that the unwilling and unable standard is "starting to seem less controversial and better settled as doctrine,"[431] according to the ICJ judgment in the *Nicaragua* case, there is a difference between "statements of international policy' and 'an assertion of rules of existing customary international law".[432] Thus, it seems plausible that it still probably too early to consider it as a rule of customary international law, especially since these latest operations are still "unlikely to be legitimized or validated as lawful, but they also are unlikely to be condemned or treated as unlawful".[433]

D. Russian Intervention

As mentioned in section A above, there are two simultaneous armed conflicts in Syria, a non-international armed conflict between the Syrian regime while the fight against ISIL is an international armed conflict. The question arises then where the Russian intervention in Syria fits. Is it lawful for the Syrian regime to seek foreign assistance? Has it the capacity (valid consent) to seek assistance?

1. Syria Seeking Support (Negative Equality Doctrine)

According to the negative equality doctrine,[434] in the case of civil wars neither the government nor the rebels can seek foreign assistance in order to avoid military intervention by outside powers in civil wars.[435] However, it has been argued that recent state practice suggests that this principle is no longer applicable, especially in the context of the War on Terror.[436]

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[430]Olivia Flasch, *supra* note 178 at 39.
[431]Ashley Deeks, 'The UK's Article 51 Letter on Use of Force in Syria' *Law fare* (12 December 2014) <www.lawfareblog.com/2014/12/the-uks-article-51-letter-on-use-of-force-in-syria/>. Olivia Flasch, *supra* note 178 at 40. This standard began to gain this leverage after the 1976 *Entebbe Raid*. In this raid Israel entered Uganda to free Israeli hostages from hijackers. The significance of this operation is that it gained support because Uganda showed its unwillingness to react to the acts of the hijackers. *See also*, Olivia Flasch, *supra* note 178.
[432]Olivia Flasch, *supra* note 178 at 43.*Nicaragua Case*, para 207.
[433]Monica Hakimi, *supra* note 390 at 31.
[434] This doctrine was based 1975 resolution of the Institute de Droit International, available at: http://www.idi-iil.org/idiE/resolutionsE/1975_wies_03_en.pdf.
[435]Sara Hassan, *supra* note 345.
[436]For example, the US led coalition intervention in Iraq, the Saudi Arabian intervention in Yemen, the French intervention in Mali, UN SC Resolution 2085, available at: http://www.un.org/press/en/2012/sc10870.doc.htm.

In September 2015, Russia launched its first airstrikes over Syrian territory upon request of the Syrian regime for assistance to fight terrorist groups. Moscow declared that it is targeting "all terrorists" in the Syrian territory including ISIL.[437] This issue is controversial. One argument confirms the compatibility of the Russian action with international law. It claims that there is no rule prohibiting intervention with invitation from the government if the consent is valid.[438] However, Russian intervention has been criticized by the West,[439] because it supports the Syrian regime. Here two important points arise; first, most of the criticism directed towards Russia is based on extending the Russian operations to include other opposition elements besides ISIL.[440] Generally, it was not the legality of intervention by invitation by the Syrian regime that was debated, but rather the scope of this intervention.[441]

The second issue is the conflict between the international acceptance of the request of the US-led coalition by the Iraqi government to fight ISIL, while critiquing the same avenue by Russia, considering the fact that both states are highly affected by ISIL's activities over their territories.[442] However, Marc Weller argues that the Iraqi and Syrian cases are not perfectly similar for comparison.[443] To illustrate, the Iraqi government is 'duly' elected, so it is the legitimate government that has the capacity to seek assistance fighting threats imposed by ISIL.[444] On the contrary, the Syrian president's legitimacy is debated because of his massacres towards his population as well as the fact that the elections were only held in areas dominated by the regime.[445] However, it is possible that the UN is the only authoritative entity to decide on the legitimacy of the regime and because it has made no statement declaring that the Syrian regime is no longer the representative of Syria's people, theoretically it cannot be assumed that the Syrian regime is no longer legitimate.[446]

[437]Syria, *supra* note 3543.
[438]Russia's Intervention in Syria, EJIL: TALK!, http://www.ejiltalk.org/russias-intervention-in-syria/ (last visited Dec 8, 2015).
[439]Joint declaration on recent military actions of the Russian Federation in Syria - Press releases - GOV.UK, ,https://www.gov.uk/government/news/joint-declaration-on-recent-military-actions-of-the-russian-federation-in-syria (last visited Dec 8, 2015).
[440]*Supra* note 394.
[441]*Ibid.*
[442] Marc Weller, *supra* note 356.
[443]*Supra* note 394.
[444]*Ibid.*
[445]Marc Weller, *supra* note 356.
[446]*Ibid.*

Although some states have recognized the Syrian National Coalition as *the legitimate representative of Syria's people*, this 'recognition' has not reached the level of a legal recognition, but rather serves the purpose of political support.[447] This leaves President Al Assad as the internationally recognized representative of Syria. Another argument by Doswald-Beck, Gray and Cortenis is that for this group military assistance is acceptable for fighting ISIL because they are an international threat.[448] To illustrate, ISIL resides in two different territories Iraq and Syria where the groups exchange support, recruit fighters from different countries, and seek to establish a caliphate even beyond these territories.[449] Moreover, the Iraqi government has referred to ISIL's "safe haven" in Syria qualifying this as one of the determining factors 'necessitating' its request for assistance.[450] In this case, the fight against ISIL is no longer within the scope of a civil war whereby a government cannot seek foreign assistance based on the negative equality doctrine. For these reasons, seeking assistance is lawful.

Finally, Christakis and Bannerlier argue that in the case of civil wars it is lawful for the government to seek foreign assistance if jointly fighting terrorism. The problem with this opinion is that it revives the problem of defining terrorists, especially if a government 'portrays' the opposition as terrorists "in order to legitimize [the government] politically and be legally able to request external help against [the opposition]."[451]

2. Consent

Consent is one of the acts precluding wrongfulness under international law.[452] The validity of consent depends on being "…actually expressed by the State rather than presumed on the basis that the State would have consented, had it been asked."[453] The importance of this validity has been affirmed in *DRC v. Uganda* where the ICJ considered consent as a circumstance precluding the wrongfulness, as long as it exists.[454]

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[447] *Supra* note 438.
[448] Dapo Akande, Zachary Vermeer, *supra* note 438.
[449] *Ibid.*
[450] Ibid.
[451] Theodore Christakis and KarineBannelier, French Military Intervention in Mali: It's Legal but… Why? Part II: Consent and UNSC Authorisation, EJIL: TALK!, http://www.ejiltalk.org/french-military-intervention-in-mali-its-legal-but-why-part-2-consent-and-unsc-authorisation/ (last visited Dec 8, 2015).
[452] Olivia Flasch, *supra* note 178 at 19.
[453] ARSIWA, art 20; ILC Report of Its 31st (14 May-3 August 1979), UN Doc A/34/10, 113. Olivia Flasch, *supra* note 178 at 20.
[454] *Supra* note 132. Laura Visser, *Supra* note 438.

Syria, in reference to the US led coalition operations in Syria has declared that: "[a]ny action of any kind without the consent of the Syrian government would be an attack on Syria."[455] It asserts that it "stands with any international effort aimed at fighting and combating terrorism" but stresses that this must occur "within the frame of full respect of national sovereignty, and in conformity with international conventions."[456] Therefore, the fight against terrorism in Syria should be with the consent of Syria in order to be compatible with the rules of international law. Since Syria did not consent to the US-led coalition operations, the operation lacks legal justification unless customary international law of the unable or unwilling standard has been settled. On the contrary, Russia's intervention by invitation is lawful.[457]

Moreover, it is not sufficient to have explicit consent, it is also important that the government has the capacity to consent by exercising effective control over the territory. Although the Syrian regime has lost effective control over vast areas of Syria, state practice has accepted invitations by other states in a similar position. For example, the Iraqi government lost effective control over vast areas of its territory that were mainly gained by ISIL.[458] In addition, there are some cases, such as Libya and Somalia where this factor was totally disregarded and replaced with the 'internationally recognized governments'.[459]

[455]Ian Black, Dan Roberts, *supra* note 399. Monica Hakimi, *supra* note 390 at 22.
[456] During the 69th Session of the United Nations General Assembly in September 2014, Olivia Flasch, *supra* note 178 at 23.
[457]*See*, *Supra* note 438.
[458]Marc Weller, *supra* note 356.
[459]Sara Hassan, *supra* note 345.

E. The Security Council

The Security Council has played a passive role in the Syrian conflict. In2012 the veto by China and the Russian Federation on the authorization of measures under article 42 against Syria left the Security Council paralyzed, as it lacked the required majority for issuing binding resolutions under Chapter VII of the Charter.[460] Since then, the role played by the Security Council has been limited to condemnation of the grave human rights violations by the Syrian regime as seen in resolutions 2118 of 2013 and 2165 of 2014.[461] While concerning the fight against terrorism, it only considers ISIL and Al-Nusra Front as threats to international peace and security in Res 2170 of 2014, which allows taking measures under Chapter VII of the Charter.

The most recent resolution by the SC Res 2249 of 2015, adopted unanimously after the terrorist attacks in Paris on 13th November 2015 following a proposal from France is significant in the context of the Syrian conflict.[462] It calls upon "Member States that have the capacity to do so to take all necessary measures" to "prevent" and "suppress" ISIL.[463] Although the preamble of the resolution did not explicitly authorize the use of force under Chapter VII of the UN Charter, this language reflects that the resolution legitimizes the measures 'taken' as well as 'to be taken' against ISIL under the explicit endorsement of the Council.[464] Although the preamble of the resolution refers to ISIL as "a global and unprecedented threat to international peace and security" that triggers the application of article 39 of the Charter, the resolution was not adopted under Chapter VII of the UN Charter.[465]

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[460]Which was not the case earlier when the council authorized the collective self-defense against Iraq when it invaded Kuwaitin 1990, under SC Res 678.Louise Arimatsu, Mohbuba Choudhury, *supra* note 349 at 14.

[461]This resolution condemned the use of chemical weapons by the regime in Rif Damascus.

[462]DapoAkande& Marko Milanovic,The Constructive Ambiguity of the Security Council's ISIS Resolution, EJIL: TALK!, http://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/ (last visited Nov 30,2015).Security Council "Unequivocally" Condemns ISIL Terrorist Attacks, Unanimously Adopting Text that Determines Extremist Group Poses "Unprecedented" Threat | Meetings Coverage and Press Releases, http://www.un.org/press/en/2015/sc12132.doc.htm (last visited Nov 30, 2015)

[463]This language of ' all the necessary measures revives the ambiguity of SC Res 1373 of 2001 "Take the necessary steps", which leave upon the states to interpret it their own way, SC Res 2249, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2249(2015), "*Calls upon* Member States that have the capacity to do so to take all necessary measures, in compliance with international law, in particular with the United Nations Charter, as well as international human rights, refugee and humanitarian law, on the territory under the control of ISIL also known as Da'esh, in Syria and Iraq, to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL also known as Da'esh…"

[464]*Supra* note 462.

[465]*Ibid.*

In order for the resolution to have a binding nature, it must "decide to do something or to authorize something".[466] This is not the first Security Council Resolution to refer to the right of states to the use of force without authorizing this use, and could trigger flexible interpretation of the resolution to legitimize the use of force.[467] For example, although SC Res 1373 did not authorize the use of force, and referred to the 'inherent' right to self-defense, it was the claimed justification behind the intervention in Afghanistan in 2001.[468] Although the language of the resolution suggests that the Council 'contemplates' or 'welcomes' the use of force against ISIL, it does not explicitly legalize such use through stating that the "necessary measures" should be "in compliance with international law, in particular the United Nations Charter".[469] Therefore, the resolution does not create a new legal basis for military operations in Syria against ISIL.[470] However, states have started to take advantage of the resolution. For example, in a statement by Syria's U.N. Ambassador Bashar Ja'afari, he noted that:"[w]elcome to everybody who finally woke up and joined the club of combating terrorists,"[471]this reflects an opportunistic conclusion by Syria in an attempt to legalize its actions against ISIL or whoever the regime decides to be alike ISIL.

In addition, the US-led coalition will also take advantage of the resolution claiming that it 'implicitly validates' their operations in Syria.[472] Furthermore, other states such the UK has used the resolution to gain political support for joining the Coalition's operations in Syria.[473] Despite this, the language of the resolution can still be read in conjunction with the rules of international law that require Syrian consent to use force, which fits with both the Russian and the Syrian arguments.[474]

[466]*Supra* note 462.
[467]*Ibid.*
[468]*Ibid.*
[469] "This is standard language in relation to counter terrorism measures not involving the use of force (see, e.g., resolutions 2213 and 2214 (2015), Libya).*Ibid.*
[470]*Ibid.*
[471]U.N. calls on states to combat militants in Syria and Iraq,,http://uk.mobile.reuters.com/article/idUKKCN0T92Z020151120?irpc=932 (last visited Dec 9, 2015).
[472]Dapo Akande, Marko Milanovic, *supra* note 462.
[473]Cameron hails UN backing for action against Islamic State - BBC News, , http://www.bbc.com/news/uk-34886574 (last visited Dec 9, 2015).
[474]Dapo Akande, Marko Milanovic, *supra* note 462.

This is, "the resolution's constructive ambiguity: it allows the major players in Syria to politically move closer together without departing from the legal positions that they had previously adopted, and without compromising their essential interests."[475] In short, the language of the resolution has been appropriated by the different actors involved in the Syrian conflict in order to legalize its actions.

[475]Dapo Akande, Marko Milanovic, *supra* note 462.

VI. Conclusion

International law is a field that is obsessed with crises, especially when security is at stake. The legal framework for combating terrorism has evolved since 9/11. The major turning points analyzed in this paper are the 9/11 attacks and the Arab Spring. These two incidents led to twofold developments: it started with expanding the exceptions to the existing legal framework on the use of force to adapt to the new threats to peace and security after 9/11. This incident may have lent legitimacy to new forms of the right to self-defense such as preemptive and anticipatory self-defense with less restrictive requirements them in the context of the "War on Terror". Then, it introduced new rules that deviate from the system created by the UN Charter through consistent states practice such as unilateral actions to fight terrorists in another state, and the 'unwilling and unable' standard that recognizes lower standard of attribution of state responsibility.

The Arab Spring has not only maintained the changes introduced after 9/11, but also suggests that crises effects', when it comes to terrorism, are becoming less disputed, more lenient, and easily normalized within the context of the War On Terror. Syria as a case study is a clear example of this effect. The major actors involved in the conflict, which are the Syrian regime, the US led coalition, Russia have "appropriated" the War on Terror implying the changes in the legal framework on the use of force after 9/11 as newly recognized legal basis. A recent example is the Paris attacks in 2015, which despite being less in intensity and scale than other several terrorist attacks,[476] were the reason behind changing France strategy through extending is airstrikes in Syria with no condemnation from the international community. I can see it as a linear change, which started with huge resistance to changes after 9/11, then followed with less resistance and condemnation, and finally toleration and normalization of these changes during Arab Spring. That is why tracing these changes is significant. In spite of these dramatic changes, I believe that this area of international law is still unsettled and requires further investigation before acknowledging these changes as customary international law that binds all states.

[476] *See*, Worst Terrorist Strikes--Worldwide, available at, http://www.johnstonsarchive.net/terrorism/wrjp255i.html (last visited Jan 7, 2016).

Moreover, the collective security system created by the UN has risen right after 9/11 through expanding the Security Council functions to include *quasi* legislative and administrative functions. However, by the time, this system is diminishing where the unilateral actions in the fight against terrorism are prevailing and Syria is a prototype example. The Security Council was paralyzed to the authorize measures under article 42 against Syria by the Chinese and the Russian's veto. However, the US led coalition launched its airstrikes without the authorization of the Security Council on the ground of different legal justifications such as collective self-defense on behalf of Iraq and the inability and unwillingness of the Syrian government to act against terrorists. Thus, the Security Council should revive its role as protector of peace and security though collective security measures and limits the use of force under any circumstances to its authorization based on its binding resolutions. Achieving this goal requires more representative membership of the Council to include more states and new decision making mechanism to limit manipulation by superpowers. This will create a robust stance against terrorism and deliver the right message to the international community that the Security Council is capable of maintaining peace and security.[477]

Finally, the criminal justice model as the core system for fighting terrorism before 9/11 is now on a decline in states' tools for fighting terrorism in favor of the military mode operation. This mode followed by states is exacerbating the vicious cycle of terrorism. This is to say, "[i]f we respond by bombing every Islamic State target we can find, odds are high we'll end up bombing some people we never wanted or intended to bomb,[478] and this won't help us make new friends."[479] Simply, force and violence will replace punishment and assassinations will replace executions, which ultimately turn terrorism into "a construct located both inside and outside law."[480]

[477]C. J. Tams, *supra* note *7at* 373.
[478]A case in point, the Middle East tends to be the area that is highly affected by the war on terror. Thousand was killed 'non-combatant' in Iraq by the US, hundreds of Arab still in the Guantanamo bay, where they have faced detention without trials. Victor V. Ramraj, et. al, *supra* note 8 at 622.
[479]*Supra* note 14.
[480]J. Tripathy, *Supra* note 2, at 224.

Thus, the first robust step towards combating terrorism is to consider it as an ongoing process that requires management not an "aberrational" phenomenon.[481] This understanding paves stopping "overreacting" to it.[482]

[481]This process could include "fund[ing] moderate Muslim organizations that offer alternatives to extremist interpretations of Islam, for instance, increase[ing] law enforcement outreach in communities that are targeted by terrorist recruiters, and look[ing] for ways to increase community incentives to report suspicious activity — perhaps by exploring rehabilitation approaches to dealing with misguided teens who are attracted by violent ideologies but haven't yet taken decisive steps to harm anyone." *Supra* note 14.

[482]For example, the late terrorist attacks in Paris that resulted in 129 people being killed were the driving force of France joining the US led coalition in Syria which potentially revives the vicious cycle of violence. *Ibid*.