

# The Legitimacy of Using Cross-Border Force to Counter-Terrorism before and after September 11 Attacks in the Light of the Right of Self-Defense

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## Abstract

The international community has allowed counter-terrorism by the use of cross-border force in the twenty first century as a respond to September 11 attacks to eliminate terrorism that has constituted a serious threat to the international peace and security. It is argued that the use of cross-border force violates article 2(4) of the *Charter of the UN* that stipulates the refrain from the threat or the use of force in international relations to prevent the intervention in internal and external affairs and protect the territorial integrity, sovereignty and political independence of state members. Indeed, the international community before September 11 attacks rejected the use of force as a respond to terrorist attacks by asserting the context of article 2(4) and limiting the authority of using force under the right of self-defence, which is referred in article 51 of the *Charter of the UN*, to counter current armed attacks that did not include terrorist attacks. Nonetheless, the international community after September 11 attacks has admitted the use of cross-border force to counter-terrorism by activating the right of anticipatory self-defence and considering terrorism as imminent threat of armed attack. However, this has undermined the obligation of refrain from the intervention in internal and external affairs and protect the territorial integrity, sovereignty and political independence of state members, according to article 2(4). Also, powerful states may misuse this authority by a way threats the stability of other states, when the former invokes counter-terrorism as a reason to use power against other states in order invade the latter's territories by derogating from article 2(4) of the *Charter of the UN*.

**Keywords:** September 11 Attacks, Counter-Terrorism, Self-Defense

## Introduction:

The international community has sought to eliminate terrorism that constitutes a serious threat to international peace and security;<sup>1</sup> this has been affirmed in several resolutions of the General Assembly of the United Nations ('UN')<sup>2</sup> and the Security Council.<sup>3</sup> The Security Council affirms the responsibility of state members to counter-terrorism by all means in accordance to their obligations under international law.<sup>4</sup> Nonetheless, the inability of the international community to reach a single unified definition of terrorism constitutes an obstacle in the process of counter-terrorism therefore the concept of terrorism is still vague and ambiguous along with unclear context and scope. The Secretary-General of the United Nations Kofi Annan raised the importance of tackling this obstacle through encouraging state members to constitute a comprehensive convention to eliminate all forms of terrorism by finding a clear and unified definition of terrorism.<sup>5</sup> However, this goal has not been achieved and this has precluded from adopting a multilateral agreement to counter and eliminate terrorism.<sup>6</sup>

Consequently, counter-terrorism has been shifted to be an individual or collective responsibility that is crystalized in the endless war on terrorism that is led by the US instead of being an international responsibility that is operated by a global centralized body. This can be noticeable in the attitude of the US and the West that

<sup>1</sup> Joshua Kastenberg, 'The Use of Conventional International Law I Combating Terrorism: A Maginot Line for Modern Civilization Employing the Principle of Anticipatory Self-Defense & Reemption' (2004) 55 *The Air Force Law Review* 87, 87-8.

<sup>2</sup> See, GA Res 50/6, UN SCOR, 50<sup>th</sup> sess, 40<sup>th</sup> plen mtg, Agenda Item 29, UN Doc A/RES/50/6 (9 November 1995, adopted 24 October 1995); GA Res 51/210, UN SCOR, 51<sup>st</sup> sess, Agenda Item 151, UN Doc A/RES/51/210 (16 January 1997, adopted 17 December 1996); GA Res 52/165, UN SCOR, 52<sup>nd</sup> sess, 472<sup>nd</sup> plen mtg, Agenda Item 152, UN Doc A/RES/52/165 (19 January 1998, adopted 15 December 1997).

<sup>3</sup> See, SC Res 2199, UN SCOR, 69<sup>nd</sup> sess, 7379<sup>th</sup> mtg, UN Doc S/RES/2199 (12 February 2015); SC Res 1373, UN SCOR, 55<sup>nd</sup> sess, 4385<sup>th</sup> mtg, UN Doc S/RES/1373 (28 September 2001); SC Res 2210, UN SCOR, 69<sup>nd</sup> sess, 7403<sup>rd</sup> mtg, UN Doc S/RES/2210 (16 March 2015); SC Res 1373, UN SCOR, 55<sup>nd</sup> sess, 4385<sup>th</sup> mtg, UN Doc S/RES/1373 (28 September 2001).

<sup>4</sup> *Threats to international peace and security caused by terrorist acts*, PRST, UN GAOR, S/PRST/2012/17 (4 May 2012) 3.

<sup>5</sup> *Secretary-General Kofi Annan Launches Global Strategy Against Terrorism in Madrid*, United Nations (10 March 2005) <<https://www.un.org/press/en/2005/sg2095.doc.htm>>.

<sup>6</sup> Thomas J. Bady, 'Defining International Terrorism: A Pragmatic Approach' (1998) 10(1) *Terrorism and Political Violence*, 90, 90.

have expanded anti-terrorism military actions after September 11 attacks; these military actions are based on the use of cross-border force in other states' territories such as in Afghanistan and then Iraq under the cloak of the right of self-defense. Nonetheless, the legitimacy of the use of cross-border force to counter-terrorism has been criticized by alleging that the use of cross-border force violates article 2(4) of the *Charter of the UN* that adopts the obligation of refrain from using force in international relations and the obligation of refrain from the intervention in internal and external affairs of other state members in order to protect the territorial integrity, sovereignty and political independence of state members. In contrast, the US has submitted that the use of cross-border force is compatible with the inherent right of self-defense and collective-defense that is recognized and acknowledged in article 51 of the *Charter of the UN*. This submission has sought to legalize the use of cross-border force through expanding the context of the right of self-defense by alleging the right of anticipatory self-defense to counter-terrorism that constitutes imminent threat of armed attack.

This research argues the legitimacy of using cross-border force to counter-terrorism before and after September 11 attacks through referring to the practice of the international community. This argument clarifies how the context of the right of self-defense and the collective-defense has been expanded after September 11 attacks by admitting the use of cross-border force to counter-terrorism. However, this has undermined the prohibition of the threat or the use of force in international relations that is referred to in article 2(4) of the *Charter of the UN* and the obligation of refrain from affecting the territorial integrity, sovereignty and political independence of state members; conversely, restricting the context of the right of self-defense before September 11 attacks had led to affirm these obligations and principles. The first part refers to the implication of terrorism to international peace and security especially in the region of the Middle East by referring to the Syrian crisis. The second part discusses the stand of the international community from the use of cross-border force to counter terrorism before September 11 attacks through referring to the decision of the International Court of Justice ('ICJ') in the case *Nicaragua v. U.S.* and the stand of the Security Council with respect to the Israeli invasion to the Lebanese territory in 1978 and 1982 as respond to the Palestinian Liberation Organization's ('PLO') operations against Israelis. The third part discusses authorizing the use of cross-border force to counter-terrorism after September 11 attacks; this authorization is attributed to expand and spread terrorism cross the world under the decentralization strategy which makes terrorism constitutes a serious threat to international peace and security. Finally, arguing how authorizing the use of cross-border force to counter-terrorism can be misused by powerful states to depart from the obligation of refrain from the threat or the use of force in international relations in order to achieve political interests.

### **I. Terrorism in the Middle East**

The Security Council has concerned about the "deterioration of the humanitarian situation" in Syria; as, the Syrian crisis has led to kill nearly a quarter of a million people as well as more than the half of Syrian population have been forced to flee from their houses, around 4 million people became refugees in neighbouring states and over 12 million people inside the Syrian territory need urgent humanitarian aids.<sup>1</sup> Therefore, the Syrian situation has been considered as the most humanitarian crisis in the globe today and constituted a serious threat to international peace and security in the Middle East; therefore, the Security Council urges states to maximize their efforts in order to prevent expanding and extending this conflict to neighbouring states.<sup>2</sup> Therefore, the Security Council has demanded parties of the Syrian conflict to immediately end all sorts of violence and respect their responsibilities under international humanitarian law.<sup>3</sup>

Indeed, the impact of the Syrian crisis has not been limited to the Syrian territory since this crisis has affected neighbouring countries that have faced several challenges in the economic, social and environmental fields along with the cost of hosting several millions of Syrian refugees within their territories which has increased the pressure on their resources and threatening their stability and security.<sup>4</sup> Consequently, the impact of terrorist activities can exceed Syrian borders to impact the entire region because terrorist groups and terrorists may increase the intensive and the period of conflict; subsequently, this can form a serious threat to the stability and security of the entire region of the Middle East.<sup>5</sup> Accordingly, the Security Council recognises the impact of the Syrian crisis on the stability and security in the Middle East therefore it calls members of the international community to enhance the ability of hosting states to bring the stability in the region through countering the threat of terrorists and terrorist groups.<sup>6</sup> In this regard, the Security Council urges the international community to fulfil its responsibility toward this crisis in accordance to the burden-sharing principles in order to support

<sup>1</sup> *Middle East*, PRST, UN GAOR, S/PRST/2015/8 (22 May 2015) 1. See, *Middle East*, PRST, UN GAOR, S/PRST/2015/15 (17 August 2015) 2; *the Situation in the Middle East*, PRST, UN GAOR, S/PRST/2013/15 (2 October 2013) 1.

<sup>2</sup> *Middle East*, PRST, UN GAOR, S/PRST/2015/8 (22 May 2015) 1.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.* 2.

<sup>5</sup> *Threats to international peace and security caused by terrorist acts*, PRST, UN GAOR, S/PRST/2015/11 (29 May 2015) 2.

<sup>6</sup> *Middle East*, PRST, UN GAOR, S/PRST/2015/8 (22 May 2015) 2.

countries in the Middle East by adopting “medium and long-term responses” to decrease the impact on societies.<sup>1</sup>

As a result, counter-terrorism requires maximizing efforts through adopting a comprehensive strategy that precludes from “radicalization to terrorism, stemming recruitment, inhibiting foreign terrorist fighter travel, disrupting financial support to foreign terrorist fighters, countering violent extremism, which can be conducive to terrorism, countering incitement to terrorist acts motivated by extremism or intolerance, promoting political and religious tolerance, economic development and social cohesion and inclusiveness, ending and resolving armed conflicts, and facilitating reintegration and rehabilitation”.<sup>2</sup> To eliminate terrorism in the Middle East, the Security Council has concerned about resolving the Syrian crisis through adopting a political process that can achieve legitimate rights and aspirations of people in Syria;<sup>3</sup> therefore, the Security Council has been satisfied with the statement of the Secretary-General of 29 July 2015 that “there can be no military solution to the Syrian conflict, and reiterates its endorsement of a political solution through implementation of the Geneva Communiqué”.<sup>4</sup>

In the light of this impact of terrorism on the entire region with respect to the Syrian crisis, the Security Council reaffirms all sorts of terrorism constitutes a serious threat to the international peace and security therefore it indicates that terrorism is “criminal and unjustifiable, regardless of their motivation, wherever, whenever and by whosoever committed ... terrorism cannot and should not be associated with any religion, nationality or civilization, and in this regard stresses the importance of promoting tolerance and inter religious dialogue”.<sup>5</sup> Accordingly, the Security Council emphasizes that the elimination of terrorism requires the comprehensive cooperation between state members, organizations and societies; however, measures that are taken to counter-terrorism shall be compatible with the *Charter of the UN* and other norms of international law.<sup>6</sup> Moreover, all state members shall comply with their obligations with respect to “refrain from providing any form of support, active or passive, to entities or persons involved in or associated with terrorist acts, including by suppressing recruitment of members of terrorist groups, consistent with international law, and eliminating the supply of weapons to terrorists”.<sup>7</sup>

Accordingly, the impact of terrorism is not limited to the place where terrorists and terrorist groups exist since implications of terrorism can affect surrounding countries and the entire world and this can impact the international peace and security; therefore, counter-terrorism is an international responsibility requires the comprehensive cooperation between state members of the international community.<sup>8</sup> This can be noticeable in the Syrian crisis; the Security Council asserts the necessity of globally counter acts of the Islamic State in Iraq and the Levant (‘ISIL’), Al-Qaida and associated groups and individuals by all means.<sup>9</sup> This stand of the Security Council is due to expand the popularity of Al-Qaida and ISIL that have attracted approximately 25 000 foreign fighters who travelled to fight with them from over 100 countries.<sup>10</sup> Also, it prohibits financially supporting these organizations<sup>11</sup> and disallows “any direct or indirect trade in oil from Iraq involving ISIL with the aim to put an end to financing terrorism”.<sup>12</sup> Hence, the international community has been aware that terrorism constitutes a serious threat to the international peace and security; therefore, it has considered the significance of adopting a comprehensive global stand to counter-terrorism to eliminate terrorism and minimize its implications on the entire world.

Nonetheless, it has been criticized the legitimacy of using cross-border force in other states’ territories

<sup>1</sup> Ibid.

<sup>2</sup> *Threats to international peace and security caused by terrorist acts*, PRST, UN GAOR, S/PRST/2015/11 (29 May 2015) 2.

<sup>3</sup> *Middle East*, PRST, UN GAOR, S/PRST/2015/15 (17 August 2015) 2.

<sup>4</sup> Ibid.

<sup>5</sup> *Threats to international peace and security caused by terrorist acts*, PRST, UN GAOR, S/PRST/2016/6 (11 May 2016) 1. See, *Middle East*, PRST, UN GAOR, S/PRST/2015/8 (22 March 2015) 2; *Reports of the Secretary-General on the Sudan and South Sudan*, PRST, UN GAOR, S/PRST/2015/10 (24 April 2015) 1; *Threats to international peace and security caused by terrorist acts*, PRST, UN GAOR, S/PRST/2015/11 (29 May 2015) 1.

<sup>6</sup> *Threats to international peace and security caused by terrorist acts*, PRST, UN GAOR, S/PRST/2016/6 (11 May 2016)1; *Burundi*, PRST, UN GAOR, S/PRST/2015/14 (28 July 2015) 1.

<sup>7</sup> *Threats to international peace and security caused by terrorist acts*, PRST, UN GAOR, S/PRST/2016/6 (11 May 2016) 1; *Threats to international peace and security caused by terrorist acts*, PRST, UN GAOR, S/PRST/2013/1 (15 January 2013) 2-4.

<sup>8</sup> *Threats to international peace and security caused by terrorist acts*, PRST, UN GAOR, S/PRST/2016/6 (11 May 2016) 2.

<sup>9</sup> *Threats to international peace and security caused by terrorist acts*, PRST, UN GAOR, S/PRST/2016/6 (11 May 2016) 2.

<sup>10</sup> *Threats to international peace and security caused by terrorist acts*, PRST, UN GAOR, S/PRST/2015/11 (29 May 2015) 1. See, *Threats to international peace and security caused by terrorist acts*, PRST, UN GAOR, S/PRST/2014/23 (19 November 2014) 1.

<sup>11</sup> *Threats to international peace and security*, PRST, UN GAOR, S/PRST/2010/4 (24 February 2010) 1.

<sup>12</sup> *Iraq*, PRST, UN GAOR, S/PRST/2014/20 (19 September 2014) 2. See, *Threats to international peace and security caused by terrorist acts*, PRST, UN GAOR, S/PRST/2014/23 (19 November 2014) 5-6.

to counter-terrorism in the light of the right of the self-defense and the prohibition of the use of force in international relations. The following part has considered the international stand from the use of cross-border force to counter-terrorism in the period that preceded September 11 attacks through referring to the case of *Nicaragua v. U.S.* and the invasion of the Lebanese territory in 1978 and 1982 by Israel as a response to operations of the Palestinian Liberation Organization ('PLO').

## II. Counter-Terrorism before September 11 Attacks

Initially, the US and its allies launched war on terrorism in Afghanistan against the Taliban regime and Al-Qaeda, after September 11 attacks; this war on terrorism was based on the use of cross-border force by invoking the right of self-defense that is referred to in article 51 of the *Charter of the UN* since the US alleged obtaining information confirmed that perpetrators of such attacks related and belonged to Al-Qaeda and the government of Afghanistan rejected the request of delivering Al-Qaeda's leaders to the US.<sup>1</sup> Nevertheless, it is argued that the US military actions in Afghanistan is incompatible with the obligation of refrain from the threat or the use of force in international relations in accordance to Article 2(4) of the *UN Charter* by submitting that the concept 'use of force' has a broad scope seeks to prevent armed conflicts, not only war between states, in order to comprehensively prohibits the use force by any state member against others.<sup>2</sup> However, it is necessary to examine the legitimacy of the use of cross-border force to counter-terrorism and the consistency with the right of self-defense through referring to previous cases and the stand of the international community.

The prohibition of the threat or use of force is compatible with the obligation of refrain from the intervention in internal and external affairs of other state members. The General Assembly, in the Resolution 2225/1966, declares that all international norms and principles dismiss the intervention in internal and external affairs of other state members along with the protection of these members' sovereignty and independence. Consequently, the General Assembly calls all state members to comply with their obligations to respect these norms and principles through emphasizing the obligation of refrain from "armed intervention or the promotion or organization of sub-version, terrorism or other indirect forms of intervention for the purpose of changing by violence the existing system in another state or interfering in civil strife in another state". Nevertheless, the prohibition of the threat or the use of force is not definitive under the *Charter of the UN* since this prohibition can be departed from in two occasions. Firstly, when the Security Council permits and authorizes the use of force under chapter VII of the *Charter of the UN*. Secondly, state members can use force under the right to self-defense that is acknowledged and recognized by article 51 of the *Charter of the UN*. However, there is a need to examine the conditions of exercising the right of self-defense; these conditions were discussed by the International Court of Justice in the case *Nicaragua v. U.S.*. Also, the legitimacy of the use of cross-border force in other states' territories as a respond to terrorist attacks can be clarified by referring to the stand of the Security Council regarding the invasion of the Lebanese territory in 1978 and 1982 by Israel as a response to the PLO operations against Israelis.

In the case *Nicaragua v. U.S.*, Nicaragua brought a claim against the US on 9 April 1984 before the International Court of Justice ('ICJ') regarding the US responsibility about military and paramilitary activities in and against Nicaragua.<sup>3</sup> The ICJ declared that the modern international customary law was reflected in article 2(4) of the *Charter of the UN* that prohibited the threat or the use of force against the territorial integrity and sovereignty and the political independence of other state members.<sup>4</sup> In contrast, the US submitted that its acts were compatible with the right of self-defense that was referred to in article 51 of the *Charter of the UN*.<sup>5</sup> Even though the ICJ acknowledged that the right of self-defense was inherent in the modern international customary law, it clarified that the use of force under the cloak of the right of self-defense in accordance to article 51 would be limited to the situation of armed attacks that had already occurred; however, the court did not tackle the matter of "the imminent threat of armed attack".<sup>6</sup> The ICJ added that the use of force under the right of self-defense should be compatible with the standard of "the necessity and the proportionality of the measures taken in self-defense".<sup>7</sup> Nonetheless, it decided that the context and the definition of armed attack exceeded "regular armed forces across an international border" to embrace acts of "sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to (inter alia) an actual armed attack conducted by regular forces, or its substantial

<sup>1</sup> Sean D. Murphy, 'Terrorism and the concept of "armed attack" in Article 51 of the U.N. Charter.(Focus: September 11, 2001 - Legal Response to Terror)' (2002) 43(1) *Harvard International Law Journal* 41, 41-2.

<sup>2</sup> *Ibid* 42-3. See,

*Threats to international peace and security caused by terrorist acts*, PRST, UN GAOR, S/PRST/2012/17 (4 May 2012) 2.

<sup>3</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.) (Judgment)* [1986] ICJ 14, 16.

<sup>4</sup> *Ibid* 99-100.

<sup>5</sup> *Ibid* 102.

<sup>6</sup> *Ibid* 102-3.

<sup>7</sup> *Ibid* 103.

involvement therein”.<sup>1</sup> Although the ICJ excluded from the scope of armed attacks assisting rebels by providing them weapons and logistical support or any other forms of support,<sup>2</sup> it asserted that these excluded acts would be considered as either illegal threat or use of force or “intervention in the internal or external affairs of a state, but not as an “armed attack” against that state”.<sup>3</sup> Accordingly, the ICJ condemned the action of using force in international relations as a respond to terrorist attacks and it restricted and limited the concept of ‘armed attacks’ by a way restricted the ability of using force under the right of self-defense; this attitude of the ICJ reflects the literature implementation of article 51 of the *Charter of the UN*.

Moreover, Israel invaded the Lebanese territory in 1978 as a respond to the attack of killing 34 Israelis in Haifa by Fatah guerrillas who belonged to the PLO and accessed to Haifa through the Damour city that was located on the southern Lebanese coast; consequently, Israel retaliated by launching a massive and destructive operation called “the operation Litani” to invade the southern area of Lebanon to destroy the PLO bases and force them to move out from there.<sup>4</sup> It is indicated that the Israeli invasion was massive and destructive therefore Israel seized the entire southern region of Lebanon till the Litani River; nonetheless, this invasion was condemned by the international community that considered it as “a serious threat to the peace in the region” and the US President Carter called the Israeli Prime Minister to withdraw its military troops from the southern region of Lebanon.<sup>5</sup> Consequently, the Security Council in the Resolution 425/1978 raised its concern about achieving the peace in the Middle East through asserting the necessity to respect the territorial integrity, sovereignty and political independence of Lebanon; therefore, it called Israel to immediately cease and stop its military operations against the territorial integrity of Lebanon and immediately withdraw its troops from this the Lebanese territory. Accordingly, the Security Council in the Resolution 427/1978 decided to deploy the United Nations Interim Force in Lebanon and called Israel to comply with the request of withdrawing its forces from the entire territory of Lebanon. It can be noticed that the Security Council in the Resolution 336/1978 concerned about brining peace in the Middle East by ordering all parties to immediately and effectively cease-fire in this area; therefore, the Security Council called all parties to comply with the Resolution 338/1973 that required all parties to cease-fire in the region of the Middle East.

Furthermore, Israel launched its war against Lebanon in 1982 by invading the Lebanese territory in order to surrender the PLO from Lebanon<sup>6</sup> by invoking that the PLO participated in the assassination of the Israeli ambassador to Great Britain on 3 June 1982 who was wounded and permanently disabled; consequently, Israel responded to this attack by launching air attacks on Beirut that directed against the PLO positions.<sup>7</sup> However, the Security Council in the Resolution 508/1982 called all parties of this conflict to immediately cease-fire in the Lebanese territory and across Lebanese-Israeli borders. Therefore, the Security Council ordered Israel in the Resolution 509/1982 to immediately and unconditionally withdraw its military forces from the Lebanese territory.<sup>8</sup> This decision was compatible and attributed to the Security Council’s stand that asserted the territorial integrity, sovereignty and political independence of Lebanon, according to the Security Council Resolutions 538/1983 and 542/1983. It is indicated that the situation of September 11 attacks is similar to the scenario of hijacking Israeli planes by members of the PLO; Israel responded to this action by invoking the right of self-defense to justify its military actions in Lebanon to eliminate the capability of the PLO to operate terrorist attacks against Israel; nonetheless, this Israeli action was condemned by the General Assembly and the Security Council.<sup>9</sup>

Based on the aforementioned cases, it can be concluded that the use of cross-border force within other states’ territories as a respond to terrorist attacks before September 11 attacks could not be justified under the cloak of the right of self-defense because terrorist attacks did not fall within the scope of armed attack that constituted the pre-requirement of exercising the right of self-defense. Consequently, the international community and international bodies affirmed the necessity of complying with the obligation of refrain from the use of force in international relations in order to protect to protect the territorial integrity, the sovereignty and the political independence of state member along with the obligation of refrain from the intervention in internal and external affairs of other state members. However, there is a need to examine whether this stand from the use of cross-border force to counter-terrorism is remained applicable after September 11 attacks.

<sup>1</sup> Ibid.

<sup>2</sup> Ibid 103.

<sup>3</sup> Ibid 103-4.

<sup>4</sup> Robert G. Rabil, *Syria, the United States, and the War on Terror in the Middle East* (Greenwood Publishing Group, 2006) 113.

<sup>5</sup> Ibid.

<sup>6</sup> Daniel Byman, *A High Price: The Triumphs and Failures of Israeli Counterterrorism* (Oxford University Press, 2011) 8.

<sup>7</sup> H. Thomas Davis, *40 Km Into Lebanon: Israel's 1982 Invasion* (DIANE Publishing, 1995) 2-3.

<sup>8</sup> See, SC Res 511, UN SCOR, 2379<sup>th</sup> mtg, UN Doc S/RES/511 (18 June 1982); SC Res 512, UN SCOR, 2382<sup>nd</sup> mtg, UN Doc S/RES/512 (19 June 1982); SC Res 513, UN SCOR, 2382<sup>nd</sup> mtg, UN Doc S/RES/513 (29 July 1982).

<sup>9</sup> Murphy, above n 25, 46. 31

### III. Counter-Terrorism after September 11 Attacks

The US after September 11 attacks declared war on terrorism in Afghanistan by using cross-border force against the Taliban regime and Al-Qaeda;<sup>1</sup> however, it is argued that this use of force constituted an obvious violation to the obligation of refrain from the threat or use of force in international relations under article 2(4) of the *Charter of the UN*.<sup>2</sup> In fact, this prohibition is compatible with the obligation of resolving international disputes by peaceful means;<sup>3</sup> however, when such peaceful means do not settle such disputes,<sup>4</sup> the latter can be referred to the Security Council as long as it threatens international peace and security.<sup>5</sup> Nevertheless, state members are allowable to use force pursuant to the right of self-defence<sup>6</sup> to counter any armed attacks.<sup>7</sup> This permission can be importance to avoid the negative stand of the Security Council, when the latter does not counter armed attacks in accordance to article 42 of the *Charter of the UN* to maintain international peace and security; therefore, the *Charter of the UN* does not deprive state members from protecting their security.<sup>8</sup>

The *Charter of the UN* regulates and determines the time-frame of exercising the right of self-defence and collective-defence in the language of article 51 that limits the use of force to counter armed attacks and stipulates the immediate stop of using force under this right, when the Security Council takes important measures to maintain international peace and security. Nevertheless, it has been questioned whether the use of cross-border force by the US in war on terrorism after September 11 attacks falls within the context of the right of self-defence in accordance to the context of article 51. Indeed, examining this matter and question can be importance to determine the development in international law after September 11 attacks through referring to the attitude of international community from the use of cross-border force to counter-terrorism.

The Security Council in the Resolution 1368/2001 condemned September 11 attacks and considered them as international terrorism that constituted serious threat to international peace and security; therefore, it reaffirmed principles and purposes of the *Charter of the UN* to counter terrorist activities by all means, recognised the inherent right of self-defence or collective-defence in accordance to the *Charter of the UN* and called all members to escalate their efforts to eliminate and counter-terrorism by enhancing the cooperation between them and the full implementation of relevant international anti-terrorist norms and agreements along with the Security Council's resolutions. Subsequently, the US declared war on terrorism in Afghanistan against Al-Qaeda and Taliban by using force under the right of self-defence and collective-defence; nonetheless, this has been condemned by scholars who submit that the right of self-defence was not available in this this case because September 11 attacks did not fall within the context of armed attacks that should be credibly proved along with identify the identity of attackers.<sup>9</sup> It is debated that although the General Assembly condemned September 11 attacks, it neither considered them as armed attacks nor recognized resorting to the use of force under the right to self-defence.<sup>10</sup> It is raised that September 11 attacks were similar to the action of hijacking Israeli planes by members of the PLO, when Israel responded to this action by invoking the right to self-defence to justify its military actions in Lebanon to destroy the PLO's capability to operate terrorist actions against it; nonetheless, this action by Israel was condemned by the General Assembly and the Security Council.<sup>11</sup> However, it is clear that the alleged motivation behind the use of cross-border force against terrorism in Afghanistan was protecting international peace and security that was threaten by September 11 attacks.

The same motivation was raised in the invasion of Iraq in 2003 by the US and its allies,<sup>12</sup> when the President George W. Bush declared to the world the possibility of using force and launching war on Iraq for the purpose of eliminating the threat to international peace and security; therefore, the US invaded Iraq and defeated Saddam Hussein regime.<sup>13</sup> The US invoked that this invasion was a respond to the Security Council Resolution

<sup>1</sup> Ibid 41-2.

<sup>2</sup> Thomas Franck, 'Terrorism and the rights of self-defense' (2001) 95(4) *The American Journal of International Law* 839, 839.

<sup>3</sup> *Charter of the United Nations* article 2(4). See, Stephen Hall, *Principles of International Law* (LexisNexis, 3<sup>rd</sup> ed, 2011) 370.

<sup>4</sup> Ibid. See, *Charter of the United Nations* article 2(3).

<sup>5</sup> Ibid.

<sup>6</sup> See, Kastenberg, above n 1, 91-8.

<sup>7</sup> *Charter of the United Nations* article 51.

<sup>8</sup> Franck, above n 42, 839.

<sup>9</sup> Franck, above n 42, 840. See, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.) (Judgment)* [1986] ICJ 14, 119-21, 127.

<sup>10</sup> Murphy, above n 25, 46.

<sup>11</sup> Ibid.

<sup>12</sup> Jean Bethke Elshstain, *Just War Against Terror: The Burden of American Power in a Violent World* (Basic Books, 2004) 87-8, 191-2.

<sup>13</sup> John C. Yoo, 'International law and the war in Iraq (Agora: Future Implications of the Iraq Conflict)' (2003) 97(3) *American Journal of International Law* 563, 563. See, Dina Badie, Groupthink, Iraq, and the War on Terror: Explaining US Policy Shift toward Iraq (2010) 6(4) *Foreign Policy Analysis* 277, 282.

1441/2002 that recognised the threat of Iraq on the international peace and security since Iraq did not comply with the Security Council resolutions and proliferation of weapons of mass destruction therefore it recalled all state members to restore the international peace and security. Therefore, it is stated that this resolution of the Security Council was considered as a permission to use force against Iraq by the UN state members to maintain the international peace and security since Iraq violated the earlier resolutions of the Security Council.<sup>1</sup> Accordingly, the US invoked that this permission of using force against Iraq could be justifiable under the right of self-defence that was recognised by article 51 of the *Charter of the UN*; however, it is argued that the context of article 51 limits the context of the right to self-defence to actual armed attacks that cross domestic frontiers, not terrorist attacks.<sup>2</sup>

In the recent situation in the Middle East, the concept 'terrorism' has been noticeable in this region by referring the domestic conflict in several states such as Syria, Iraq, Libya and Yemen along with Al-Qaeda's activities and attacks in this region. The Security Council condemns in the Resolution 2322/2016 terrorist acts of ISIL and Al-Qaeda therefore it reaffirms the responsibility of states to meaningfully cooperate in order to counter the expansion of terrorism and adopting effectual criminal justice system. The Security Council also notices the negative impact of Al-Qaeda's activities on neighboring countries; for instance, it declares its deep concern about destabilizing the security of Lebanon because of the Syrian crisis and the existence of violent extremist groups that have involved in fighting in Syria.<sup>3</sup> Moreover, it urged and encouraged the Iraqi government and population to continue and enhance their cooperation in fighting against ISIL that seeks to destabilize the Iraqi region.<sup>4</sup> Accordingly, the Security Council has urged and affirmed the necessity to counter-terrorism because terrorism can destabilize countries through impacting their peace and security.

It can be noticed that the Security Council has escalated the necessity of cooperation to comply with the obligation of countering Al-Qaeda and prevent it from expansion in the Middle East because of increasing its threat to international peace and security. This is attributed to increase Al-Qaeda's activities and concentrate its existence in the Middle East regardless where its leadership is located, after the US has adopted the proactive strategy that is based on the use of cross-border force under the cloak of self-defense in its war on terrorism in Afghanistan and Iraq as a respond to September 11 attacks.<sup>5</sup> Subsequently, Al-Qaeda moved its leadership to Iraq and adopted the strategy of decentralization by financially supporting and training its groups and members cross the world in order to enhance its ability to operate attacks in any pace in the world.<sup>6</sup> Also, Western countries have been aware about the ability of Al-Qaeda to destabilize their territories since it has received the tolerance and the support of Muslim communities within their territories; therefore, this has alarmed Western countries about the probability of affecting the coexistence between Muslims and non-Muslims in Western countries.<sup>7</sup> Accordingly, the US and its allies have led war on terrorism<sup>8</sup> and have maximized and escalated their efforts and operations against Al-Qaeda.<sup>9</sup> As a result, it is obvious that the international community has moved to use cross-border force to counter Al-Qaeda that has constituted a serious threat to international peace and security because Al-Qaeda has developed and enhanced its ability to operate attacks cross the world.<sup>10</sup>

Based on the aforementioned, the international community has moved toward admitting the use of cross-border force to counter-terrorism post September 11 attacks under the motivation of eliminating terrorism that constitutes a serious threat to international peace and security. This reflects the development in international law through expanding the context of the right of self-defense through modifying the pre-requirement of occurring armed attacks by allowing the use cross-border force to counter-terrorism and respond to terrorist activities. Indeed, this enhances the existence of the right of anticipatory self-defense that allows the use of cross-border force to counter-terrorism that constitutes imminent threat of armed attack. For instance, although Al-Qaeda was not a state with respect to 11 September attacks, the Security Council recognised these attacks within the context of terrorism that constituted threat international peace and security and acknowledged the right of self-defence and the collective self-defence in the Resolution 1368/2001. In this regard, it is debated that article 51 of the *Charter of the UN* neither limits nor restricts the context of the right of self-defence to counter

<sup>1</sup> Yoo, above n 53, 566-7.

<sup>2</sup> Ibid 571.

<sup>3</sup> See, *Middle East*, PRST, UN GAOR, S/PRST/2015/7 (19 March 2015) 2; *the Situation in the Middle East*, PRST, UN GAOR, S/PRST/2013/9 (10 July 2013) 1-3.

<sup>4</sup> *Iraq*, PRST, UN GAOR, S/PRST/2014/1 (10 January 2014) 1.

<sup>5</sup> Rohan Gunaratna, 'The post-madrid face of Al Qaeda' (2004) 27(3) *The Washington Quarterly* 91, 94.

<sup>6</sup> Ibid 97. See, Javier Jordan and Luisa Boix, 'Al-Qaeda and Western Islam' (2004) 16(1) *Terrorism & Political Violence* 1, 2-3.

<sup>7</sup> Ibid 1.

<sup>8</sup> Gunaratna, above n 58, 93.

<sup>9</sup> Audrey Kurth Cronin, 'The 'War on Terrorism': What Does it Mean to Win?' (2013) 37(2) *Routledge* 174, 174.

<sup>10</sup> Stockholm International Peace Research Institute, *SIPRI Yearbook 2005: Armaments, Disarmament, and International Security* (New York: Oxford University Press, 2005) 28-9.

only factual armed attack that is in progress therefore state members are allowed to use cross-border force to protect themselves under the right of self-defence that is inherent in the international customary law.<sup>1</sup> The President of the Security Council declares that terrorism constitutes a serious threat to international peace and security however it asserts combating terrorism by all means pursuant to the *UN Charter* and international law;<sup>2</sup> however, it excludes the right of self-defence from the scope of prohibiting the use of force.<sup>3</sup> However, the allowance of the use of cross-border force to counter-terrorism under the right of anticipatory self-defence has led to undermines the obligation of refrain from using force in international relations under article 2(4) of the *Charter of the UN* as well as the inherent obligation of refrain from the intervention in internal and external affairs of other state members to protect the territorial integrity, sovereignty and political independence of state members.

#### IV. Implications of Counter-Terrorism by Using Cross-Border Force

The previous part shows that the reason behind the new movement toward admitting the use of cross-border force to counter-terrorism is the increased awareness about the risk of terrorism that has constituted a serious threat to international peace and security. Although this new movement can be considered as a positive development in war on terrorism, this development can lead to undermine other provisions of the *Charter of the UN* by the illegal modification of its provisions. Another implication, there is a need to consider that counter-terrorism has shifted to become an individual or collective responsibility because of not having centralized body to monitor and regulate this mission especially in the light of the absence of the Security Council.

The new practice of using cross-border force to counter-terrorism under the cloak of the right of self-defence may lead to undermine the *Charter of the UN* because of the illegal way of modifying the requirements of the right of self-defence that is referred to in article 51 of the *Charter of the UN* and the prohibition of the threat or the use of force in international relations that is referred to in article 2(4) of the *Charter of the UN*. This subsequent practice is considered by article 31(2)(b) of the *Vienna Convention on the Law of Treaties 1969* in the process of interpreting treaties and it considers as a source of international law that constitutes an international custom pursuant to article 38(1)(b) of the *Statute of the ICJ*; therefore, the practice has constituted precedent that has modified the use of force with respect to counter terrorism under the cloak of self-defence that is referred to article 51 of the *Charter of the UN*. However, this modification is incompatible with article 108 of the *UN Charter* that determines the amendments of the *Charter of the UN* by stipulating “a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council”. Moreover, this subsequent practice undermines provision 2(4) of the *Charter of the UN* such as the obligation of refrain from the threat or the use of force in international relations against the political independence and the territorial integrity of other state members, it undermines the obligation of refrain from the intervention in internal and external affairs of other state members as well. Moreover, this subsequent practice can lead to undermine other international agreements that tackle international crimes. For instance, hijackers who operated September 11 attacks were a small group did not constitute armed or military groups and their attacks constituted a use of force but it did not reach the stage of armed attack; therefore, these criminal acts were tackled by terrorism conventions that considered offences of “jeopardize safety on board aircraft, hijacking of aircraft, sabotage of aircraft, and attacks against state or “infrastructure” facilities using explosive devices”.<sup>4</sup> This authorization can undermine the inherent right of self-determination that is acknowledged by the General Assembly for all people in the Resolution 1514/1960 because activities of liberation movements may be considered as terrorist acts by other states. This can be obvious in the conflict between Israel and Palestinians since Arab countries consider acts of Palestinians against the Israeli occupation within the context of liberation movement in accordance to the right of self-determination,<sup>5</sup> while Israel and its supporters consider the same acts within the context of terrorism.<sup>6</sup>

Furthermore, authorizing states to use cross-border force to counter-terrorism can constitute a serious threat to other states’ peace and security because of not having an effective centralized body to monitor the process of using of force. This authorization can be exploited by powerful states to achieve political interests by using force under the cloak of the right of self-defence to depart from international obligations that have asserted by the Security Council such as the refrain from the threat or the use of force in international relations and

<sup>1</sup> Yoo, above n 53, 572-4.

<sup>2</sup> *Threats to international peace and security caused by terrorist acts*, PRST, UN GAOR, S/PRST/2012/17 (4 May 2012) 3.

<sup>3</sup> *Protection of Civilians in armed conflict*, PRST, UN GAOR, S/PRST/2015/22 (25 November 2015) 1.

<sup>4</sup> Murphy, above n 25, 45-6.

<sup>5</sup> Edward W. Said, *The Politics of Dispossession: The Struggle for Palestinian Self-Determination, 1969-1994* (Knopf Doubleday Publishing Group, 2012) 139, 159.

<sup>6</sup> See, Alan Dershowitz, ‘The Case of Israel’ (2003) 25 *Dublin U. L.J.* 44; Sami Zaidant, ‘Desperately Seeking Definition: The International Community’s Quest for Identifying the Specter of Terrorism’ (2003-2004) 36 *Cornell Int’l L.J.* 491.



affecting “the sovereignty, independence, territorial integrity and the unity’ as well as ‘the principles of good-neighborliness, non-interference and regional cooperation”.<sup>1</sup> Accordingly, misusing this authorization to achieve political interests can constitute a serious threat to other states’ peace and security. For instance, the US and the West since the mid 1990s have invoked that Al-Qaeda is a terrorist organisation, although the US and the West had been supported Al-Qaeda in the anti-Soviet jihad after forming it in the late 1980s.<sup>2</sup> It is argued that this war on terrorism especially against Al-Qaeda seems to be endless<sup>3</sup> and Al-Qaeda has escalated its operations and existence cross the world; this can be referred to either the inability of the international community to end the existence of Al-Qaeda or powerful states are unwilling to terminate this war on terrorism.<sup>4</sup> In the recent Syrian crisis, it is indicated that the US has supported rebels and opponents against the Syrian regime that has constituted a serious threat to the security of Israel and the US in the region, after Syria has enhanced its cooperation with Iran and supporting Hezbollah in Lebanon.<sup>5</sup> Also, the negative impact of authorizing the use of force has been obvious in the invasion of Iraq in 2003 under the cloak of war on terrorism<sup>6</sup> that has led to create a harsh conflict between Sunni and Shia in the region.<sup>7</sup>

### Conclusion

In sum, this paper argues the legitimacy of authorizing the use of cross-border force to counter-terrorism before and after September 11 attacks. The use of cross-border force to counter terrorism under the right of self-defense was forbidden before September 11 attacks because of granting the supremacy to the obligation of refrain from the use of force in international relations and the obligation of refrain from the intervention in internal and external affairs of other state members in order to protect the territorial integrity, sovereignty and political independence of state members. However, this attitude has been changed after September 11 attacks by authorizing the use of cross-border force under the inherent right of self-defense; this is due to expand the existence of terrorism cross the world under the decentralization technique even terrorism has constituted a serious threat to international peace and security. Nonetheless, authorization of using cross-border force to counter-terrorism can threaten the security and peace of other states, when powerful state members misuse this authorization to depart from the obligation of refrain from the threat or the use of force in international relations in order to achieve political interests by invading other states by invoking counter-terrorism; this cannot be ignored since the mission of counter-terrorism has become an individual or collective responsibility that is crystalized in the US endless war on terrorism in the light of missing a global centralized body to monitor and observe the use of cross-border force against terrorism.

<sup>1</sup> See, SC Res 2337, UN SCOR, 72<sup>nd</sup> sess, 7866<sup>th</sup> mtg, UN Doc S/RES/2337 (19 January 2017); SC Res 2339, UN SCOR, 72<sup>nd</sup> sess, 7872<sup>nd</sup> mtg, UN Doc S/RES/2339 (27 January 2017); SC Res 2340, UN SCOR, 72<sup>nd</sup> sess, 7878<sup>th</sup> mtg, UN Doc S/RES/2340 (8 February 2017).

<sup>2</sup> Michael Scheuer, *Imperial Hubris: Why the West is Losing the War on Terror* (Potomac Books, Inc., 2004) 216, 218, 220.

<sup>3</sup> Cronin, above n 62, 174.

<sup>4</sup> Ibid 175-9.

<sup>5</sup> Robert G. Rabil, *Syria, the United States, and the War on Terror in the Middle East* (Greenwood Publishing Group, 2006) 113.

<sup>6</sup> See, Jean Bethke Elshtain, *Just War Against Terror: The Burden of American Power in a Violent World* (Basic Books, 2004) 198-9; Stockholm International Peace Research Institute, *SIPRI Yearbook 2005: Armaments, Disarmament, and International Security* (New York: Oxford University Press, 2005) 112.

<sup>7</sup> Ibid 227.