

**FROM AL-QAIDA IN 2001 TO ISIL IN 2015: THE SECURITY COUNCIL'S DECISIONS ON  
TERRORISM AND THEIR IMPACT ON THE RIGHT TO SELF-DEFENSE AGAINST AUTONOMOUS  
NON-STATE ACTORS**

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“The fortunes of war more than any other are liable to frequent fluctuations,” said Don Quixote. Prominent voices certainly embraced this logic regarding a right to self-defense against autonomous non-State actors shortly after 9/11<sup>1</sup>, mainly as a result of Resolutions 1368 and 1373 (2001) adopted by the Security Council in the aftermath of the infamous terrorist attacks.<sup>2</sup> Others

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<sup>1</sup> The label “right to self-defense against autonomous non-State actors” means the right to self-defense against armed attacks or threats thereof coming from autonomous non-State actors and aimed at the territory of the State from which they operate (hereinafter “innocent States”). Traditionally, autonomous non-State actors are those whose actions cannot be attributed to a third State, based on the customary rule embodied in Article 8 of the International Law Commission's Articles on State Responsibility, as interpreted by the International Court of Justice. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 115 (June 27). However, as this Article will illustrate below in Section IX, such analysis will be made in light of the Security Council's own rules of attribution, which it has put in place in the domain of threats to international peace and security caused by terrorist acts. As to the customary rule, see *id.*; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶ 399–400 (Feb. 26); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, ¶ 146 (Dec. 19).

<sup>2</sup> *See* Theresa Reinold, *State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11*, 105 AM. J. INT'L L. 244, 248 (2011); Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. INT'L L. 769, 774 (2012); Michael N. Schmitt, *Responding to Transnational Terrorism Under the Jus ad Bellum: A Normative Framework*, 56 NAVAL L. REV. 1, 3–5 (2008); W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AM. J. INT'L L. 525, 527–32 (2006). To be sure, not all commentators shared this view post-9/11; *see, e.g.*, Antonio Cassese, *Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT'L L. 993, 996 (2001); Gilbert Guillaume, *Terrorism and International Law*, 53 INT'L & COMP. L.Q. 537, 546–47 (2004); Mary Ellen O'Connell, *Dangerous Departures*, 107 AM. J. INT'L L. 380, 382 (2013); Dire Tladi, *The Nonconsenting Innocent State: The Problem with Bethlehem's Principle 12*, 107 AM. J. INT'L L. 570, 575 (2013); CHRISTINE GRAY, *The Charter Limitations on the Use of Force: Theory and Practice*, in UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945 86, 97 (Vaughan Lowe et al. eds., 2008).

argued that these resolutions had lowered the threshold of attribution to States of actions carried out by non-State actors, in the sense that States would be held responsible for armed attacks consummated by terrorist groups that the former had either actively or passively supported.<sup>3</sup>

However, the International Court of Justice (the “Court” or “ICJ”) held in its advisory opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*<sup>4</sup> in 2004 that Article 51 “recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State.”<sup>5</sup> This was the Court’s response to Israel’s invocation of Resolutions 1368<sup>6</sup> and 1373.<sup>7</sup> Nonetheless, the Court said nothing on whether Resolutions 1368 and 1373 contained a standard of attribution different from that of customary international law. At the same time, Judges Higgins, Buergenthal, and Kooijmans were of a different view: the scope of Article 51 is not limited to attacks carried out by States.<sup>8</sup>

Some prominent voices did not much heed the Court as to the issue of autonomous non-State actors. For instance, Sir Daniel Bethlehem argued that “it is by now reasonably clear and accepted that states have a right of self-defense against attacks by non-state actors—as reflected,

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<sup>3</sup> See Thomas Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT’L L. 607, 610 (2003); see also Iain Scobbie, *Words My Mother Never Taught Me: “In Defense of the International Court,”* 99 AM. J. INT’L L. 76, 81 (2005).

<sup>4</sup> *Legal Consequences of the Construction of Wall in Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. Rep. 136 (July 9).

<sup>5</sup> *Id.* ¶ 139; see U.N. Charter art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence 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-defence 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.”).

<sup>6</sup> S.C. Res. 1368 (Sept. 12, 2001).

<sup>7</sup> S.C. Res. 1373 (Sept. 28, 2001).

<sup>8</sup> See *Legal Consequences of Construction of Wall in the Occupied Palestinian Territory*, 2004 I.C.J. Rep. at ¶ 33 (separate opinion by Higgins, R.); *id.* ¶ 6 (separate opinion by Buergenthal, T.); *id.* ¶ 35 (separate opinion by Kooijmans, P.); see also YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 229–30 (2012); Sean D. Murphy, *Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit From the ICJ?*, 99 AM. J. INT’L L. 62, 64 (2005).

for example, in UN Security Council Resolutions 1368 and 1373 of 2001, adopted following the 9/11 attacks . . . .”<sup>9</sup>

Has the emergence of the Islamic State in Iraq and the Levant (“ISIL”) and the Al Nusrah Front (“ANF”) made discussions on the existence of the right to self-defense against autonomous non-State actors irrelevant? Apparently, yes. A swift analysis would be as follows: the United States and United Kingdom invoked the right to self-defense against Al-Qaida back in 2001;<sup>10</sup> the Security Council mentioned the inherent right to self-defense in Resolutions 1368 and 1373 (2001)<sup>11</sup>; the United States, the United Kingdom, and France invoked the right to self-defense in 2014 and 2015 in response to ISIL<sup>12</sup>; and the Council enacted Resolution 2249 (2015), calling upon UN members to take all necessary measures against this terrorist group.<sup>13</sup> The right of self-defense against autonomous non-State actors would then be well established under Article 51 of the United Nations Charter (“Charter”) as a result of the Council’s decisions. Despite the allure of this chain of events, this proposition does not hold true. To be sure, this is not to say that the understanding of this provision is the same now as it was in 1945. This would simply ignore the reality the world is facing as a result of the threat that autonomous non-State actors pose for international peace and security. To prove this conclusion, this Article will follow an approach highlighted in the most recent evaluation of the Charter carried out by Simma, Khan, Nolte, and Paulus.<sup>14</sup>

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<sup>9</sup> Bethlehem, *supra* note 2, at 774; *see also* DINSTEIN, *supra* note 8, at 230.

<sup>10</sup> *See* Press Release, Security Council, Press Statement on Terrorist Threats by Security Council President, U.N. Press Release SC/7167 (Oct. 8, 2001) [hereinafter Press Statement on Terrorist Threats].

<sup>11</sup> *See* S.C. Res. 1368, *supra* note 6, S.C. Res. 1373, *supra* note **Error! Bookmark not defined.**

<sup>12</sup> *See* Marc Weller, *Permanent Imminence of Armed Attacks: Resolution 2249 (2015) and the Right to Self Defence Against Designated Terrorist Groups*, EJIL: TALK!: BLOG OF THE EUR. J. INT’L L. (Nov. 25, 2015), <http://www.ejiltalk.org/permanent-imminence-of-armed-attacks-resolution-2249-2015-and-the-right-to-self-defence-against-designated-terrorist-groups/#more-13871>.

<sup>13</sup> S.C. Res. 2249, ¶ 5 (Nov. 20, 2015).

<sup>14</sup> *See* Georg Nolte & Albrecht Randelzhofer, *Article 51*, in 2 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1397 (Bruno Simma et al. eds., 3d ed. 2012).

In their assessment of Article 51, Nolte and Randelzhofer offered an additional layer of analysis regarding its interpretation. They simply but acutely recalled how the Charter, in particular Article 51, had to be interpreted as a treaty in accordance with the Vienna Convention on the Law of Treaties (“VCLT”). Thus, they opened the way for the evaluation of subsequent practice by expressing:

[T]he UN Charter is to be interpreted according to the general rules of treaty interpretation which are codified in Arts 31–33 VCLT . . . In principle, the rules of treaty interpretation and on the sources of international law do not exclude the possibility that Art. 51 is reinterpreted, including on the basis of subsequent practice. Theoretically it is even possible that an additional exception to the general prohibition of the use of force could develop alongside Art. 51 by way of superseding customary international law. In view, however, of the fundamental importance of the right to self-defense for the Charter system of collective security, the conditions for the recognition of any significant reinterpretation of, or superseding exception to, Art 51 are strict.<sup>15</sup>

It is on this basis that I suggest the *Wall Opinion* cannot be seen as preventing the Security Council, the General Assembly, or UN members from reinterpreting Article 51 through subsequent decisions and practice. Moreover, there is room for an interpretation of Article 51 that this provision does not limit its scope to attacks by States, as Judges Higgins, Buergenthal, and

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<sup>15</sup> *Id.* ¶ 4. On the issue of subsequent decisions and practice within international organizations as elements to be used in the interpretation of their constitutive treaties, see JOSE ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 87–92 (2005); JAN KLABBERS, *AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW* 96–103 (2002); Jan Wouters & Philip De Man, *International Organizations as Law-Makers*, in *RESEARCH HANDBOOK ON THE LAW OF INTERNATIONAL ORGANIZATIONS* 190, 192–94 (Jan Klabbbers & Asa Wallendahl eds., 2011). *See also* Whaling in Antarctic (Austl. v. Japan/N.Z.), Judgment, 2014 I.C.J. Rep. 226, ¶¶ 46–47, 137 (Mar. 31). There have been discussions during the Security Council’s deliberations on the potential amendment character of particular draft resolutions. To be sure, the issue is Janus-faced. What some States might consider as an amendment to a Charter provision, others might not. In this regard, see the discussion that took place during the adoption of Resolution 255 (1968), which referred to measures to safeguard non-nuclear-weapons States parties to the Treaty on the Non-Proliferation of Nuclear Weapons. U.N. DEP’T OF POLITICAL AND SEC. COUNCIL AFFAIRS, *REPertoire OF THE PRACTICE OF THE U.N. SECURITY COUNCIL: SUPPLEMENT 1966–68*, Chapter XI at 217–23, U.N. Doc. ST/PSCA/1/Add.5, U.N. Sales No. F.71 VII.1 (1971) [hereinafter *REPertoire OF THE PRACTICE OF THE U.N. SEC. COUNCIL: SUPPLEMENT 1966–68*]. However, the point here is not whether the Security Council’s decisions and practices can introduce amendments to Article 51, but whether these decisions have adjusted the understanding of this provision to reflect new realities.

Kooijmans suggested in their separate opinions and declaration to the Court's opinion.<sup>16</sup> Consequently, what the *Wall Opinion* does not say, in the present author's view and in accordance with the VCLT, is that Article 51 excludes *per se* the existence of a right to self-defense against such actors. However, what the *Wall* opinion can be inferred to say is that this until July 2004, this practice—in particular the Council's—had not altered the traditional understanding of the scope of Article 51 to cover armed attacks by autonomous non-State actors.

After *Wall*, those arguing that the right to self-defense against autonomous non-State actors has crystallized cannot base their claims solely on a reading of the text of Article 51 and of Resolutions 1368 and 1373, which the Court did not embrace in 2004. To be rigorous and convincing, the statement needs to be based on subsequent United Nations decisions and practice. The same can be said of the creation of a new standard of attribution to States of non-State actors' actions in the domain of terrorism.

This Article explores to the fullest extent possible Nolte and Randelzhofer's approach<sup>17</sup> and examines the Security Council's decisions and practice after Resolutions 1368 and 1373 (2001), and until Resolution 2249 (2015)—exhorting members to take all necessary means against ISIL.<sup>18</sup> The Article will illustrate the following main conclusions after an evaluation of 37

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<sup>16</sup> See Legal Consequences of the Construction of Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 33 (July 9) (separate opinion by Higgins, R.); *id.* ¶ 6 (separate opinion by Buergenthal, T.); *id.* ¶ 35 (separate opinion by Kooijmans, P.).

<sup>17</sup> See *supra* note 15 and accompanying text. Hakimi and Cogan offer a different framework of analysis from the one explored here. Although the present author does not fully share their approach, their article constitutes an important contribution to the literature. See Monica Hakimi & Jacob Katz Cogan, *The Two Codes on the Use of Force*, 27 EUR. J. INT'L L. 257, 257 (2016).

<sup>18</sup> Nolte & Randelzhofer, *supra* note 14, ¶ 37 (concluding that “the preferable view seems to be that attacks by organized groups need to be attributed to a State in order to enable the affected State to exercise its right to self-defence.”). This conclusion does not render the present Article irrelevant, for Nolte and Randelzhofer highlighted the argument of expansion of Article 51 through subsequent decisions and practices without embarking upon an evaluation of such decisions.

resolutions, 48 presidential statements enacted and issued by the Council, and 156 press statements made by its members:

- (i) Between 2002 and November 2015 (Resolution 2249), there was no explicit subsequent decision or practice related to the right to self-defense against autonomous non-State actors;
- (ii) With the exception of Resolution 2249, the Council has consistently chosen to develop multilateral tools unrelated to the use of force to overcome terrorist threats in its 85 decisions;
- (iii) There is some evidence of what could be labelled as “implicit subsequent decisions and practice” related to the use of force in self-defense against autonomous non-State actors from 2001 until right before Resolution 2249. This practice, however, combined with Resolutions 1268 and 1373, has not been enough to expand the right to self-defense under Article 51 of the Charter against such terrorist entities;
- (iv) Contrary to the lack of decisions regarding Article 51 in this realm, the Council has made four explicit references to this provision during the same period in a different context;
- (v) The International Court was right with its cautious approach in the *Wall Opinion*, which reflects the Council’s perspective from 2002 to 2015;
- (vi) In 1998 the Council began creating a new standard of attribution to States of non-State actors’ actions in the domain of terrorism, which the Council applied to the 9/11 attacks and has repeatedly reaffirmed over the said period. The standard is different from that of customary international law: actions by non-State actors that do not meet the customary standard can meet the Council’s standards, be attributed to States, and may trigger self-defensive responses;
- (vii) As a result of this newly-created standard, the Council has indirectly expanded the applicability of Article 51 to respond to armed terrorist attacks; and
- (viii) In Resolution 2249 the Council, for the first time, tacitly endorsed self-defensive action against an autonomous non-State actor—ISIL in Syria and Iraq—but the resolution does not go beyond that.<sup>19</sup>

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<sup>19</sup> The decisions adopted by the Security Council in the domain of threats to international peace and security in 2016 do not change this conclusion. In effect, the Council issued two resolutions on this topic. Resolution 2309 dealt with measures aimed at preventing terrorist attacks against the global aviation system. *See* S.C. Res. 2309 (Sept. 22, 2016). Security Council Resolution 2322 expanded measures against ISIL and was aimed at curbing its ability to recruit foreign terrorist fighters and to have access to funds and financial assets. *See* S.C. Res. 2322 (Dec. 12, 2016). So did the following two statements from the Security Council President. First, the presidential statement of May 11, 2016, requested the Counter Terrorism Committee to present a proposal to the Council for a comprehensive international framework to counter ISIL’s narratives encouraging the commission of terrorist attacks. *See* U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2016/6 (May 11, 2016). The second presidential statement took place on May 13, 2016, and was related to Boko Haram. The Council commended the governments of Cameroon, Chad, Niger, and Nigeria for their regional efforts against this terrorist group. *See* U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2016/7 (May 13, 2016).

Essentially, the Council's decisions and practices from 2001 to 2015 evidence that under the legal terms of the UN Charter, a State that has been the object of an armed attack by a non-State actor—other than ISIL in Syria and Iraq—or is under imminent threat of such attack, needs to identify if the attack can be attributed to a State under the Council's norms of attribution in the domain of terrorism. If not, the attacked State needs to secure, as a matter of law, the innocent State's consent to carry out self-defensive action in the former's territory under the well-established principle of sovereignty and territorial integrity enshrined in the Charter, or it needs the Security Council's endorsement or a Chapter VII authorization for the given self-defensive action.<sup>20</sup> Merely the existence of an armed attack or imminent threat by an autonomous non-State actor is not enough to trigger lawful self-defensive action under the UN Charter on the basis of the Council's subsequent decisions and practices.

### **I. Security Council Decisions and Practices and How to Interpret Them**

The Security Council operates through a diverse set of instruments: binding resolutions, non-binding resolutions, and presidential statements.<sup>21</sup> However, it is important to note that the label “presidential statements” is slightly inaccurate, as the statement comes directly from the Council in a formal meeting, after informal consultations of the whole involving negotiations of each paragraph, and it is merely read out by the president.<sup>22</sup> More importantly, these statements constitute decisions of the Security Council under Article 27 of the Charter,<sup>23</sup> a conclusion

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<sup>20</sup> The U.N. Charter establishes only two exceptions to the prohibition of the use of force: the Council's enforcement actions pursuant to Chapter VII, and the right to individual and collective self-defense set forth in Art. 51. *See Nolte & Randelzhofer, supra* note 14, ¶ 3.

<sup>21</sup> *See generally* U.N. President of the S.C., Note dated July 26, 2010, U.N. Doc. S/2010/507 (July 26, 2010) [hereinafter U.N. President of the S.C. July 2010 Note] (explaining that the U.N. Security Council uses various forms of documentation to communicate their initiatives).

<sup>22</sup> *See* Michael C. Wood, *Security Council Working Methods and Procedure: Recent Developments*, 45 INT'L & COMP. L.Q. 150, 154 n.12 (1996); Stefan Talmon, *The Statements by the President of the Security Council*, 2 CHINESE J. INT'L L. 419, 419 (2003).

<sup>23</sup> *See* Andreas Zimmermann, *Article 27*, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 871, ¶ 73 (Bruno Simma et al. eds., 3d ed. 2012).

supported by States' practice and the UN Secretariat.<sup>24</sup> In terms of ranking, Sievers and Daws say, "there is no hierarchy among Council decisions created because of the format in which they are 'published.'"<sup>25</sup> So, a binding decision can exist in a presidential statement, too.<sup>26</sup> It all depends on the substantive content.<sup>27</sup> However, there is another reality highlighted by these authors: "[b]ecause of the common perception that a resolution 'carries more weight' . . . than a presidential statement, the Council has tended to publish all of its major operational decisions as resolutions."<sup>28</sup> In practice, no Chapter VII decision has been imparted in a presidential statement.<sup>29</sup> In addition to these decisions, the Council also issues annual reports, which are sent to the UN General Assembly by virtue of Article 24(3) of the Charter and which are approved by all of its members.<sup>30</sup>

Finally, there is another type of practice worth mentioning: statements to the press. They are made orally by the Security Council President (the "President"), on behalf of the members of the Council and on the basis of general guidelines determined after informal consultations.<sup>31</sup> These statements, however, do not constitute decisions under Article 27<sup>32</sup> but are still considered important by the Council itself, which has regulated their discussion process<sup>33</sup> and included them among the information available to the public on the Council's website.<sup>34</sup> In any case, they constitute declarations by the members of the Council regarding particular topics.

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<sup>24</sup> See Talmon, *supra* note 22, at 448.

<sup>25</sup> LORAINIE SIEVERS & SAM DAWS, *THE PROCEDURE OF THE UN SECURITY COUNCIL* 375 (4th ed. 2014).

<sup>26</sup> See *id.* at 381. These authors also present evidence of the Council's practice of events of binding nature of presidential statements and Notes of the President. See *id.* at 375–76.

<sup>27</sup> See *id.* at 374. *But see* Talmon, *supra* note 22, at 452.

<sup>28</sup> SIEVERS & DAWS, *supra* note 25, at 376–78.

<sup>29</sup> See *id.* at 378.

<sup>30</sup> See U.N. President of the S.C. July Note, *supra* note 21, at 12–15.

<sup>31</sup> See Wood, *supra* note 22, at 154; Talmon, *supra* note 22, at 430.

<sup>32</sup> See Zimmermann, *supra* note 23, at 74; Talmon, *supra* note 22, at 448–49.

<sup>33</sup> See U.N. President of the S.C. July Note, *supra* note 21, at 9, ¶ 42.

<sup>34</sup> Links to the Security Council's press releases can be found, in reverse chronological order, at in the main webpage of the United Nations Security Council. See U.N. SECURITY COUNCIL, <http://www.un.org/en/sc/> (last visited April 4, 2017).



The issue then is how to interpret these subsequent decisions and practices made by the Council when assessing whether they have achieved expansion of Article 51. The International Court first expressed in the Advisory Opinion in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*,

The language of a resolution of the Security Council should be carefully analysed... having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences....<sup>35</sup>

Most recently, the Court expressed in its advisory opinion in *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*:

The interpretation of Security Council resolutions may require the Court to analyse statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of States affected by those given resolutions.<sup>36</sup>

As can be seen, the Court highlights “other resolutions on the same subject” as elements to be taken into consideration at the time of interpretation of specific resolutions. Presidential statements can also be used to interpret Security Council resolutions as part of the subsequent practice the Court mentioned in the *Kosovo* advisory opinion. In fact, the Court used statements of this nature when interpreting the applicable resolutions in this opinion.<sup>37</sup>

Finally, the fact that the International Court has said that other resolutions on the same issue are relevant for the purpose of interpretations of particular resolutions has an impact on the scope of the subsequent practice to be assessed for the purpose of the inquiry carried out here.

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<sup>35</sup> *Legal Consequences for States of Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. Rep. 16, ¶ 114 (June 21).

<sup>36</sup> *Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 2010 I.C.J. Rep. 403, ¶ 94 (July 22).

<sup>37</sup> *See id.* ¶ 91.

Indeed, the Council included Resolutions 1368 and 1373 within the topic “threats to international peace and security caused by terrorist acts,”<sup>38</sup> so for the purpose of identifying subsequent decisions and practices by the Council related to the right to self-defense against autonomous non-State actors that could have expanded Article 51, this Article will assess 37 resolutions, 48 presidential statements, and 156 press statements catalogued by the Council as being made under the said label over the period 2001–15. This paper will also look at 13 Annual Reports to the General Assembly issued by the Council, as well as the Repertoire of Practice of the Security Council concerning Article 51.<sup>39</sup> Only after reviewing all of these decisions can an interpreter

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<sup>38</sup> See S.C. Res. 1368, *supra* note **Error! Bookmark not defined.**; S.C. Res.1373, *supra* note **Error! Bookmark not defined.** It is important to note that, despite the fact that the Council has rendered 85 decisions under the label “threats to international peace and security caused by terrorist acts,” there is no general definition of the term “terrorism” in international law. The closest the Security Council has come to a definition is provided in Resolution 1566, where the Council stated:

[C]riminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature;

S.C. Res. 1566, ¶ 3 (Oct. 8, 2004); *see also* Michael Wood, *The Role of the UN Security Council in Relation to the Use of Force Against Terrorists*, in COUNTER-TERRORISM STRATEGIES IN A FRAGMENTED INTERNATIONAL LEGAL ORDER: MEETING THE CHALLENGES 317, 323 (Larissa Van den Kerik & Nico Schrijver eds., 2013). However, the Special Tribunal for Lebanon defined, for the first time, terrorism in international law in the following terms:

On the basis of treaties, UN resolutions and the legislative and judicial practice of States, there is convincing evidence that a customary rule of international law has evolved on terrorism in time of peace, requiring the following elements: (i) the intent (*dolus*) of the underlying crime and (ii) the special intent (*dolus specialis*) to spread fear or coerce authority; (iii) the commission of a criminal act, and (iv) that the terrorist act be transnational.

Ayyash et al., Case No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 3 (Special Trib. for Lebanon Feb. 16, 2011). On the topic of a definition of terrorism, see BEN SAUL, *DEFINING TERRORISM IN INTERNATIONAL LAW* 1 (2006) (explaining that there is no one absolute, correct definition of terrorism due to the word’s subjective and political nature); ANTHONY AUST, *HANDBOOK OF INTERNATIONAL LAW* 264–67 (2010); Marcello Di Filippo, *Terrorist Crimes and International Co-operation: Critical Remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes*, 19 EUR. J. INT’L L. 533, 539, 546 (2008); Ben Saul, *Terrorism as a Transnational Crime*, in *HANDBOOK OF TRANSNATIONAL CRIMINAL LAW* 394 (N. Boister & R. Currie eds., 2015).

<sup>39</sup> The Repertoire of the Practice of the Security Council covers the period from 1946 to 2011. *See The Repertoire of the Practice of the Security Council*, UNITED NATIONS, <http://www.un.org/en/sc/repertoire/actions.shtml> (last visited Mar. 28, 2017).

conclude whether or not the subsequent practice has expanded the scope of Article 51 of the Charter to cover self-defensive actions against armed attacks from autonomous non-State actors and whether or not the subsequent practice has created or reaffirmed a particular standard of attribution to States of acts performed by non-State actors in the domain of terrorism.<sup>40</sup>

## II. **The Security Council’s Decisions and Practices in Response to the 9/11 Terrorist Attacks**

Resolution 1368 condemned the 9/11 attacks, recognized “the inherent right of individual or collective self-defense in accordance with the Charter,”<sup>41</sup> and called on States to work together “to bring to justice perpetrators, organizers and sponsors of these terrorist attacks . . . .”<sup>42</sup> On September 21, 2001, the President issued a press statement on behalf of the members of the Council, in which he provided a broader context to Resolution 1368; in particular, he highlighted 12 international conventions dealing with different dimensions of terrorism and anticipated the adoption of resolutions of a general nature, which in effect the Council adopted when it issued Resolution 1373.<sup>43</sup>

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<sup>40</sup> This Article has also included a review of Notes by the President of the Security Council regarding threats to international peace and security caused by terrorist acts. There was nothing relevant in them.

<sup>41</sup> See S.C. Res. 1368, *supra* note 6, pmb. ¶ 3.

<sup>42</sup> See *id.* ¶ 3. On September 13, 2001, the President of the Security Council issued a note acknowledging the receipt of communications sent by the representatives of Australia, Belgium (on behalf of the European Union), Brazil, Cuba, Israel, Japan, New Zealand, Romania, Slovenia, and Yugoslavia, in which the terrorist attacks were condemned. See U.N. President of the S.C., Note by the President of the Security Council, U.N. Doc S/2001/864 (Sept. 13, 2001).

<sup>43</sup> See Press Release, Security Council, Note by President of Security Council, U.N. Press Release S/2001/864 (Sept. 29, 2001).

Resolution 1373 (2001) reaffirmed the inherent right to self-defense<sup>44</sup> as well as “the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts.”<sup>45</sup> The resolution also provided that:

[A]ll States shall:

(a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;

. . .

(c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens . . . .<sup>46</sup>

In addition, Resolution 1373 called on “States to work together urgently to prevent and suppress terrorist acts . . . .”<sup>47</sup> It mandated States to criminalize the willful provision or collection of funds by their nationals to be used for terrorist purposes, ordered the freeze of assets of persons involved in terrorist actions, and called for the prohibition of nationals to make funds available to those involved in terrorist actions. Resolution 1373 also called upon UN members to become parties to conventions related to terrorism, created a Committee of the Security Council to monitor implementation of the resolution, and ordered States to report to the Committee on the steps they had taken in this direction.

In essence, Resolution 1373 has both unilateral and multilateral dimensions, but this does not mean that the two natures are of the same degree. In fact, the unilateral dimension in Resolution 1373 is present in its preamble only, while the multilateral character is present both in the preamble

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<sup>44</sup> See S.C. Res. 1373, *supra* note **Error! Bookmark not defined.**, pmb. ¶ 4. In addition to the United Kingdom and the United States, Canada, France, Australia, Germany, the Netherlands, New Zealand, Poland, Belgium (on behalf of General Affairs Council of the European Union), Norway, Egypt, Malaysia, and Chile (on behalf of State members of the Rio Group) supported the invocation of Article 51 under the circumstances. See U.N. DEP’T OF POLITICAL AND SEC. COUNCIL AFFAIRS, REPERTOIRE OF THE PRACTICE OF THE U.N. SECURITY COUNCIL: SUPPLEMENT 2000–03, Chapter XI at 1005–06, U.N. Doc. ST/PSCA/1/Add.14, U.N. Sales No. [not provided] (2011) [hereinafter REPERTOIRE OF THE PRACTICE OF THE U.N. SECURITY COUNCIL: SUPPLEMENT 2000–03].

<sup>45</sup> See S.C. Res. 1373, *supra* note **Error! Bookmark not defined.**, pmb. ¶ 5.

<sup>46</sup> *Id.* ¶¶ 2(a), 2(c).

<sup>47</sup> *Id.* pmb. ¶ 7.

and, more importantly, in the operative part of the resolution. This is a distinction worth keeping in mind.

On October 8, 2001, the President released a press statement on behalf of the members of the Council closely related to Resolutions 1368 and 1373 (2001). In it, the President stated:

I might recall that the Security Council reacted to the attacks of 11 September, first through resolution 1368, and then through resolution 1373, which took direct aim at the financing and support of international terrorism. The members of the Council are determined to see the full implementation of these resolutions.

The members of the Security Council took note of the letters that the representatives of the United States and of the United Kingdom sent yesterday to the President of the Security Council, in accordance with Article 51 of the United Nations Charter, in which they state that the action was taken in accordance with the inherent right of individual and collective self-defence following the terrorist attacks in the United States of 11 September 2001.<sup>48</sup>

One month after the attacks, the members of the Council made a press statement in which they announced the appointment of the members of the Committee that Resolution 1373 had established to monitor its implementation.<sup>49</sup>

Another decision by the Council adopted in relation to the 9/11 attacks was Resolution 1377 (2001).<sup>50</sup> The decision contained a declaration by the Council on the global effort against terrorism, recalled, among others, the 9/11 resolutions,<sup>51</sup> and declared that international terrorism was a serious threat to peace and security and was contrary to the purposes and principles of the Charter.<sup>52</sup> The resolution affirmed that active participation and collaboration of UN members, in accordance with the Charter, was essential to combat terrorism.<sup>53</sup> The Council also began setting the basis for the strengthening of the Counter-Terrorism Committee (“CTC”), first, by recognizing

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<sup>48</sup> See Press Statement on Terrorist Threats, *supra* note **Error! Bookmark not defined.**

<sup>49</sup> See Press Release, Security Council, Press Statement on ‘Terrorism Committee’ by President of Security Council, U.N. Press Release SC/7163 (Oct. 4, 2001).

<sup>50</sup> See S.C. Res. 1377 (Nov. 12, 2001).

<sup>51</sup> See *id.* ¶ 3.

<sup>52</sup> See *id.* ¶ 4.

<sup>53</sup> See *id.* ¶ 9.

that States may need assistance to implement Resolution 1373, and second, by authorizing the CTC to explore ways to provide it.<sup>54</sup>

Finally, the Council issued a press statement commemorating the first anniversary of the 9/11 attacks, in which it endorsed the actions carried out in self-defense by the United States and the United Kingdom against the Taliban and Al-Qaida:

The international community has responded to the atrocities of 11 September with unyielding determination. A broad coalition of States has taken action against the Taliban, Al-Qaida, and their supporters. It did so in defence of common values and common security. Consistent with the high purposes of this institution and the provisions of the United Nations Charter, the coalition continues to pursue those responsible.<sup>55</sup>

Despite the fact that the Court just mentioned Resolutions 1368 and 1373 in the *Wall* opinion, these resolutions, plus the presidential statements already mentioned, are the decisions by the Council that the Court implicitly regarded as insufficient to expand Article 51 against autonomous non-State actors.

Before proceeding, note that for the right to self-defense against autonomous non-State actors to exist, there is an important trade-off: namely, the territorial integrity of the State from which the autonomous non-State actor operates, whose consent is not required. This is because the self-defending State, by virtue of the existence of the right, would not need to get the State's consent prior to carrying out the self-defensive action. Differently put, with the existence of an armed attack, the right to self-defense would trump the right to territorial integrity of the State from which the non-State actor operates. The right to self-defense against such acts would exist under Article 51 only once UN members recognized an exception to the right to territorial integrity of the non-consenting State. The coexistence of the two rights would exist only in the event of

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<sup>54</sup> See *id.* ¶¶ 14–15.

<sup>55</sup> U.N. Security Council, Statement by the President of the Security Council, ¶ 4, U.N. Doc. S/PRST/2002/25 (Sept. 11, 2002) [hereinafter Statement by the President of the Security Council on Sept. 11, 2002].

such consent. The sole exception, as will be seen, is endorsement or Chapter VII authorization by the Security Council to take all necessary measures against an autonomous non-State actor.

### III. The Right to Self-Defense Against ISIL and Resolution 2249 (2015)

Given the impression that Resolution 2249 may have confirmed the existence of the right to self-defense against autonomous non-State actors—and because Article 51 had been invoked against ISIL by Iraq and the United States since 2014,<sup>56</sup> with the opposition of Russia and China, which claimed that all military operations in Syria required its consent<sup>57</sup>—it is important to assess that resolution. To begin with, the Council has defined ISIL as an autonomous non-State actor by dissociating its actions from both Iraq and Syria in Resolution 2199 (2015):

*Reaffirming* the independence, sovereignty, unity and territorial integrity of the Republic of Iraq and the Syrian Arab Republic, and reaffirming further the purposes and principles of the Charter of the United Nations, . . .

*Noting with concern* the continued threat posed to international peace and security by ISIL, ANF and all other individuals, groups, undertakings and entities associated with Al-Qaida, and reaffirming its resolve to address all aspects of that threat.<sup>58</sup>

In Resolution 2249, and after condemning ISIL’s attacks in Paris, Beirut, Turkey, and the Sinai, the Council notes that this group “has the capability and intention to carry out further attacks and *regards* all such acts of terrorism as a threat to peace and security.”<sup>59</sup>

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<sup>56</sup> See U.N. Secretary-General, Letter dated Sept. 23, 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, U.N. Doc. S/2014/695 (Sept. 23, 2014).

<sup>57</sup> See Ben Blanchard, *China Gives Cautious Response to Obama’s Islamic State Call*, REUTERS (Sept. 11, 2014, 4:33 AM), <http://www.reuters.com/article/2014/09/11/iraq-crisis-china-idUSL3N0RC23K20140911> (statement of Chinese Foreign Ministry spokeswoman Hua Chunying) (“China opposes all forms of terrorism, and upholds that the international community must jointly cooperate to strike against terrorism, including supporting efforts by relevant countries to maintain domestic security and stability[.] . . . At the same time, we also uphold that in the international fight against terrorism, international law should be respected and the sovereignty, independence and territorial integrity of relevant nations should also be respected . . .”). For Russia’s statement, see Ian Black & Dan Roberts, *Isis Air Strikes: Obama’s Plan Condemned by Syria, Russia and Iran*, GUARDIAN (Sep. 12, 2014), <http://www.theguardian.com/world/2014/sep/11/assad-moscow-tehran-condemn-obama-isis-air-strike-plan> (statement of Russian spokesman) (“The US president has spoken directly about the possibility of strikes by the US armed forces against Isil positions in Syria without the consent of the legitimate government[.] . . . This step, in the absence of a UN security council decision, would be an act of aggression, a gross violation of international law.”).

<sup>58</sup> S.C. Res. 2199, pmb. ¶¶ 7, 22 (Feb. 12, 2015).

<sup>59</sup> S.C. Res. 2249, *supra* note 13, ¶ 1.

[The Council] [c]alls 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 as well as ANF, and all other individuals, groups, undertakings, and entities associated with Al Qaeda, and other terrorist groups, as designated by the United Nations Security Council, and as may further be agreed by the International Syria Support Group (ISSG) and endorsed by the UN Security Council, pursuant to the statement of the International Syria Support Group (ISSG) of 14 November, and to eradicate the safe haven they have established over significant parts of Iraq and Syria . . . .<sup>60</sup>

Early assessments of the resolution pointed at its ambiguity, in particular its use of Chapter VII language without explicitly invoking its powers and calling upon States to take necessary measures without actually mandating or deciding the adoption of any measure.<sup>61</sup> According to Akande and Milanovic, the resolution does “not provide for the use of force against ISIS either in Syria or in Iraq;”<sup>62</sup> a conclusion shared by Weller.<sup>63</sup> Deeks is of the view that Resolution 2249 is mainly an exercise of soft power by the Council and blurs the “long-standing bright line between Chapter VII resolutions that authorize force and those that do not.”<sup>64</sup> However, although critical of the Council, Starski argues that the resolution legitimizes self-defense without Syrian consent.<sup>65</sup> Commenting on Resolution 2249, Sir Michael Wood, a member of the UN International Law Commission, disagrees with the argument of ambiguity and expresses:

[I]t is difficult to read the resolution otherwise than as an endorsement, in the circumstances, of the use of force in self-defence against an ongoing or imminent armed attack by Da'esh, a non-State actor. Paragraph 5 of the resolution itself

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<sup>60</sup> *Id.* ¶ 5.

<sup>61</sup> Dapo Akande & Marko Milanovic, *The Constructive Ambiguity of the Security Council's ISIS Resolution*, EJIL: TALK!: BLOG OF THE EUR. J. INT'L L. (Nov. 21, 2015), <http://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/>.

<sup>62</sup> *Id.*

<sup>63</sup> See Weller, *supra* note 12.

<sup>64</sup> Ashley Deeks, *Threading the Needle in Security Council Resolution 2249*, LAWFARE (Nov. 23, 2015, 3:25 PM), <https://www.lawfareblog.com/threading-needle-security-council-resolution-2249>.

<sup>65</sup> See Paulina Starski, “*Legitimized Self-Defense*” – Quo Vadis Security Council?, EJIL: TALK!: BLOG OF THE EUR. J. INT'L L. (Dec. 10, 2015), <http://www.ejiltalk.org/legitimized-self-defense-quo-vadis-security-council/#more-13897>.



referred to the need “to prevent and suppress terrorist acts committed specifically by ISIL also known as Da’esh as well as [by other specified terrorist groups]”. No one at the Council meeting at which the resolution was adopted suggested otherwise.<sup>66</sup>

The resolution is not a Chapter VII resolution, which means neither that it is not binding nor that it lacks important legal effects.<sup>67</sup> The resolution does not authorize UN Members to carry out any particular actions against ISIL, but it does, among other things, endorse military actions against this terrorist group. The scope of the exhortation is vast and long term: (i) to prevent terrorist acts by ISIL and present and even future associate entities; (b) to suppress their terrorist acts; and (c) to eradicate the safe haven that ISIL has established in Iraq and Syria. The resolution has also a territorial limitation: the measures the Council calls upon States to take must be carried out in the territory controlled by ISIL and no further. Thus, Syrian territory controlled by the Syrian army cannot be targeted on the basis of the resolution, meaning that the exception to the principle of territorial integrity is also geographically constrained: a constraint that must be respected, for the resolution recalls such principle in its preamble.<sup>68</sup>

As to the reasons for the wording of paragraph 5, a UK House of Commons’ document expresses:

This careful wording implicitly supports states’ existing military actions against specific terrorist groups in those countries without either explicitly accepting or rejecting the various competing justifications or clearly providing a new stand-alone legal basis or authorisation for those actions.

The result is that states are likely to continue relying on the other varying legal arguments they have been using up until now, despite the disagreement between Russia and other states.<sup>69</sup>

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<sup>66</sup> Michael Wood, *The Use of Force in 2015 With Particular Reference to Syria* 8 (Hebrew U. Jerusalem, Res. Paper No. 16-05, 2016), <https://ssrn.com/abstract=2714064>.

<sup>67</sup> See Weller, *supra* note 12; Akande & Milanovic, *supra* note 61.

<sup>68</sup> See S.C. Res. 2249 (2015), *supra* note 13, pmbl. ¶ 2.

<sup>69</sup> Arabella Lang, *Legal Basis for UK Military Action in Syria*, HOUSE OF COMMONS BRIEFING PAPERS NO. 7404 (Dec. 1, 2015), <http://researchbriefings.files.parliament.uk/documents/CBP-7404/CBP-7404.pdf>.

This could be a reason why Resolution 2249 was not adopted under Chapter VII.<sup>70</sup>

Equally important is that the resolution does not impose any explicit restriction on States to claim the right to self-defense, so States still can invoke the right against ISIL.<sup>71</sup> In fact, the resolution has important implications for the right to self-defense against this group. First, States no longer need Syria and/or Iraq's consent to lawfully take self-defensive actions against ISIL.<sup>72</sup> The existence of an attack and even of a threat suffices for the use of force in self-defense. Second, it is important to highlight that the resolution creates an exception to the obligation to respect the territorial integrity of Syria only,<sup>73</sup> but not to other requirements of the right of self-defense, such as necessity and proportionality. The latter two must be complied with by any UN Member acting in self-defense upon the resolution as part of its express order that all necessary measures must comply with the Charter and international law.<sup>74</sup>

Third, the call made by the Council is wider and encompasses not only States that have been the object of terrorist attacks or terrorist threats by ISIL, but also any State that has the capabilities to contribute to the eradication of the group's safe haven in Syria and Iraq. The resolution then goes well beyond the confines of self-defense as to ISIL.<sup>75</sup>

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<sup>70</sup> Personal conversation with a public official from a non-permanent Security Council member who took part in the negotiations.

<sup>71</sup> See Nolte & Randelzhofer, *supra* note 14, at 1428.

<sup>72</sup> Consequently, Assad's statement calling the United Kingdom's operation against ISIL in Syria after Resolution 2249 "illegal" lacks merit. As to the declaration, see *Assad says Britain's Syria Strikes 'Illegal', Will Encourage Terror*, MSN NEWS (June 12, 2015), <http://www.msn.com/en-nz/news/world/assad-says-britains-syria-strikes-illegal-will-encourage-terror/ar-AAg50o6?li=AA59FU&ocid=mailsignout>.

<sup>73</sup> Germany was of this view in its communication to the Security Council invoking Article 51 and Resolution 2249 as bases for its actions against ISIL in Syria. See U.N. Security Council, Letter dated Dec. 10, 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/946 (Dec. 10, 2015). The United Kingdom made a similar argument. See U.N. Security Council, Letter dated Dec. 3, 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/928 (Dec. 3, 2015).

<sup>74</sup> See S.C. Res. 2249, *supra* note 13, ¶ 5.

<sup>75</sup> *Id.*

Equally important is to identify what Resolution 2249 does *not* provide for. First, it does not establish the right to self-defense against *any* autonomous non-State actors in *any* part of the world. Consequently, it does not endorse the use of self-defensive force on the basis only of the existence of terrorist threats or attack by any autonomous terrorist organizations. The resolution is circumscribed to ISIL, has a geographic limitation, and there is no similar endorsement to dispense with the obligation to respect the territorial integrity of innocent States, if the given non-State actors' action cannot be attributed to a State under the rules of attribution that the Security Council has established in the domain of terrorism, as will be seen below in Section IX.

If Resolution 2249 does not create a right of self-defense against autonomous non-State actors in general, the question becomes whether or not such a right already existed as a result of the Security Council's decisions prior to Resolution 2249. The answer is negative; there was no explicit decision by the Council in relation to Article 51 and autonomous non-State actors other than the 9/11 resolutions from 2002 and before Resolution 2249. Eighty-four decisions were made by the Council during this time, all aimed at designing a multilateral framework to deal with terrorist threats to international peace and security, which were unrelated to the use of force. These Security Council decisions are important for the interpretation of the scope of Resolutions 1368 and 1373 (2001) and, ultimately, of Resolution 2249.

#### **IV. The Subsequent Decisions and Practices of the Security Council Related to Threats to International Peace and Security Caused by Non-State Actors from 2002 to November 2015 before Resolution 2249: No Explicit Expansion of Article 51**

The purposes of this section are twofold: first, to show that the Council made a consistent choice to rely on a multilateral effort to address the threat to international peace and security caused by terrorist acts; and second, to describe and illustrate with certain detail the scope and elements of the multilateral tools. Such detailed description is necessary for interpreters to answer

fundamental questions, such as the potential existence of implicit subsequent practices able to expand Article 51 to cover autonomous non-State actors.<sup>76</sup>

As will be seen in this section, the choice of multilateral instruments to face terrorist threats has been clear from 2002 to 2015.<sup>77</sup> The elements of these tools are several. Some of them are the following: (i) Council's mandate to members to adopt or apply existing domestic legislation to carry out the measures ordered by the Council; (ii) the creation and/or strengthening of several sanctions committees made up of the members of the Council and the expansion and refinement of their working procedures; (iii) close monitoring by the committee of compliance by UN members with the given resolutions; (iv) coordination between the Security Council sanctions committees and between them and other UN organs; (v) coordination between the committees and other international, regional, and sub-regional organizations; and (v) cooperation between UN members in their counter-terrorism efforts.<sup>78</sup>

In addition to this type of decision, the Council and its members made other decisions included in resolutions, presidential statements, and statements to the press condemning terrorist

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<sup>76</sup> What follows in this section and, particularly its footnotes, is tiresome, but indispensable. An important part of this Article rests on the descriptions contained herein, which constitute the necessary background—based on what the International Court stated in *Kosovo*—of any assessment of whether subsequent decisions have explicitly expanded Article 51 to cover autonomous non-State actors. However, those who are familiar with the different dimensions of the 85 decisions made by the Council over the said period can skip this Section and move on to Section V.

<sup>77</sup> This choice has not been the only one made by the Council regarding threats to international peace and security caused by terrorist acts. It was already said that Resolution 2249 endorsed self-defensive actions against ISIL without Syrian consent. Furthermore, as will be explained in Section IX, from 1998 to 2015 the Council has created and reaffirmed a new standard of attribution to States of acts carried out by non-State actors in this domain.

<sup>78</sup> Section IV is descriptive in character. No comment is included on the faults or merits of the Security Council's decisions presented below, as this section's purpose is to answer the question of whether subsequent decisions by the Council on threats to international peace and security have expanded Article 51 to cover armed attacks by autonomous non-State actors. On the Council's counter-terrorism decisions from a multilateral angle, see, for example, Andreas Paulus, *Article 29, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 1004–09 (Bruno Simma et al. eds., 3d ed. 2012); Jane Boulden, *The Security Council and Terrorism, in UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945* 608 (Vaughan Lowe et al. eds., 2008); Andrea Bianchi, *Assessing the Effectiveness of the UN Security Council's Anti-Terrorism Measures: The Quest for Legitimacy and Cohesion*, 17 *EUR. J. INT'L L.* 881 (2006). For a critical perspective, see Andrew Hudson, *Not a Great Asset: The UN Security Council Counter-Terrorism Regime: Violating Human Rights*, 25 *BERKELEY. J. INT'L L.* 203 (2007).

attacks in several countries. In all of them, the need to comply with Resolution 1373 and to cooperate with the affected countries to bring to justice the perpetrators was recalled.<sup>79</sup>

## **A. The Security Council's Decisions and Practices on Terrorism from 2002 to November 2015**

### **i. The Security Council and Terrorism in 2002**

In 2002, the Security Council adopted five resolutions related to terrorist threats. Resolutions 1390<sup>80</sup> and 1452<sup>81</sup> dealt with an existing multilateral instrument—namely, the Resolution 1267 Committee—and were adopted under Chapter VII.<sup>82</sup> The remaining three resolutions—1438, 1440, and 1450—contained political statements condemning terrorist attacks in Bali, Russia, and Kenya.<sup>83</sup> In addition to the presidential statement on the first anniversary of 9/11 mentioned above,<sup>84</sup> the Council issued three presidential statements in 2002 related to the operation of one of the multilateral instruments, the CTC.<sup>85</sup> Finally, there was one press statement

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<sup>79</sup> See, e.g., S.C. Res. 1530, ¶ 3 (Mar. 11, 2004); S.C. Res. 1611, ¶ 3 (July 7, 2005); see also U.N. President of the S.C., Statement by the President of the Security Council, ¶ 3, U.N. Doc. S/PRST/2006/18 (Apr. 25, 2006); U.N. President of the S.C., Statement by the President of the Security Council, ¶ 2, U.N. Doc. S/PSRT/2008/19 (June 2, 2008).

<sup>80</sup> Resolution 1390 held that the Taliban regime had violated prior resolutions and condemned that group for allowing Afghanistan to be a base for Al Qaida. The Council decided to continue measures aimed at freezing Taliban property and funds, established by Resolution 1267. In effect, Resolution 1267 created a Committee (the Resolution 1267 Committee), consisting of all members of the Council, and given the task of ensuring UN Members' compliance with the resolution through the implementation of the following measures: freeze of the Taliban's assets and a denial of takeoff or landing to aircrafts owned, leased, or operated by or on behalf of the Taliban. The resolution also called upon States to bring proceedings against individuals or entities that violated the measures and to report to the Committee on implementation. See S.C. Res. 1267 (Oct. 15, 1999). Resolution 1390 also established new measures against the Taliban and Al Qaida, created new tasks and duties to report for the Resolution 1267 Committee, and requested UN Members to report it on the implementation of the measures. See S.C. Res. 1390 (Jan. 16, 2002).

<sup>81</sup> Resolution 1452 provided for some exceptions to the freezing obligations of funds belonging to the Taliban pursuant to Resolutions 1267 and 1390. See S.C. Res. 1452 (Dec. 20, 2002).

<sup>82</sup> See S.C. Res. 1390, *supra* note 80, pmb. ¶ 10; *id.*, pmb. ¶ 4.

<sup>83</sup> See S.C. Res. 1438 (Oct. 14, 2002); S.C. Res. 1440 (Oct. 24, 2002); S.C. Res. 1450 (Dec. 12, 2002).

<sup>84</sup> See *supra* note 55 and accompanying text.

<sup>85</sup> See U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2002/10 (Apr. 15, 2002); U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2002/26 (Oct. 8 2002); U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2002/38 (Dec. 17, 2002).

issued by the members of the Council in 2002 that specifically related to terrorism, in which an attack in Afghanistan was reproved.<sup>86</sup>

## ii. **The Security Council and Terrorism in 2003**

The Security Council adopted four resolutions relating to terrorism in 2003. Resolution 1455, a Chapter VII decision,<sup>87</sup> and Resolution 1456,<sup>88</sup> were multilateral instruments designed to face the threat posed by terrorism and to deal with the Resolution 1267 Committee and the CTC. The two other decisions, Resolutions 1465 and 1516, censured terrorist actions in Colombia and Turkey.<sup>89</sup> The Council also made three presidential statements in 2003, two of which referred to the operation of the CTC,<sup>90</sup> and one which condemned a terrorist attack in Iraq.<sup>91</sup> There was also in 2003 a single press statement issued by the members of the Council related to the operation of a multilateral instrument, the Resolution 1267 Committee.<sup>92</sup>

## i. **The Security Council and Terrorism in 2004**

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<sup>86</sup> See Press Release, Security Council, Press Statement on Afghanistan by Security Council President, U.N. Press Release SC/7497 (Sep. 6, 2002).

<sup>87</sup> Resolution 1455 established better coordination between the Resolution 1267 Committee and the CTC. Resolution 1455 also called upon members to prevent violations of the Council's resolutions against terrorist groups and to inform the Resolution 1267 Committee of all investigations and enforcement actions. This resolution also created a Monitoring Group charged with the tasks of monitoring implementation by members of the measures ordered by the Council and of identifying incomplete implementation. See S.C. Res. 1455 (Jan. 17, 2003).

<sup>88</sup> Resolution 1456 was portrayed by the Council as a high-level meeting of the Security Council on combating terrorism, and it was a decision containing a political declaration that summarized the main elements of the anti-terrorism strategy put in place by the Council up to that point. The Council explicitly acknowledged that strong multilateral cooperation was the key to dealing with terrorism. The Council then called upon States to prevent and suppress active and passive support for terrorism; to cooperate fully in the investigation, prosecution, and punishment of acts of terrorism; to bring to justice those who financed, planned, supported, or committed terrorist actions; and to report to the CTC fully and promptly. This resolution also requested that the CTC intensify the efforts to achieve the implementation by UN members of Resolution 1373. See S.C. Res. 1456 (Jan. 20, 2003).

<sup>89</sup> See S.C. Res. 1465 (Feb. 13, 2003); S.C. Res. 1516 (Nov. 20, 2003).

<sup>90</sup> See U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2003/3 (Apr. 4, 2003); U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2003/17 (Oct. 16, 2003).

<sup>91</sup> See U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PSRT/2003/13 (Aug. 20, 2003).

<sup>92</sup> See Press Release, Security Council, Press Statement by Security Council President Following Briefing by Chair of Committee Monitoring Taliban, Al-Qaida Sanctions, U.N. Press Release SC/7730 (Apr. 15, 2003).

The Council handed down four resolutions in 2004 dealing with threats to peace and security caused by terrorism. Three were in exercise of the Council's Chapter VII powers and enhanced multilateral tools, the Resolution 1267 Committee and the CTC, to respond to this threat. They were Resolutions 1526,<sup>93</sup> 1535,<sup>94</sup> and 1566.<sup>95</sup> The fourth, Resolution 1530, reprovved a terrorist attack in Spain.<sup>96</sup> In addition, there were two presidential statements made by the Council in 2004, both in response to terrorist attacks in Russia,<sup>97</sup> and one press statement by the members condemning terrorist attacks in Pakistan, Egypt, and Iraq.<sup>98</sup>

## ii. The Security Council and Terrorism in 2005

The Council adopted five resolutions related to terrorism in 2005. The Council continued to strengthen multilateral instruments to deal with it in Resolution 1617, a Chapter VII decision,<sup>99</sup>

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<sup>93</sup> Resolution 1526 strengthened measures to be taken by UN members against Al Qaida and the Taliban, their members, and other associated groups referred to in Resolutions 1267 and 1333. The resolution also established an Analytical Support and Sanctions Monitoring Team under the direction of the Resolution 1267 Committee and instructed the team to submit reports on States' implementation of the measures adopted by the Council against Al Qaida and the Taliban. The resolution also invited States to report to the Committee any investigation and enforcement actions carried out by them. *See* S.C. Res. 1526 (Jan. 30, 2004); *see also* S.C. Res. 1333 (Sept. 19, 2000).

<sup>94</sup> Resolution 1535 reinforced the structure of the CTC by creating a Plenary, made up of all Security Council members, and the Bureau, composed of the Chair and Vice-Chairs, both assisted by the Counter-Terrorism Executive Directorate. The purpose of the new structure was to improve the Committee's ability to implement Resolution 1373. *See* S.C. Res. 1535 (Mar. 24, 2004).

<sup>95</sup> Resolution 1566 called upon members to cooperate with those States affected by terrorist acts by finding, denying safe haven to, and bringing to justice those who supported, facilitated, or participated in such acts. The resolution called upon international organizations to cooperate with the CTC and requested that the latter develop a set of best practices to help States implement Resolution 1373. *See* S.C. Res. 1566, *supra* note 38.

<sup>96</sup> *See* S.C. Res. 1530, *supra* note 79.

<sup>97</sup> *See* U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2004/31 (Sept. 1, 2004); *see also* U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2004/14 (May 10, 2004).

<sup>98</sup> *See* Press Release, Security Council, Press Statement by Security Council President on Recent Terrorist Attacks, U.N. Press Release SC/8215 (Oct. 8, 2004).

<sup>99</sup> Resolution 1617 reaffirmed the measures that members had to take against the individuals included in the list created by Resolutions 1267 and 1333. The Council also defined when there was an association between Al-Qaeda and the Taliban and other groups, and decided that such associated groups could also be included in the above-mentioned list. The resolution also requested that States include the measures imposed on those individuals and entities on the list and that they inform the Committee of the listing and delisting procedures. The resolution also mandated coordination between the Resolution 1267 Committee, the CTC, and another Committee created by Resolution 1540. *See* S.C. Res. 1617 (July 29, 2005). Resolution 1540 established a Security Council committee tasked with implementing the said resolution, which seeks to prevent non-State actors from developing, acquiring, manufacturing, possessing, transporting, or using chemical or biological weapons. *See* S.C. Res. 1540 (Apr. 28, 2004).

and in Resolution 1624.<sup>100</sup> For its part, Resolution 1625 contained a declaration on strengthening the Council's conflict prevention role in Africa in particular and reaffirmed the principle of refraining from the threat or use of force in contravention with the Charter.<sup>101</sup> The right to self-defense was not mentioned. In addition, Resolutions 1611<sup>102</sup> and 1618<sup>103</sup> denounced the terrorist attacks in London and Iraq, respectively. Also, the Council rendered two presidential statements dealing with the ongoing operation of the CTC.<sup>104</sup> Moreover, six presidential statements were issued in 2005 in the aftermath of terrorist operations in Iraq, Egypt, Indonesia, India, and Jordan.<sup>105</sup> Finally, there was one statement to the press issued by the members of the Council dealing with terrorism in 2005, condemning the July 7 attack in London.<sup>106</sup>

### iii. **The Security Council and Terrorism in 2006**

In 2006 the Security Council adopted only one resolution, a Chapter VII decision, related to terrorism: Resolution 1735. Deep improvements to multilateral instruments to face terrorism

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<sup>100</sup> Resolution 1624 dealt with incitement to terrorism through the use of communications. It recalled members' obligation to deny safe haven and to bring to justice those individuals who, among others, support and participate in the various stages of terrorist attacks. Resolution 1624 required States to enact legislation aimed at prohibiting incitement to carry out terrorist attacks, at preventing such incitement, and at denying protection to those guilty of such conduct. The resolution also obliged States to report to the CTC all the steps they had taken in this direction. *See* S.C. Res. 1624 (Sept. 14, 2005).

<sup>101</sup> Resolution 1625 recognized the need for partnerships with African organizations to offer early responses to disputes. S.C. Res. 1625 (Sept. 14, 2005).

<sup>102</sup> S.C. Res. 1611 (July 7, 2005).

<sup>103</sup> S.C. Res. 1618 (Aug. 4, 2005).

<sup>104</sup> *See* U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2005/64 (Dec. 21, 2005); *see also* U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2005/3 (Jan. 18, 2005).

<sup>105</sup> *See* U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2005/55 (Nov. 10, 2005); *see also* U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2005/53 (Oct. 31, 2005); U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2005/45 (Oct. 4, 2005); U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2005/37 (July 27, 2005); U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2005/36 (July 27, 2005); U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2005/29 (July 8, 2005).

<sup>106</sup> Press Release, Security Council, Press Statement on London Terrorist Attack, U.N. Press Release SC/8439 (July 7, 2005).



were put in place by this resolution.<sup>107</sup> Furthermore, there were two presidential statements in 2006, following terrorist attacks in Egypt and India, respectively.<sup>108</sup> Finally, there was no reference to practice related to terrorism in press statements in 2006.<sup>109</sup>

#### iv. **The Security Council and Terrorism in 2007**

Only one resolution dealing with threats to international peace provoked by terrorism was adopted by the Council in 2007: Resolution 1787. It reminded States of the need to comply with international law when combating terrorism, and commended States for cooperating with the CTC.<sup>110</sup> In addition, the Council issued eight other presidential statements in 2007 in response to terrorism attacks,<sup>111</sup> and highlighted in another its willingness to work together with the UN Secretary General to address “the multifaceted and interconnected challenges and threats confronting our world.”<sup>112</sup> Lastly, the members of the Council issued three press statements in 2007 as a result of terrorist attacks in India, Iraq, and Afghanistan.<sup>113</sup>

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<sup>107</sup> Resolution 1735 confirmed the set of measures established by prior resolutions and improved the listing and delisting process in terms of the quality and nature of the information that must be provided by designating members and the information that could be made public to interested States. Resolution 1735 directed the Resolution 1267 Committee to identify causes of non-compliance and to report to the Council on this matter. *See* S.C. Res. 1735 (Dec. 22, 2006).

<sup>108</sup> *See* U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2006/30 (July 12, 2006); *see also* U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2006/18 (Apr. 25, 2006).

<sup>109</sup> *See Press Statements*, U.N. SEC. COUNCIL, <https://www.un.org/en/sc/documents/press/2006.shtml> (listing press statements made by the President of the Security Council in 2006) (last visited Feb. 21, 2017).

<sup>110</sup> S.C. Res. 1787 (Dec. 10, 2007).

<sup>111</sup> *See* U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2007/50 (Dec. 27, 2007); *see also* U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2007/45 (Dec. 11, 2007); U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2007/39 (Oct. 22, 2007); U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2007/36 (Oct. 5, 2007); U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2007/32 (Sept. 7, 2007); U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2007/26 (July 9, 2007); U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2007/11 (Apr. 13, 2007); U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2007/10 (Apr. 12, 2007).

<sup>112</sup> U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2007/1 (Jan. 8, 2008).

<sup>113</sup> *See* Press Release, Security Council, Security Council Condemns Attack on Military Bus in Kabul, U.N. Press Release SC/9162 (Nov. 5, 2007); *see also* Press Release, Security Council, Security Council Press Statement on Baghdad Attack, U.N. Press Release SC/8974 (Mar. 22, 2007); Press Release, Security Council, Security Council Press Statement on Bombing of Delhi-Lahore Train, U.N. Press Release SC/8961 (Feb. 20, 2007).

v. **The Security Council and Terrorism in 2008**

In 2008 the Council issued two resolutions in order to improve multilateral instruments—the Resolution 1267 Committee and the CTC—to face terrorist threats: Resolution 1805<sup>114</sup> and Resolution 1922, a Chapter VII decision.<sup>115</sup> In addition, the Council made four presidential statements condemning terrorist attacks in Pakistan and Algeria.<sup>116</sup> Lastly, the members of the Council issued eight press statements censuring terrorist attacks in Afghanistan, Pakistan, Turkey, Spain, Syria, and India.<sup>117</sup>

vi. **The Security Council and Terrorism in 2009**

The Security Council enacted only one resolution in 2009, Resolution 1904, a Chapter VII decision aimed again at improving a multilateral tool, the Resolution 1267 Committee.<sup>118</sup> The

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<sup>114</sup> Resolution 1805 urged the Counter-Terrorism Committee Executive Directorate (“CTED”) to increase members’ counter-terrorism capabilities, and stressed the need for a close dialogue between members, the CTC, and the CTED. *See* S.C. Res. 1805 (Mar. 20, 2008).

<sup>115</sup> In response to challenges before national courts to measures taken on the basis of counter-terrorism resolutions, Resolution 1822 recognized the need for a fair and clear process for the inclusion of individuals and entities within the consolidated list pursuant to Resolutions 1267 and 1333 (the “Consolidated List”). The resolution improved the listing and delisting procedures by increasing transparency. It directed the Resolution 1267 Committee to make accessible on its website a summary of the reasons for listing individuals or entities. Also, the resolution demanded that notified States take all possible measures to inform the listed individual or entity of the designation, its reasons, effects, and the Committee’s procedures for assessing delisting requests. The resolution also welcomed the creation of a Focal Point that allowed listed individuals and entities to directly request delisting. *See* S.C. Res. 1822 (June 30, 2008).

<sup>116</sup> *See* U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2008/35 (Sept. 22, 2008); *see also* U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2008/32 (Aug. 21, 2008); U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2008/31 (Aug. 19, 2008); U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2008/19 (June 2, 2008).

<sup>117</sup> *See* Press Release, Security Council, Security Council Press Statement on Terrorist Attacks in Mumbai, U.N. Press Release SC/9513 (Nov. 28, 2008); *see also* Press Release, Security Council, Security Council Press Statement on Damascus Terrorist Attack, U.N. Press Release SC/9460 (Sept. 27, 2008); Press Release, Security Council, Security Council Press Statement on Terrorist Attacks in Spain, U.N. Press Release SC/9455 (Sept. 24, 2008); Press Release, Security Council, Security Council Press Statement on Terrorist Attack in Turkey, U.N. Press Release SC/9394 (July 10, 2008); Press Release, Security Council, Security Council Press Statement on Terrorist Attacks in Pakistan, U.N. Press Release SC/9389 (July 8, 2008); Press Release, Security Council, Security Council Press Statement on Kabul Bomb Attack, U.N. Press Release SC/9386 (July 7, 2008); Press Release, Security Council, Security Council Press Statement on Kandahar Terrorist Attack, U.N. Press Release SC/9251 (Feb. 17, 2008); Press Release, Security Council, Security Council Press Statement on Kabul Hotel Bombing, U.N. Press Release SC/9226 (Jan. 15, 2008).

<sup>118</sup> Resolution 1904 reaffirmed the traditional measures and their exemptions for humanitarian reasons. The most important development the resolution contained was the creation of an independent Office of the Ombudsperson, which would assist the Resolution 1267 Committee in dealing with delisting requests made by individuals. The

Council made only one presidential statement in 2009, in the aftermath of a terrorist attack in Indonesia.<sup>119</sup> Lastly, the members of the Council issued five press statements after terrorist attacks in Afghanistan, Iraq, and Iran.<sup>120</sup>

vii. **The Security Council and Terrorism in 2010**

Resolution 1963 was the only resolution adopted by the Council on threats to international peace provoked by terrorism in 2010 and, again, was aimed at developing a multilateral tool, the CTC, to cope with this threat.<sup>121</sup> As to presidential statements, the Council issued two. The statement of February 24 dealt with the connection between drug trafficking and terrorism and called for international and regional cooperation and for States to prosecute persons responsible for organized crime, terrorism, and corruption.<sup>122</sup> The second statement, on September 27, mainly addressed issues of compliance with previous resolutions, cooperation between UN members, and with the operation of the CTC.<sup>123</sup> Finally, the members of the Security Council issued seven

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resolution also dealt with the review and maintenance of the Consolidated List by encouraging members to provide the Committee with additional information on listed persons and entities related to operating status, incarceration, movement, and death, among others. The resolution also requested the Monitoring Team to identify the listed individuals and entities whose information was not enough to ensure implementation of the measures imposed upon them. *See* S.C. Res. 1904 (Dec. 17, 2009).

<sup>119</sup> *See* U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2009/22 (July 17, 2009).

<sup>120</sup> *See* Press Release, Security Council, Security Council Press Statement on Terrorist Attack in Iran, U.N. Press Release SC/9770 (Oct. 20, 2009); *see also* Press Release, Security Council, Security Council Press Statement on the Kabul Bomb Attack, U.N. Press Release SC/9763 (Oct. 8, 2009); Press Release, Security Council, Security Council Press Statement on Terrorist Attack in Kandahar, U.N. Press Release SC/9735 (Aug. 26, 2009); Press Release, Security Council, Security Council Press Statement on Baghdad Bombings, U.N. Press Release SC/9733 (Aug. 19, 2009); Press Release, Security Council, Security Council Press Statement on Terrorist Attacks in Kabul, U.N. Press Release SC/9593 (Feb. 11, 2009).

<sup>121</sup> Resolution 1963 contained some decisions regarding the operation of the CTC and the CTED in terms of the developing of States' capabilities to combat terrorism. The resolution also reminded members that counter-terrorism measures and respect for human rights were complementary and reinforced each other. *See* S.C. Res. 1963 (Dec. 20, 2010).

<sup>122</sup> U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2010/4 (Feb. 24, 2010).

<sup>123</sup> U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2010/19 (Sept. 27, 2010).

statements related to terrorism in response to terrorist attacks in Russia, Uganda, Iran, Nigeria, Afghanistan, and Iraq.<sup>124</sup>

#### viii. **The Security Council and Terrorism in 2011**

The Security Council enacted two resolutions in 2011 regarding terrorism: Resolutions 1988<sup>125</sup> and 1989,<sup>126</sup> both Chapter VII decisions creating and improving multilateral instruments to overcome terrorist threats. The Council issued two presidential statements in this domain. The first presidential statement was issued on February 11 and addressed the interdependence between

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<sup>124</sup> See Press Release, Security Council, Security Council Press Statement on Violence in Iraq, U.N. Press Release SC/10081 (Nov. 10, 2010); see also Press Release, Security Council, Security Council Press Statement on Terrorist Attack in Herat, U.N. Press Release SC/10070 (Oct. 25, 2010); Press Release, Security Council, Security Council Press Statement on Abuja Bombings, U.N. Press Release SC/10048 (Oct. 4, 2010); Press Release, Security Council, Security Council Press Statement on Deadly Vladikavkaz Bombing, U.N. Press Release SC/10025 (Sept. 13, 2010); Press Release, Security Council, Security Council Press Statement on Terrorist Attacks in Iran, U.N. Press Release SC/9986 (July 16, 2010); Press Release, Security Council, Security Council Press Statement on Kampala Bombings, U.N. Press Release SC/9980 (July 12, 2010); Press Release, Security Council, Security Council Press Statement on Deadly Moscow Bombings, U.N. Press Release SC/9895 (Mar. 29, 2010).

<sup>125</sup> Resolution 1988 reaffirmed the measures against the Taliban and created a separate sanction regime for the group, whose members or associates were to be included within a particular list and no longer the Consolidated List created by Resolutions 1267 and 1333. The resolution also created a new Sanctions Committee, consisting of all the members of the Council, and decided that the acts or activities that could make a person or entity eligible for designation were the participation in the various stages of terrorist acts, such as the supply of arms and related material, and recruitment. The resolution also decided that all members had to apply the available exemptions set forth in Resolutions 1452 and 1735 to the measures already mentioned. Resolution 1988 directed its Committee to make accessible on its website a narrative summary of the reasons for the listing. As to delisting procedures, Resolution 1988 ordered the Committee to remove names of those individuals who had renounced terrorism and any membership in terrorist entities, and it also made it possible for individuals and entities to request delisting without members' support by submitting such request to the Focal Point created by Resolution 173. See S.C. Res. 1988, ¶ 1 (June 17, 2011).

<sup>126</sup> Resolution 1989 adjusted the Resolution 1267 Committee's mandate to the changes introduced by Resolution 1988 and to the Committee established therein, while preserving the measures against Al-Qaida and its members, the requirements of listing requests by UN States, and the procedure to follow after listing names. The resolution also determined that the Ombudsperson had to present to the Committee recommendations regarding the delisting request the office had received and determined the procedure to be followed. It also stated that, when the designating State requested a delisting, members would terminate the measures against the given person or entity 60 days after the request, unless the Committee decided by consensus to keep the listing. In the absence of consensus, the Security Council would make the decision within 60 days. The resolution reaffirmed the existing notification procedure of nationality, location, or incorporation of any delisting to UN members and to the individuals and entities themselves. In terms of the review and maintenance of the Al-Qaida Sanctions List, Resolution 1989 requested periodic updates. As to measure-implementation procedures, Resolution 1989 urged States to implement the standards embodied in the Financial Action Task Force ("FATF") Recommendations and the FATF Special Recommendations on Terrorist Financing. See S.C. Res. 1989 (June 17, 2011).

security and development.<sup>127</sup> The second presidential statement was issued on the day of the death of Osama Bin Laden, May 2, 2011. The Council stated:

The Security Council stresses that no cause or grievance can justify the murder of innocent people and that terrorism will not be defeated by military force, law enforcement measures, and intelligence operations alone, and can only be defeated by a sustained and comprehensive approach involving the active participation and collaboration of all States and relevant international and regional organizations and civil society to address the conditions conducive to the spread of terrorism and to impede, impair, isolate and incapacitate the terrorist threat.<sup>128</sup>

The death of Bin Laden gave the Council the opportunity to refer in some way to the right to self-defense once again. It is telling that, instead, the Council emphasized only the multilateral character of the fight against terrorism.

Also worth noting is the fact that the tenth anniversary of the 9/11 attacks came and went without the Council's mentioning the right to self-defense. The press statement issued by the Council on September 11, 2011, made no reference to this right as an important means to face threats to international peace and security posed by terrorism. Instead, the members gave significant emphasis to the multinational dimension of the effort by stating:

The members of the Security Council noted that in the period after the 11 September 2001 attacks, States joined together in a spirit of cooperation to combat terrorism, including through diplomatic efforts at and with the United Nations, and that such cooperation is essential and should be further strengthened.<sup>129</sup>

Finally, the members of the Council issued nine other statements related to terrorism during 2011, condemning terrorist attacks in Russia, Belarus, Norway, India, Syria, and Nigeria.<sup>130</sup>

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<sup>127</sup> See U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2011/4 (Feb. 11, 2011).

<sup>128</sup> U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2011/9, ¶ 9 (May 2, 2011).

<sup>129</sup> Press Release, Security Council, Security Council Press Statement on Tenth Anniversary of 11 September 2001, U.N. Press Release SC/10378, ¶ 4 (Sept. 9, 2011) [hereinafter Press Statement on Tenth Anniversary of 11 September 2001].

<sup>130</sup> See Press Release, Security Council, Security Council Press Statement on Terrorist Attacks in Nigeria, U.N. Press Release SC/10507 (Dec. 27, 2011); see also Press Release, Security Council, Security Council Press Statement

ix. **A.11 The Security Council and Terrorism in 2012**

Two resolutions on threats to international peace prompted by terrorism were made by the Council in 2012: Resolution 2082<sup>131</sup> and Resolution 2083.<sup>132</sup> Both were Chapter VII decisions and multilateral in character, calling for strengthening the Resolution 1988 Committee and the CTC. In terms of presidential statements, the Security Council issued one on May 4, 2012, in which it referenced several dimensions of its strategy to deal with terrorist threats.<sup>133</sup> For their part, the members of the Security Council issued 12 statements related to terrorism in 2012. Condemnation was made after terrorist attacks in Syria, Nigeria, Yemen, Bulgaria, Iraq, Somalia, and Lebanon.

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on Terrorist Attack in Damascus, Syria, U.N. Press Release SC/10506 (Dec. 23, 2011); Press Release, Security Council, Security Council Press Statement on Terrorist Attack in India, U.N. Press Release SC/10377 (Sept. 7, 2011); Press Release, Security Council, Security Council Press Statement on Abuja Bombing, U.N. Press Release SC/10370 (Aug. 26, 2011); Press Release, Security Council, Security Council Press Statement on Terrorist Attacks in Norway, U.N. Press Release SC/10337 (July 25, 2011); Press Release, Security Council, Security Council Press Statement on Attacks in Mumbai, India, U.N. Press Release SC/10325 (July 13, 2011); Press Release, Security Council, Security Council Press Statement on Minsk Bombing, U.N. Press Release SC/10225 (Apr. 13, 2011); Press Release, Security Council, Security Council Press Statement on Deadly Moscow Bombing, U.N. Press Release SC/10162 (Jan. 24, 2011).

<sup>131</sup> Resolution 2082 defined the assets that could be frozen, and reiterated when an entity was associated with the Taliban and could, therefore, be listed by the Resolution 1988 Committee. The resolution also exempted from the travel ban, under certain conditions, those listed individuals participating in the Afghan reconciliation process. As to listing procedures, Resolution 2082 improved them by urging members to consult with the Afghan government before making listing requests to the Committee. As to delisting procedures, Resolution 2082 followed Resolution 1988 in general terms and mandated expeditious removal of individuals and entities that no longer met the criteria or had renounced terrorism. *See* S.C. Res. 2082 (Dec. 17, 2012).

<sup>132</sup> Resolution 2083 reaffirmed the existing measures against Al Qaida, its members, and associated entities and the information requirements regarding them, the notification procedure for States and listed individuals and entities, and the information disclosure requirements. As to delisting, the resolution also reaffirmed the existing procedure and time-frame when it was the designating State who requested delisting to the Resolutions 1267/1989 Committee. The resolution also directed the Committee to provide reasons for objections to delisting requests, confirmed prior notification procedures of delisting decisions, and introduced adjustments to exemptions procedures. As to the Review and Maintenance of the Al Qaeda Sanctions List, Resolution 2083 was in line with prior resolutions, in particular regarding deceased listed individuals. As to measures implementation, the resolution reaffirmed members' obligation to identify or introduce procedures to implement the sanctions against listed individuals and urged States to implement the Financial Action Task Force's recommendations on combating money laundering and the financing of terrorism. *See* S.C. Res. 2083 (Dec. 17, 2012).

<sup>133</sup> U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2012/17 (May 4, 2012).

<sup>134</sup> *See* Press Release, Security Council, Security Council Press Statement on Lebanon, U.N. Press Release SC/10799 (Oct. 19, 2012); *see also* Press Release, Security Council, Security Council Press Statement on Terrorist Attacks in Aleppo, U.N. Press Release SC/10784 (Oct. 5, 2012); Press Release, Security Council, Security Council Press Statement on Terrorist Attacks in Somalia, U.N. Press Release SC/10774 (Sept. 21, 2012); Press Release,

## x. The Security Council and Terrorism in 2013

The Council enacted one resolution in 2013, Resolution 2129, dealing again with different dimensions of the CTC to cope with terrorist threats.<sup>135</sup> The Council issued only one presidential statement, which was the result of an open debate held on a comprehensive response to counterterrorism.<sup>136</sup> Lastly, the members of the Council issued 26 press statements after terrorist attacks in Algeria, Syria, Afghanistan, Somalia, Libya, Turkey, Niger, Lebanon, Kenya, Iraq, Yemen, Mali, and Russia. In these statements the Council reaffirmed the need to bring perpetrators to justice and called upon States to cooperate to this end.<sup>137</sup>

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Security Council, Security Council Press Statement on Terrorist Attack in Yemen, U.N. Press Release SC/10762 (Sept. 13, 2012); Press Release, Security Council, Security Council Press Statement on Terrorist Attacks in Iraq, U.N. Press Release SC/10757 (Sept. 11 2012); Press Release, Security Council, Security Council Press Statement on Terrorist Attack in Bulgaria, U.N. Press Release SC/10717 (July 19, 2012); Press Release, Security Council, Security Council Press Statement on Attacks in Syria, U.N. Press Release SC/10658 (May 27, 2012); Press Release, Security Council, Security Council Press Statement on Terrorist Attack in Yemen, U.N. Press Release SC/10656 (May 21, 2012); Press Release, Security Council, Security Council Press Statement on Terrorist Attacks in Damascus, U.N. Press Release SC/10643 (May 10, 2012); Press Release, Security Council, Security Council Press Statement on Terrorist Attacks in Syria, U.N. Press Release SC/10585 (Mar. 21, 2012); Press Release, Security Council, Security Council Press Statement on Terrorist Attacks in Nigeria, U.N. Press Release SC/10530 (Jan. 26, 2012); Press Release, Security Council, Security Council Press Statement on Damascus Terrorist Attack, U.N. Press Release SC/10513 (Jan. 6, 2012).

<sup>135</sup> Resolution 2129 invited the CTED to cooperate with UN members and regional and sub-regional organizations on the formulation of counterterrorism strategies to implement Resolutions 1373 and 1624. The Resolution invited the CTDE to engage in partnerships with civil society and international organizations, in consultation with given members, in order to prevent the spread of terrorism, and also stressed the importance of tailored dialogues among the CTC, the CTDE, and members. *See* S.C. Res. 2129 (Dec. 17, 2013).

<sup>136</sup> *See* U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2013/1, ¶¶ 2, 4, 8 (Jan. 15, 2013).

<sup>137</sup> *See* Press Release, Security Council, Security Council Press Statement on Second Terrorist Attack in Russian Federation, U.N. Press Release SC/11234 (Dec. 30, 2013); *see also* Press Release, Security Council, Security Council Press Statement on Terrorist Attack in Russian Federation, U.N. Press Release SC/11233 (Dec. 29, 2013); Press Release, Security Council, Security Council Press Statement on Lebanon Terrorist Attack, U.N. Press Release SC/11232 (Dec. 27, 2013); Press Release, Security Council, Security Council Press Statement on Terrorist Attack in Mali, U.N. Press Release SC/11214 (Dec. 14, 2013); Press Release, Security Council, Security Council Press Statement on Attack Against Defense Ministry of Yemen, U.N. Press Release SC/11202 (Dec. 5, 2013); Press Release, Security Council, Security Council Press Statement on Attacks in Afghanistan, U.N. Press Release SC/11199 (Dec. 4, 2013); Press Release, Security Council, Security Council Press Statement on Violence in Iraq, U.N. Press Release SC/11186 (Nov. 25, 2013); Press Release, Security Council, Security Council Press Statement on Terrorist Attack in Lebanon, U.N. Press Release SC/11180 (Nov. 19, 2013); Press Release, Security Council, Security Council Press Statement on Bomb Attack in Mogadishu, U.N. Press Release SC/11170 (Nov. 9, 2013); Press Release, Security Council, Security Council Press Statement on Attack in Nairobi, U.N. Press Release SC/11129 (Sept. 21, 2013); Press Release, Security Council, Security Council Press Statement on 13 September Attack Against United States Consulate in Afghanistan, U.N. Press Release SC/11122 (Sept. 13, 2013); Press Release, Security Council, Security Council Press Statement on Terrorist Attacks in Tripoli, Lebanon, U.N. Press

## xi. The Security Council and Terrorism in 2014

In 2014 the Security Council adopted five resolutions related to terrorism: Resolutions 2133,<sup>138</sup> 2160,<sup>139</sup> 2161,<sup>140</sup> 2170,<sup>141</sup> and 2178.<sup>142</sup> Resolutions 2160, 2161, 2170, and 2178 are Chapter VII decisions. All are aimed at improving or expanding the scope of multilateral tools—the Resolutions 1267/1889 Committee, the CTC, and the Resolution 1988 Committee—to respond to the emergence of ISIL and the ANF.

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Release SC/11101 (Aug. 23, 2013); Press Release, Security Council, Security Council Press Statement on Lebanon, U.N. Press Release SC/11095 (Aug. 15, 2013); Press Release, Security Council, Security Council Press Statement on 3 August Attack in Afghanistan, U.N. Press Release SC/11086 (Aug. 5, 2013); Press Release, Security Council, Security Council Press Statement on Attack Against Turkish Embassy in Somalia, U.N. Press Release SC/11080 (July 29, 2013); Press Release, Security Council, Security Council Press Statement on Lebanon, U.N. Press Release SC/11055 (July 9, 2013); Press Release, Security Council, Security Council Press Statement on Afghanistan, U.N. Press Release SC/11030 (June 11, 2013); Press Release, Security Council, Security Council Press Statement on Afghanistan, U.N. Press Release SC/11016 (May 26, 2013); Press Release, Security Council, Security Council Press Statement on Attacks in Niger, U.N. Press Release SC/11014 (May 24, 2013); Press Release, Security Council, Security Council Press Statement on Deadly Attack in Benghazi, Libya, U.N. Press Release SC/11008 (May 13, 2013); Press Release, Security Council, Security Council Press Statement on Terrorist Attacks in Reyhanli, Turkey, U.N. Press Release SC/11006 (May 13, 2013); Press Release, Security Council, Security Council Press Statement on Attack Against French Embassy in Libya, U.N. Press Release SC/10984 (Apr. 23, 2013); Press Release, Security Council, Security Council Press Statement on Terrorist Attacks in Somalia, U.N. Press Release SC/10972 (Apr. 15, 2013); Press Release, Security Council, Security Council Press Statement on Afghanistan, U.N. Press Release SC/10967 (Apr. 4, 2013); Press Release, Security Council, Security Council Press Statement on Damascus Bombing, U.N. Press Release SC/10953 (Mar. 22, 2013); Press Release, Security Council, Security Council Press Statement on Terrorist Attack in Amenas, Algeria, U.N. Press Release SC/10887 (Jan. 18, 2013).

<sup>138</sup> Resolution 2133 attempts to prevent kidnapping by terrorist organizations by seeking to reduce organizations' access to funding and financial services. It calls upon States to cooperate during events of kidnapping by terrorist groups and encourages the Monitoring Team of the Resolutions 1267/1989 Committee and the Resolution 1988 Committee to cooperate when furnishing information on trends and developments in this domain. *See* S.C. Res. 2133 (Jan. 27, 2014).

<sup>139</sup> Resolution 2160 deals with the threats that the Taliban and Al-Qaida pose to Afghanistan. It keeps the fine tuning of the operation of the Resolution 1988 Committee in term of supporting information for the listing of entities and individuals, de-listing procedures, and compliance with the Resolution, among other issues. *See* S.C. Res. 2160 (June 17, 2014).

<sup>140</sup> In addition to the traditional provisions on measures against Al-Qaida and associated entities or individuals and exemptions, Resolution 2161 urges States to implement the standards contemplated in the Financial Action Task Force's Forty Recommendations on Combating Money Laundering and the Financing of Terrorism and Proliferation. Further, the resolution continues to refine listing procedures for the Resolutions 1267/1989 Committee in terms of quality, transparency, inter-state cooperation, timely notification to listed individuals, de-listing requests and procedures, the duties and responsibilities of the Ombudsperson and the general structure of delisting procedure, the maintenance of the list in order to remove these listings if they are no longer appropriate. Finally, Resolution 2161 also directs the Resolutions 1267/1989 Committee to cooperate with the Resolution 1988 Committee, the CTC, and the Resolution 1540 Committee. *See* S.C. Res. 2161 (June 17, 2014).

<sup>141</sup> *See* S.C. Res. 2170 (Aug. 15, 2014).

<sup>142</sup> *See* S.C. Res. 2178 (Sept. 24, 2014).



Resolution 2170 reiterates that terrorism is one of the most serious threats to international peace and security and strongly condemns ISIL's actions, but does not mention the right to self-defense.<sup>143</sup> The Council's response to ISIL in Resolution 2178 remains focused on the multilateral dimension. The Council reaffirms "its respect for the sovereignty, territorial integrity and political independence of all States in accordance with the Charter"<sup>144</sup> and notes the "recent developments and initiatives at the international, regional and sub-regional levels to prevent and suppress international terrorism."<sup>145</sup> The focus of the resolution is the multinational effort to address the issue of foreign terrorist fighters who pose a risk to their state of origin and the states to which they travel.<sup>146</sup>

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<sup>143</sup> Resolution 2170 explicitly provides for the measures contemplated by Resolution 2161 (2014) to be applied to ISIL and ANF as well. S.C. Res. 2170, ¶ 5, (Aug. 15, 2014). The resolution urges States to cooperate in order to bring to justice ISIL and ANF members and associated entities or undertakings. *Id.* It reaffirms that States must prevent the direct or indirect supply of arms and related material of all kinds to ISIL and ANF and ensure that no funds are made available to them by persons or entities within their territories. *Id.* ¶ 10. Resolution 2170 also notes that ISIL and ANF have gained control of oilfields, and the Council reiterates that engaging in trade with the organizations constitutes financial support for entities designated by the Resolutions 1267/1989 Committee and leads to additional listings. *Id.* ¶ 13. Finally, Resolution 2170 expresses that individuals, groups, and entities giving support to ISIL and ANF can be included on the Al-Qaida sanctions list, and it identifies a set of individuals that shall be the subject of the measures provided for in Resolution 2161. *Id.* ¶ 18. Resolution 2170 also directs the Monitoring Team to report to the said Committee on the threat, resources, and funding of ISIL and ANF within 90 days. *Id.* ¶ 22. Resolution 2170 explicitly provides for the measures contemplated by Resolution 2161 (2014) to be applied to ISIL and ANF as well. The resolution urges States to cooperate in order to bring to justice ISIL and ANF members and associated entities or undertakings. It reaffirms that States must prevent the direct or indirect supply of arms and related material of all kinds to ISIL and ANF and ensure that no funds are made available to them by persons or entities within their territories. Resolution 2170 also notes that ISIL and ANF have gained control of oilfields, and the Council reiterates that engaging in trade with the organizations constitutes financial support for entities designated by the Resolutions 1267/1989 Committee and leads to additional listings. Finally, Resolution 2170 expresses that individuals, groups, and entities giving support to ISIL and ANF can be included on the Al-Qaida sanctions list, and it identifies a set of individuals that shall be the subject of the measures provided for in Resolution 2161. Resolution 2170 also directs the Monitoring Team to report to the said Committee on the threat, resources, and funding of ISIL and ANF within 90 days. *See* S.C. Res. 2170 (Aug. 15, 2014).

<sup>144</sup> S.C. Res. 2178, pmb. ¶ 6 (Aug. 15, 2014).

<sup>145</sup> *Id.* pmb. ¶ 17.

<sup>146</sup> The Council reaffirms in Resolution 2178 that States must prevent the movement of terrorists by effective border controls and urges States to intensify the exchange of information regarding actions or movements of foreign terrorist fighters. S.C. Res. 2178, *supra* note 142, ¶ 2. Resolution 2178 also decides that States must prevent financial support for these fighters and implement prosecution and reintegration strategies for those who return to their countries of origin. *Id.* ¶ 4. The Resolution also decides that all States must ensure that their legislation establishes serious criminal offenses sufficient to prosecute and penalize nationals who travel or attempt to travel to other States for the purpose of participating at various stages of terrorist attacks and for the provision of funds in any way with knowledge that they will be used to finance the travel of foreign terrorist fighters. *Id.* ¶ 6. Resolution 2178 also orders States to deny entry or transit of any individual that might be considered to be doing so for the purpose

The Council issued four presidential statements related to terrorism in 2014. In its first statement, on January 10, the Council condemned the attacks in Iraq carried out by ISIL and reaffirmed past practice calling on States to cooperate in order to bring to justice the perpetrators and to comply with international law when adopting measures aimed at combatting terrorism. Importantly, the Council calls for unity between different segments of Iraqi society to face the threat, without framing the situation within the contours of self-defense.<sup>147</sup> The Council issued the second presidential statement on July 28, 2014, which also dealt with the threats posed by ISIL and ANF. The statement starts by reaffirming past resolutions, including Resolution 1373, and underscores that trading in oil with these organizations is a violation of the Council's resolutions.<sup>148</sup>

The third presidential statement took place on September 19, 2014, and in it, the Council condemns what it calls a large-scale offensive by ISIL and associated groups against Iraq, which posed a major threat to the region. The Council also urges the international community to support Iraq in its fight against ISIL and stresses that terrorism can be defeated only by a comprehensive approach involving the active participation of all parties.<sup>149</sup> The fourth presidential statement was made by the Council on November 19, once again in response to the situation created by ISIL and ANF in Syria and Iraq.<sup>150</sup> It closely follows the four resolutions adopted in 2014 and urges States to take prompt action.

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of the said criminal offenses. *Id.* ¶ 8. It also calls upon members to improve cooperation at all levels to prevent the travel of foreign terrorist fighters and emphasizes that they could be eligible for inclusion on the Al-Qaida Sanctions list. *Id.* ¶ 11.

<sup>147</sup> U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2014/1 (Jan. 10, 2014).

<sup>148</sup> *See* U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2014/14 (July 28, 2014).

<sup>149</sup> U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2014/20 (Sept. 19, 2014).

<sup>150</sup> U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2014/23 (Nov. 19, 2014).

The Council also issued 40 terrorism-related press statements in 2014. The statements were made in response to terrorist attacks in Lebanon, Somalia, Afghanistan, Pakistan, Yemen, Nigeria, Algeria, Belgium, Iraq, Libya, Greece, and Mali.<sup>151</sup>

### iii. The Security Council and Terrorism in 2015

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<sup>151</sup> See generally Press Release, Security Council, Mogadishu, U.N. Press Release SC/11240-AFR/2789 (Jan. 2, 2014); Press Release, Security Council, Attack in Lebanon, U.N. Press Release SC/11239 (Jan. 2, 2014); Press Release, Security Council, Terrorist Attack in Lebanon, U.N. Press Release SC/11249 (Jan. 16, 2014); Press Release, Security Council, Special Tribunal for Lebanon, U.N. Press Release SC/11250-L/3224 (Jan. 16, 2014); Press Release, Security Council, Terrorist Attack in Kabul, U.N. Press Release SC/11251-AFG/405 (Jan. 17, 2014); Press Release, Security Council, Deadly Terrorist Attack in Lebanon, U.N. Press Release SC/11256 (Jan. 21, 2014); Press Release, Security Council, Lebanon, U.N. Press Release SC/11269 (Feb. 1, 2014); Press Release, Security Council, Attack in Lebanon, U.N. Press Release SC/11287 (Feb. 19, 2014); Press Statement, Security Council, Terrorist Attack in Somalia, U.N. Press Release SC/11291-AFR/2823 (Feb. 21, 2014); Press Release, Security Council, Terrorist Attack in Somalia, U.N. Press Release SC/11300-AFR/2831 (Feb. 27, 2014); Press Release, Security Council, Terrorist Attack in Afghanistan, U.N. Press Release SC/11324-AFG/407 (Mar. 18, 2014); Press Release, Security Council, Attack on Somalia, U.N. Press Release SC/11331-AFR/2840 (Mar. 19, 2014); Press Release, Security Council, Terrorist Attack in Afghanistan, U.N. Press Release SC/11334-AFG/408 (Mar. 21, 2014); Press Release, Security Council, Attack in Yemen, U.N. Press Release SC/11336 (Mar. 25, 2014); Press Release, Security Council, Terrorist Attacks in Nigeria, U.N. Press Release SC/11352-AFR/2861 (Apr. 14, 2014); Press Release, Security Council, Terrorist Attack in Algeria, U.N. Press Release SC/11364-AFR/2872 (Apr. 24, 2014); Press Release, Security Council, Terrorist Attack in Somalia, U.N. Press Release SC/11380-AFR/2877 (May 4, 2014); Press Release, Security Council, Terrorist Attack in Yemen, U.N. Press Release SC/11381 (May 5, 2014); Press Release, Security Council, Attacks in Nigeria, U.N. Press Release SC/11387-AFR/2882 (May 9, 2014); Press Release, Security Council, Afghanistan Attack, U.N. Press Release SC/11411-AFG/416 (May 23, 2014); Press Release, Security Council, Terrorist Attack in Belgium, U.N. Press Release SC/11418 (May 28, 2014); Press Release, Security Council, Afghanistan Attack, U.N. Press Release SC/11431-AFG/417 (June 6, 2014); Press Release, Security Council, Mali, U.N. Press Release SC/11568-AFR/2970-PKO/439 (Sept. 19, 2014); Press Release, Security Council, Murder of Hervé Gourdel, U.N. Press Release SC/11581 (Sept. 24, 2014); Press Release, Security Council, Murder of Alan Henning, U.N. Press Release SC/11590 (Oct. 3, 2014); Press Release, Security Council, Bomb Attacks on School in Homs, Syria, U.N. Press Release SC/11589 (Oct. 3, 2014); Press Release, Security Council, Yemen, U.N. Press Release SC/11595 (Oct. 10, 2014); Press Release, Security Council, Terrorist Attacks by ISIL, U.N. Press Release SC/11605-IK/693 (Oct. 17, 2014); Press Release, Security Council, Iraq, U.N. Press Release SC/11625-IK/694 (Oct. 31, 2014); Press Release, Security Council, Suicide Bomb Attack against Government Science Technical School in Potiskum in Yobe State, Nigeria, U.N. Press Release SC/11639-AFR/3014 (Nov. 10, 2014); Press Release, Security Council, Bomb Attacks in Tripoli, U.N. Press Release SC/11646-AFR/3015 (Nov. 13, 2014); Press Release, Security Council, ISIL Killings, U.N. Press Release SC/11654 (Nov. 18, 2014); Press Release, Security Council, Afghanistan, U.N. Press Release SC/11664-AFG/431 (Nov. 24, 2014); Press Release, Security Council, Attack in Kabul, Afghanistan, U.N. Press Release SC/11678-AFG/432 (Nov. 27, 2014); Press Release, Security Council, Terrorist Attack in Mogadishu, U.N. Press Release SC/11710 (Dec. 3, 2014); Press Release, Security Council, Yemen, U.N. Press Release SC/11683 (Dec. 4, 2014); Press Release, Security Council, Kabul Attack, U.N. Press Release SC/11695-AFG/433 (Dec. 11, 2014); Press Release, Security Council, Attack against Israeli Embassy in Athens, U.N. Press Release SC/11700 (Dec. 13, 2014); Press Release, Security Council, Terrorist Attack in Peshawar, Pakistan, U.N. Press Release SC/11707 (Dec. 16, 2014); Press Release, Security Council, Yemen, U.N. Press Release SC/11710 (Dec. 17, 2014); Press Release, Security Council, Terrorist Attack in Mogadishu, U.N. Press Release SC/11721-AFR/3047-PKO/460 (Dec. 26, 2014).

In 2015, prior to Resolution 2249, the Council adopted two resolutions under Chapter VII. Resolution 2199 continues with the design and use of multilateral tools, such as the Resolutions 1267/1989 Committee, to face the threat to international peace and security caused by ISIL.<sup>152</sup> Resolution 2214 also deals with multilateral tools, the above-mentioned Committee, and is aimed at combating terrorist actions by Al-Qaida, ISIL, and a new group, Ansar Al Charia, in Libya.<sup>153</sup> The Council also issued three presidential statements before November 2015. Two condemn attacks perpetrated by Boko Haram and highlight the regional efforts to combat this entity,<sup>154</sup> while the third deals again with ISIL and foreign fighters with calls for wide implementation of Resolution 2178 (2014) by UN members.<sup>155</sup>

Lastly, the members of the Council made 41 statements to the press from January to November 2015, all of which condemn terrorist attacks in France, Yemen, Lebanon, Syria, Libya, Egypt, Cameroon, Chad, Niger, Somalia, Turkey, Saudi Arabia, Afghanistan, and Mali, and reaffirm past pronouncements on international cooperation and justice for perpetrators.<sup>156</sup>

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<sup>152</sup> Resolution 2199 contains measures on oil trade, cultural heritage, banking, arms and related material, and asset freeze aimed at striking at ISIL's financial resources. *See* S.C. Res. 2199, *supra* note 58.

<sup>153</sup> In particular, Resolution 2214 encourages UN Member States to "submit listing requests to the Committee established pursuant to resolutions 1267 (1999) and 1989 (2011) . . . of individuals and entities supporting ISIL, Ansar Al Charia," and Al-Qaida in Libya. S.C. Res. 2214, ¶ 4 (Mar. 27, 2015). This resolution has not been included as a decision related to threats to international peace and security caused by terrorist acts, but its connection with the topic is significant.

<sup>154</sup> *See* U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2015/4 (Jan. 19, 2015); U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2015/14 (July 28, 2015).

<sup>155</sup> *See* U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2015/11 (May 29, 2015).

<sup>156</sup> *See generally* Press Release, Security Council, Yemen, U.N. Press Release SC/11728 (Jan. 7, 2015); Press Release, Security Council, Terrorist Attack on French Newspaper, U.N. Press Release SC/11727-PI/2109 (Jan. 7, 2015); Press Release, Security Council, Lebanon, U.N. Press Release SC/11731 (Jan. 11, 2015); Press Release, Security Council, Murder of Haruna Yukawa, U.N. Press Release SC/11752 (Jan. 25, 2015); Press Release, Security Council, Terrorist Attack in Libya, U.N. Press Release SC/11754-AFR/3060 (Jan. 27, 2015); Press Release, Security Council, Sinai Terrorist Attack, U.N. Press Release SC/11761 (Jan. 30, 2015); Press Release, Security Council, Murder of Kenji Goto, U.N. Press Release SC/11762-PI/2111 (Feb. 1, 2015); Press Release, Security Council, Boko Haram Attacks in Nigeria and against Chadian Troops in Cameroon, U.N. Press Release SC/11763-AFR/3068 (Feb. 2, 2015); Press Release, Security Council, Murder of Muath Al-Kasasbeh, U.N. Press Release SC/11764 (Feb. 3, 2015); Press Release, Security Council, Boko Haram Attacks in Cameroon, Chad and Niger, U.N. Press Release SC/11780-AFR/3077 (Feb. 13, 2015); Press Release, Security Council, Murder of 21 Egyptians, U.N. Press Release

## B. Summary of the Security Council's Decisions and Practices from 2002 to November 2015, before Resolution 2249

### 1. *Multilateralism as the First Guiding Principle in the Fight Against Terrorist Threats*

The Security Council's decisions and practices related to terrorism prior to Resolution 2249 involved multilateral tools unrelated to the use of force—tools which the Council focused on, devised, refined, and expanded.<sup>157</sup> The council advanced these objectives in several ways. The

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SC/11782-AFR/3078 (Feb. 15, 2015); Press Release, Security Council, Terrorist Attacks in Mogadishu, U.N. Press Release SC/11791-AFR/3083 (Feb. 20, 2015); Press Release, Security Council, Bomb Attack in al-Qubba, Libya, U.N. Press Release SC/11792-AFR/3084 (Feb. 20, 2015); Press Release, Security Council, ISIL's Destruction of Religious and Cultural Artefacts in Mosul, U.N. Press Release SC/11804-IK/700 (Feb. 27, 2015); Press Release, Security Council, Terrorist Attack in Bamako, U.N. Press Release SC/11811-AFR/3090 (Mar. 7, 2015); Press Release, Security Council, Terrorist Attack in Kidal, Mali, U.N. Press Release SC/11812-AFR/3092-PKO/472 (Mar. 8, 2015); Press Release, Security Council, Terrorist Attack in Tunisia, U.N. Press Release SC/11823-AFR/3097 (Mar. 18, 2015); Press Release, Security Council, Bomb Attacks in Yemen, U.N. Press Release SC/11827 (Mar. 20, 2015); Press Release, Security Council, Terrorist Attack in Mogadishu, U.N. Press Release SC/11844-AFR/3099 (Mar. 28, 2015); Press Release, Security Council, Al-Shabaab Attack in Garissa, Kenya, U.N. Press Release SC/11850-AFR/3104 (Apr. 3, 2015); Press Release, Security Council, Boko Haram Attacks against Civilians in North-East Nigeria and Chad, U.N. Press Release SC/11852-AFR/3106 (Apr. 7, 2015); Press Release, Security Council, Mali, U.N. Press Release SC/11855-AFR/3108 (Apr. 10, 2015); Press Release, Security Council, Attacks in Tripoli, U.N. Press Release SC/11861-AFR/3112 (Apr. 14, 2015); Press Release, Security Council, Terrorist Attack in Mogadishu, Somalia, U.N. Press Release SC/11863-AFR/3113 (Apr. 15, 2015); Press Release, Security Council, Al-Shabaab Attack against UNICEF in Garowe, Somalia, U.N. Press Release SC/11866-AFR/3117 (Apr. 20, 2015); Press Release, Security Council, Attacks against Civilians in Syria, U.N. Press Release SC/11921 (June 5, 2015); Press Release, Security Council, Terrorist Attack in N'Djamena, Chad, U.N. Press Release SC/11927-AFR/3157 (June 15, 2015); Press Release, Security Council, Terrorist Attack in Yemen, U.N. Press Release SC/11935 (June 18, 2015); Press Release, Security Council, Al-Shabaab Attack in Mogadishu, U.N. Press Release SC/11945-AFR/3162 (June 25, 2015); Press Release, Security Council, Terrorist Attacks in France, Kuwait, Tunisia, U.N. Press Release SC/11947 (June 26, 2015); Press Release, Security Council, Al-Shabaab Attacks in Somalia, U.N. Press Release SC/11949-AFR/3166-PKO/501 (June 27, 2015); Press Release, Security Council, Terrorist Attacks in Mali, U.N. Press Release SC/11959-AFR/3173-PKO/505 (July 2, 2015); Press Release, Security Council, Terrorist Attacks in Suruç, Turkey, U.N. Press Release SC/11979 (July 22, 2015); Press Release, Security Council, Attacks in Mogadishu, U.N. Press Release SC/11981-AFR/3186 (July 27, 2015); Press Release, Security Council, Terrorist Attacks in Saudi Arabia, U.N. Press Release SC/12000 (Aug. 6, 2015); Press Release, Security Council, Terrorist Attacks in Afghanistan, U.N. Press Release SC/12003-AFG/442 (Aug. 9, 2015); Press Release, Security Council, Eid Bombings in Yemen, U.N. Press Release SC/12056 (Sept. 24, 2015); Press Release, Security Council, Terrorist Attacks by Boko Haram, U.N. Press Release SC/12075-AFR/3242 (Oct. 12, 2015); Press Release, Security Council, Terrorist Attack in Paris, U.N. Press Release SC/12121 (Nov. 13, 2015); Press Release, Security Council, Terrorist Attacks in Lebanon, U.N. Press Release SC/12120 (Nov. 13, 2015); Press Release, Security Council, Terrorist Attack in Bamako, U.N. Press Release SC/12133-AFR/3268 (Nov. 20, 2015).

<sup>157</sup> Another strategy the Security Council employed prior to Resolution 2249, discussed below in Part IX, was the creation of a particular standard of attribution to States of non-State actors' actions.

reality was matched by the Council's intention, clearly expressed in several decisions. Early in 2003, for example, the Council expressed in Resolution 1456 that:

[T]errorism can only be defeated, in accordance with the Charter of the United Nations and international law, by a sustained comprehensive approach involving the active participation and collaboration of all States, international and regional organizations, and by redoubled efforts at the national level.<sup>158</sup>

This statement was reaffirmed several times over the next decade, such as in Resolution 1735 (2006), a Chapter VII decision, as well as in Resolution 1904 (2009), Resolution 1989 (2011), Resolution 2161 (2014), Resolution 2170 (2014); and Resolution 2199 (2015). Furthermore, the members of the Council, on the 10-year anniversary of 9/11, declared:

[I]n the period after the 11 September 2001 attacks, States joined together in a spirit of cooperation to combat terrorism, including through diplomatic efforts at and with the United Nations, and that such cooperation is essential and should be further strengthened.<sup>159</sup>

2. *No Explicit Subsequent Security Council Decision and Practice Related to the Right to Self-Defense Against Autonomous Non-State Actors Between 2002 and 2015, Before Resolution 2249*

The initial post-9/11 decisions and practices of the Security Council, specifically Resolutions 1368 (2001) and 1373 (2001), related to the right of self-defense in response to terrorist attacks. From 2002 to 2015, prior to Resolution 2249, the Security Council adopted 36 resolutions, 20 under Chapter VII, issued 48 presidential statements, and made 156 press statements. None have explicitly mentioned the right to self-defense in response to terrorist attacks. The silence is striking, in particular, regarding the 20 legislative resolutions adopted under Chapter VII for the purpose of dealing with terrorist threats, since they offered the Council opportunities to make a statement of a general character similar to that made with the first resolution of this

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<sup>158</sup> S.C. Res. 1456, *supra* note 88, ¶ 2.

<sup>159</sup> Press Statement on Tenth Anniversary of 11 September 2001, *supra* note 129.

nature, Resolution 1373, which highlighted the inherent right to self-defense. The Council did not use them.

Furthermore, the Council declined to mention the inherent right of self-defense as a result of terrorist attacks, even during important events such as the ten- and fifteen-year anniversaries of 9/11 and Osama Bin Laden's death.<sup>160</sup> The Council has, however, condemned terrorist attacks in 12 resolutions, 32 presidential statements, and 154 press statements by members, detailed in Section IV(A) above. So far, neither the Council nor its several members ever referred to the right to self-defense during 2002–2015. Not all attacks during this period were carried out by non-State actors operating from another State, so there was often not an explicit need to reference Article 51. Consequently, the value of this specific silence is limited. These and other attacks offered the Council the opportunity to make an explicit reference to the right of self-defense, but during this thirteen-year period, never did.<sup>161</sup>

Although press statements, taken in isolation, are not decisions by the Council, in the aggregate and over a significant period of time, they reflect the position expressed by a much larger portion of UN membership. This is a result of the rotational character of non-permanent members—sometimes positions expressed by non-permanent members reflect the views of the region they represent.<sup>162</sup> The press statements highlighted above were made by a total of 73

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<sup>160</sup> See *Id.* No similar releases were made on the fifteen-year anniversary in 2016.

<sup>161</sup> See Rep. of the S.C., at 7–8, U.N. Doc. A/57/2 (June 16, 2001) [hereinafter SC 2001–02]; Rep. of the S.C., at 11–12, U.N. Doc. A/58/2 (Aug. 1, 2002) [hereinafter S.C. 2002–03]; Rep. of the S.C., at 17, U.N. Doc. A/59/2 (Aug. 1, 2003) [hereinafter S.C. 2003–04]; Rep. of the S.C., at 19–21, U.N. Doc. A/60/2 (Aug. 1, 2004) [hereinafter S.C. 2004–05]; Rep. of the S.C., at 17–18, U.N. Doc. A/60/2 (Aug. 1, 2005) [hereinafter S.C. 2005–06]; Rep. of the S.C., at 23, U.N. Doc. A/62/2 (Aug. 1, 2006) [hereinafter S.C. 2006–07]; Rep. of the S.C., at 47–49, U.N. Doc. A/64/2 (Aug. 1, 2008) [hereinafter S.C. 2008–09]; Rep. of the S.C., U.N. Doc. A/65/2 (Aug. 1, 2009) [hereinafter S.C. 2009–10]; Rep. of the S.C., at 35, U.N. Doc. A/66/2 (Aug. 1, 2010) [hereinafter S.C. 2010–11]; Rep. of the S.C., at 52, U.N. Doc. A/67/2 (Aug. 1, 2011) [hereinafter S.C. 2011–12]; Rep. of the S.C., at 64–65, U.N. Doc. A/68/2 (Aug. 1, 2012) [hereinafter S.C. 2012–13]; Rep. of the S.C., at 70–71, U.N. Doc. A/69/2 (Aug. 1, 2013) [hereinafter S.C. 2013–14].

<sup>162</sup> See SIEVERS & DAWS, *supra* note 25, at 129.

members: 5 permanent and 68 non-permanent members.<sup>163</sup> Some value should be attached to these statements as confirming the overall trend set by the Council in its formal decision to not mention the right of self-defense.

In sum, there has been neither an explicit later decision nor a practice of invoking the right of self-defense against autonomous non-State actors prior to Resolution 2249 by the Council or its members from 2002 to November 2015. There is, however, still the possibility of implicit subsequent decisions and practices in this domain during this period. To address this topic, it is necessary to first illustrate how the Council did make pronouncements related to Article 51 after 2002.

#### V. **Explicit Security Council Decisions Related to Article 51 Outside the Realm of Terrorism from 2001 to 2011**

Contrary to the lack of an explicit decision regarding to the right to self-defense from 2002 to 2015 in the context of terrorist threats, the Council did explicitly mention Article 51 several times in another realm: States' right to import, produce, and retain small arms and light weapons. Before going into these references, however, a little history to show the Council's determinations in this regard should be considered.

The Council has referenced the right to self-defense fifteen times in its history. According to the Repertoire of the Practice of the Security Council, these references to the right to self-defense

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<sup>163</sup> The non-permanent members from 2001 to 2015 were: Algeria, Angola, Argentina, Australia, Austria, Azerbaijan, Bangladesh, Belgium, Benin, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Cameroon, Colombia, Congo, Costa Rica, Chad, Chile, Croatia, Denmark, Gabon, Germany, Ghana, Greece, Guatemala, Guinea, India, Indonesia, Ireland, Italy, Jamaica, Japan, Jordan, Lebanon, Libya, Lithuania, Luxembourg, Malaysia, Mali, Mauritius, Mexico, Morocco, New Zealand, Nigeria, Norway, Pakistan, Panama, Peru, Philippines, Portugal, Qatar, Republic of Korea, Romania, Rwanda, Singapore, Slovakia, South Africa, Spain, Syria, Tanzania, Tunisia, Turkey, Uganda, Ukraine, Togo, Venezuela, and Vietnam. *See* S.C. 2001–02, *supra* note 161, at 267; S.C. 2002–03, *supra* note 161, at 201; S.C. 2003–04, *supra* note 161, at 211; S.C. 2004–05, *supra* note 161, at 223; S.C. 2005–06, *supra* note 161, at 223; S.C. 2006–07, *supra* note 161, at 231; S.C. 2008–09, *supra* note 161, at 241; S.C. 2010–11, *supra* note 161, at 219; S.C. 2012–13, *supra* note 161, at 252.



took place about once per decade between 1950 and 1990, with Resolutions 95 (1951),<sup>164</sup> 255 (1968),<sup>165</sup> 403 (1977),<sup>166</sup> and Resolution 574 (1985);<sup>167</sup> four times in the 1990s with Resolutions 661 (1990) after the Iraqi invasion of Kuwait,<sup>168</sup> Resolution 984 (1995),<sup>169</sup> Resolution 1134 (1999) (referring to the situation in the Democratic Republic of the Congo),<sup>170</sup> and the presidential statement of September 24, 1999 (addressing small arms).<sup>171</sup> A similar statement was made once in the new millennium prior to 9/11 with the presidential statement of September 4, 2001.<sup>172</sup> Post-9/11 brought Resolutions 1368 and 1373, along with four others. In its presidential statement of October 31, 2002, the Council reaffirmed:

[T]he inherent right of individual or collective self-defence in accordance with Article 51 of the Charter of the United Nations and, subject to the Charter, the right of each State to import, produce and retain small arms and light weapons for its self-defence and security needs.<sup>173</sup>

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<sup>164</sup> S.C. Res. 95, ¶ 3 (Sept. 1, 1951); U.N. DEP'T OF POLITICAL AND SECURITY COUNCIL AFFAIRS, REPERTOIRE OF THE PRACTICE OF THE U.N. SECURITY COUNCIL: SUPPLEMENT 1946–51, Chapter XI at 450, U.N. Doc. ST/PSCA/1, U.N. Sales No. [not provided] (1954).

<sup>165</sup> See S.C. Res. 255, ¶ 3 (June 19, 1968); REPERTOIRE OF THE PRACTICE OF THE U.N. SECURITY COUNCIL: SUPPLEMENT 1966–68, *supra* note 15, Chapter XI at 217–18.

<sup>166</sup> See S.C. Res. 403, ¶ 5 (Jan. 14, 1977); U.N. DEP'T OF POLITICAL AND SEC. COUNCIL AFFAIRS, REPERTOIRE OF THE PRACTICE OF THE U.N. SECURITY COUNCIL: SUPPLEMENT 1975–80 (1987), Chapter XI at 402, [http://www.un.org/en/sc/repertoire/75-80/75-80\\_11.pdf#page=4](http://www.un.org/en/sc/repertoire/75-80/75-80_11.pdf#page=4). [hereinafter REPERTOIRE OF THE PRACTICE OF THE U.N. SECURITY COUNCIL: SUPPLEMENT 1975–80] [FYI- Cait, this one is formatted differently because the document doesn't provide a doc no. or sales no.]

<sup>167</sup> S.C. Res. 574, ¶ 4 (Oct. 7 1985); U.N. DEP'T OF POLITICAL AND SEC. COUNCIL AFFAIRS, REPERTOIRE OF THE PRACTICE OF THE U.N. SECURITY COUNCIL: SUPPLEMENT 1985–88, Chapter XI at 427, U.N. Doc. ST/DPA/1/Add.10, U.N. Sales No. E.98 VII.1 (2000).

<sup>168</sup> See S.C. Res. 661, pmb. ¶ 6 (Aug. 6, 1990); U.N. DEP'T OF POLITICAL AND SEC. COUNCIL AFFAIRS, REPERTOIRE OF THE PRACTICE OF THE U.N. SECURITY COUNCIL: SUPPLEMENT 1989–92, Chapter XI at 934, U.N. Doc. ST/PSCA/1/Add.11, U.N. Sales No. 05.VII.1 (2007).

<sup>169</sup> See S.C. Res. 984, ¶ 9 (April 11, 1995); U.N. DEP'T OF POLITICAL AND SEC. COUNCIL AFFAIRS, REPERTOIRE OF THE PRACTICE OF THE U.N. SECURITY COUNCIL: SUPPLEMENT 1993–95, Chapter XI at 1147, U.N. Doc. ST/PSCA/1/Add.12, U.N. Sales No. E.10.VII.2 (2009).

<sup>170</sup> See S.C. Res. 1234, pmb. ¶ 8 (Apr. 9, 1999); U.N. DEP'T OF POLITICAL AND SEC. COUNCIL AFFAIRS, REPERTOIRE OF THE PRACTICE OF THE U.N. SECURITY COUNCIL: SUPPLEMENT 1996–99, Chapter XI at 1168, U.N. Doc. ST/PSCA/1/Add.13, U.N. Sales No. 10.VII.3 (2009) [hereinafter REPERTOIRE OF THE PRACTICE OF THE U.N. SECURITY COUNCIL: SUPPLEMENT 1996–99].

<sup>171</sup> See S.C. Pres. Statement 1999/28 (Sept. 24, 1999); REPERTOIRE OF THE PRACTICE OF THE U.N. SECURITY COUNCIL: SUPPLEMENT 1996–99, *supra* note 170, Chapter XI at 1168.

<sup>172</sup> See S.C. Pres. Statement 2001/21 (Sept. 4, 2001); REPERTOIRE OF THE PRACTICE OF THE U.N. SECURITY COUNCIL: SUPPLEMENT 2000–03, *supra* note 44, Chapter XI at 1005.

<sup>173</sup> U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2002/30 (Oct. 31, 2002); see also REPERTOIRE OF THE PRACTICE OF THE U.N. SECURITY COUNCIL: SUPPLEMENT 2000–03, *supra* note 44, Chapter XI at 1004–05.

This reference to the inherent right of individual or collective self-defense was made again by the Council in its presidential statements of January 19, 2004, and February 17, 2005.<sup>174</sup> Lastly, in the presidential statement of March 19, 2010, the Council made reference to the right to self-defense in connection with the “Central African region.” It stated:

The Security Council, while acknowledging the right of all States to manufacture, import, export, transfer and retain the Conventional arms for self-defence and security needs consistent with international law and the Charter of the United Nations, underlines the vital importance of effective regulations and controls of the transparent trade in SALW (small arms and light weapons) in order to prevent their illegal diversion and re-export.<sup>175</sup>

These four decisions, unrelated to terrorism, represent more than twenty-five percent of the Council’s references to self-defense. This fact correlates with the lack of subsequent decisions regarding Article 51 in relation to autonomous non-State actors from 2002 to 2015 and before Resolution 2249.

In sum, the lack of explicit subsequent decisions related to Article 51 in the context of terrorism is not owed to the fact that the Council is not expected to adopt decisions related to the right to self-defense, or that it lacks the capacity to do so. The Council’s prior decisions in regard to Article 51 in other domains suggest this inaction in connection with armed terrorist attacks is a deliberate policy choice.

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<sup>174</sup> See U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2004/1 (Jan. 19, 2004); U.N. President of the S.C., Statement by the President of the Security Council, ¶ 2, U.N. Doc. S/PRST/2005/7 (Feb. 17, 2005); U.N. DEP’T OF POLITICAL AND SEC. COUNCIL AFFAIRS, REPERTOIRE OF THE PRACTICE OF THE U.N. SECURITY COUNCIL: SUPPLEMENT 2004–07, Chapter XI at 1022, U.N. Doc. ST/PSCA/1/Add.15, U.N. Sales No. 13.VII.1 (2013).

<sup>175</sup> U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2010/6 (Mar. 19, 2010); see also U.N. DEP’T OF POLITICAL AND SEC. COUNCIL AFFAIRS, REPERTOIRE OF THE PRACTICE OF THE U.N. SECURITY COUNCIL: SUPPLEMENT 2010–11, Chapter VII at 160–61, U.N. Doc. ST/PSCA/1/Add.17, U.N. Sales No. E.15.VII.1 (2016).

**VI. Lack of Implicit Subsequent Practice by the Security Council from 2002 to 2015 Related to Terrorist Acts Able to Expand Article 51 to Cover Autonomous Non-State Actors in General**

Could it be that the Security Council carried out *implicit* subsequent decisions and practices that, in addition to Resolutions 1368 and 1373, *could have* expanded the scope of Article 51 to include armed attacks by autonomous terrorist groups before Resolution 2249, but failed to do so?<sup>176</sup> What exactly constitutes an implicit decision and practice relevant for the purpose of the expansion of the right to self-defense is an open question. However, after the review of all the decisions by the Council from 2002 to November 2015 before Resolution 2249, the present author has identified the following circumstances that could be regarded as implicit decisions and practices *not to* expand the scope of Article 51:

- (i) The permanent reaffirmation by the Council of Resolution 1373 in almost all of its post-9/11 resolutions<sup>177</sup> and presidential statements, which would include the resolution's reference to the right to self-defense. This would suggest an implicit subsequent decision for the purpose of the expansion of Article 51.
- (ii) The reaffirmation in several resolutions, presidential statements, and press statements during the period 2002–2014 of “the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by

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<sup>176</sup> Resolution 2249 is an implicit decision in connection with Article 51. It does not mention the precept, but it is clear that the use of the words “take all necessary measures” includes self-defense actions. The Council has implicitly recognized the right to self-defense before with Resolution 403 (1977). See *REPertoire OF THE PRACTICE OF THE U.N. SECURITY COUNCIL: SUPPLEMENT 1975–80*, *supra* note 166, Chapter XI at 402. This explicit expression is as follows:

[The Security Council] *Takes cognizance* of the special economic hardship confronting Botswana as a result of the imperative need to divert funds from ongoing and planned development projects to hitherto unplanned and unbudgeted security measures necessitated by the urgent need effectively to defend itself against attacks and threats by the illegal régime in Sothern Rhodesia.

S.C. Res. 403, ¶ 5 (Jan. 14, 1977).

<sup>177</sup> See S.C. Res. 1390, *supra* note 80; S.C. Res. 1452, *supra* note 81; S.C. Res. 1456, *supra* note 88; S.C. Res. 1465, *supra* note 89; S.C. Res. 1516, *supra* note 89; S.C. Res. 1530, *supra* note 79; S.C. Res. 1535, *supra* note 94; S.C. Res. 1566, *supra* note 95; S.C. Res. 1611, *supra* note 102; S.C. Res. 1617, *supra* note 99; S.C. Res. 1618, *supra* note 103; S.C. Res. 1624, *supra* note 100; S.C. Res. 1735, *supra* note 125; S.C. Res. 1787, *supra* note 110; S.C. Res. 1805, *supra* note 114; S.C. Res. 1822, *supra* note 115; S.C. Res. 1904, *supra* note 118; S.C. Res. 1963, *supra* note 121; S.C. Res. 1988, *supra* note 125; S.C. Res. 1989, *supra* note 126; S.C. Res. 2082, *supra* note 131; S.C. Res. 2083, *supra* note 132; S.C. Res. 2129, *supra* note 135; S.C. Res. 2133, *supra* note 138; S.C. Res. 2160, *supra* note 139; S.C. Res. 2161, *supra* note 140; S.C. Res. 2199, *supra* note 58; S.C. Res. 2214, *supra* note 153.

terrorist acts” or very similar wording.<sup>178</sup> The use of the word “all” would tacitly be including the right to self-defense.<sup>179</sup>

- (iii) The Council sometimes recognized “that terrorism will not be defeated by military force, law enforcement measures, and intelligence operations alone” in Resolutions 1963 (2010),<sup>180</sup> 2129 (2013),<sup>181</sup> and 2178 (2014),<sup>182</sup> as well as the presidential statement issued by the Council on September 27, 2010.<sup>183</sup> This suggests that the use of force in self-defense against non-State actors is a form of military force, which was not excluded by the statement and is, therefore, implicitly allowed.

The fact that there might be some implicit subsequent decisions and practices does not immediately lead to the conclusion that any of them in isolation or all of them put together, when combined with Resolutions 1368 and 1373, have achieved the expansion of Article 51 to cover armed attacks by autonomous non-State actors.<sup>184</sup> In order to address this issue, each of the implicit practices will be assessed individually and then collectively.

a. *Reaffirmation of Resolution 1373*

Although it constitutes an implicit subsequent decision related to Article 51, the constant reaffirmation of Resolution 1373 by the Council in almost all of the resolutions related to terrorist threats from 2002 to November 2015 does not in itself expand the right to self-defense against autonomous non-State actors in general or when combined with Resolutions 1368 and 1373.

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<sup>178</sup> See S.C. Res. 1438, *supra* note 83; S.C. Res. 1450, *supra* note 83; S.C. Res. 1455, *supra* note 87; S.C. Res. 1526, *supra* note 93; S.C. Res. 1530, *supra* note 79; S.C. Res. 1566, *supra* note 38; S.C. Res. 1611, *supra* note 79; S.C. Res. 1617, *supra* note 99; S.C. Res. 1618, *supra* note 103; S.C. Res. 1624, *supra* note 100; S.C. Res. 1735, *supra* note 107; S.C. Res. 1822, *supra* note 115; S.C. Res. 1904, *supra* note 118; S.C. Res. 1989, *supra* note 126; S.C. Res. 2133, *supra* note 138; S.C. Res. 2160, *supra* note 139; S.C. Res. 2161, *supra* note 140; S.C. Res. 2178, *supra* note 142; S.C. Res. 2199, *supra* note 58.

<sup>179</sup> In the past, for instance, the use by the Council of the expression “take all measures necessary to defend its sovereignty and territorial integrity under the Charter” has been understood by some UN Member States to include the right to self-defense. See *REPertoire OF THE PRACTICE OF THE U.N. SECURITY COUNCIL: SUPPLEMENT 1985–88*, *supra* note 166, Chapter XI at 428. To be sure, the expressions “the need to combat by all means” and “take all measures necessary” do not have the same meaning for the Council.

<sup>180</sup> See S.C. Res. 1963, *supra* note 121, pmb. ¶ 4.

<sup>181</sup> See S.C. Res. 2129, *supra* note 135, pmb. ¶ 3.

<sup>182</sup> See S.C. Res. 2178, *supra* note 142, pmb. ¶ 14.

<sup>183</sup> See Presidential Statement of 27 September 2010, *supra* note 123, ¶ 7.

<sup>184</sup> It is important to mention that any *implicit* subsequent practice by the Council, in principle, would not be able to expand Article 51 on its own from 2001 to 2015, before Resolution 2249. The expansion, though, could exist as a result of assessing the self-defense declarations in Resolutions 1368 and 1373, in light of implicit decisions and practices by the Council.

Rather, the reaffirmation of Resolution 1373 must be seen in the context of the thematic connection between Resolution 1373 and the subsequent reaffirming resolution in, mainly, their operative parts. While Resolution 1373 has a statement related to self-defense, the thrust of the resolution in the operative part contains a multilateral effort to face the threats that terrorism poses to international peace and security. Thus, if the reaffirming resolution is multilateral in character and unrelated to the use of force in terms of the contents of its operative part, as has been the case with all of the resolutions prior to Resolution 2249,<sup>185</sup> the reaffirmation of Resolution 1373 must be understood to refer mainly to the latter's multilateral nature. Consequently, the reaffirmation of Resolution 1373 by almost every post-9/11 resolution should not be seen as adding much substance to what the Council states in Resolutions 1368 and 1373 in relation to Article 51 against terrorist attacks by autonomous non-State actors.

*b. Reaffirmation of the Need to Combat by "All" Means*

As to the second implicit practice, the Council has reaffirmed in multiple resolutions and presidential statements "the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts," or very similar wording,<sup>186</sup> as tacitly including the right to self-defense. It is possible to say that the implicit practice of using "all means" has important limits in contributing to the expansion of Article 51. In effect, this conclusion is supported by a contextual element of Resolution 1373, where the reference to the right to self-defense immediately precedes the use of the expression "to combat by all means." The post-9/11 anti-terrorism resolutions therefore include "to combat by all means" and omit the "right to self-defense."

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<sup>185</sup> Resolution 2249 is also multilateral, but of a different nature in the sense that it endorses the use of force against ISIL by any State with the capacity to do so. *See* S.C. Res. 2249, *supra* note 13.

<sup>186</sup> *See supra* note 177.

When seen in light of the explicit multilateral effort to address terrorist threats, this omission is not an oversight by the Council. Thus, what this reaffirmed statement adds to Resolutions 1373 and 1368 is not enough to achieve an expansion of Article 51. The same can be said of the use of “to combat by all means” in Resolution 2249. It is incorporated in the preamble,<sup>187</sup> and by including the call upon members to take all necessary measures in the operative part of the resolution, the Council gives further evidence that the statement alone does not imply the use of force in self-defense.

*c. Reaffirmation that Terrorism Will Not be Defeated by Military Force, Law Enforcement Measures, and Intelligence Operations Alone*

The third argument in support of implicit subsequent decisions and practices is that the Council has recognized in several resolutions and presidential statements that “terrorism will not be defeated by military force, law enforcement measures, and intelligence operations alone.” Self-defense would be one of the military actions tacitly included. To assess the merits of this argument, it is important to look at the context of the statement in the Council’s decisions to determine whether or not it can be said that the statement contains an implicit decision supporting an expansion of Article 51 to include autonomous non-State actors. The context of the statement in the three decisions, Resolutions 1963, 2129, and 2178, does not support such inference, principally because all three decisions highlight multinational efforts as being fundamental to the fight against terrorism. Resolutions 1963 and 2129 contain the following statement in their preamble:

[T]hat all Member States must cooperate fully in the fight against terrorism . . . <sup>188</sup>

*Reiterating* its call upon Member States to enhance their cooperation and solidarity, particularly through bilateral and multilateral arrangements and agreements to

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<sup>187</sup> See S.C. Res. 2249, *supra* note 13, pmbl. ¶ 7.

<sup>188</sup> See S.C. Res. 1963, *supra* note 121, pmbl. ¶ 10; S.C. Res. 2129, *supra* note 135, pmbl. ¶ 18.

prevent and suppress terrorist attacks and encourages Member States to strengthen cooperation at the regional and subregional level . . . .<sup>189</sup>

For its part, Resolution 2178 also proclaims:

*[U]nderlining* the need for Member States to act cooperatively to prevent terrorists from exploiting technology, communications and resources to incite support for terrorist acts, while respecting human rights and fundamental freedoms . . . .

*Noting* recent developments and initiatives at the international, regional and subregional levels to prevent and suppress international terrorism . . . .<sup>190</sup>

Given the clear emphasis on multilateral efforts, it is unlikely that the statement on limitations on the use of military force might alone expand Article 51 to cover armed attacks by autonomous non-State actors in general. On the other hand, it would not be logical that a statement recognizing the limitations on the use of force could make an important contribution to the expansion of the right to use force in self-defense. For these reasons, the said statement would not even qualify as an implicit subsequent decision for this purpose.

*d. Subsequent Implicit Practices as a Whole*

The fourth and final proposed argument is whether the foregoing implicit determinations, taken together, count as subsequent decisions capable of expanding the scope of Article 51 prior to Resolution 2249. That is to say, would Resolutions 1368 and 1373, coupled with the widely reaffirmed “all means” statement, have expanded Article 51 to cover autonomous non-State actors?

This comprehensive argument must be answered in an equally holistic way and in the context of other resolutions and later UN practices. This context is made up of the 37 resolutions, 48 presidential statements, and 156 press statements in which the Council, when dealing with

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<sup>189</sup> See S.C. Res. 1963, *supra* note 121, pmb. ¶ 15; S.C. Res. 2129, *supra* note 135, pmb. ¶ 26. The presidential statement of September 27, 2010, also contains a statement of virtually identical wording. See Presidential Statement of 27 September 2010, *supra* note 123, ¶ 11.

<sup>190</sup> S.C. Res. 2178, *supra* note 142, pmb. ¶¶ 15, 17.

terrorist threats, explicitly embarked on a multinational effort from 2002 until 2015 without ever mentioning Article 51. Secondly, the presidential statements of October 31, 2002, January 19, 2004, February 15, 2005, and March 19, 2010—in which the Council made an explicit reference to the right to self-defense in the realm of arms control<sup>191</sup>—indicate that from 2002 to November 2015, whenever the Council regarded a situation to merit reference to the right, it did so.

The subsequent implicit expansion of the right to self-defense against autonomous non-State actors seems to be limited in light of the above-mentioned context. This is a conclusion that is not affected by the tacit reference to Article 51 in Resolution 2249, as it exclusively focused on ISIL. However, the fact that the Council’s subsequent explicit decisions and practices focused on the development of multilateral instruments from 2002 to 2015, prior to Resolution 2249, did not mean that the references to the inherent right in Resolutions 1368 and 1373 were tacitly rejected. In effect, this is because the unilateral and multilateral tools used to address terrorist threats did not exclude each other, as Resolution 1373 illustrates.<sup>192</sup>

Finally, at this stage of the analysis, it is worth coming back to Resolution 2249 to assess the argument that it endorsed the United States’ and France’s arguments that self-defensive actions against autonomous non-State actors did not require the innocent State’s consent. If, as was mandated by the Court in *Kosovo*, the interpretation of the scope of Resolution 2249 must take into account other resolutions on the same subject-matter, then the interpretation that emerges is one that denies Resolution 2249 any wider effects beyond ISIL in Syria and Iraq, as such effects are not supported in any previous decisions or practices by the Council (which said nothing related to self-defense beyond the important but inconclusive 9/11 Resolutions).

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<sup>191</sup> See S.C. Pres. Statement 2002/30, *supra* note 173, at 1; S.C. Pres. Statement 2004/1, *supra* note 174, at 1; S.C. Pres. Statement 2005/7, *supra* note 174, at 1; S.C. Pres. Statement 2010/6, *supra* note 175, at 1.

<sup>192</sup> See generally Wood, *supra* note 38, at 318–19 (discussing the law enforcement approach in contrast to the “armed conflict” approach taken by the Security Council and other United Nation bodies to combat terrorism).



## VII. Multilateralism in the Fight Against Terrorism in the UN General Assembly from 2001 to 2015.

Pursuant to Article 24 of the Charter, the Security Council has primary but not exclusive responsibility for the maintenance of international peace and security.<sup>193</sup> The General Assembly also has, within certain limits provided for in Article 11 of the Charter,<sup>194</sup> competences in this particular domain, as the International Court of Justice expressed in *Nicaragua* and in the *Wall* opinion.<sup>195</sup> In light of both the Charter's instruction to the Assembly to consider the principle of cooperation in the maintenance of international peace and security in the latter provision, and of the way the Assembly has applied it,<sup>196</sup> it is not surprising to find that the position the Assembly has taken in respect to terrorism has been consistent with this principle.

In effect, the resolutions adopted by the General Assembly related to terrorism have all been guided by an active promotion of multilateral efforts. Contrary to the Security Council's response in the aftermath of the 9/11 attacks, the General Assembly has always focused *only* on the multinational effort to fight terrorism. For example, while strongly condemning the attacks, the Assembly urgently called in Resolution 56/1 (2011): “[f]or international cooperation to prevent and eradicate acts of terrorism, and stresses that those responsible for aiding, supporting, or

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<sup>193</sup> Article 24.1 states:

In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf. U.N. Charter art. 24, ¶ 1.

<sup>194</sup> Article 11.2 states:

The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations with regard to any such questions to the state or states concerned or to the Security Council or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion. U.N. Charter art. 11, ¶ 2.

<sup>195</sup> *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, ¶ 95 (June 27); *Legal Consequences of the Construction of Wall in Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 26 (July 9).

<sup>196</sup> See Eckart Klein & Stefanie Schmahl, *Ch. IV The General Assembly, Functions and Powers, Article 11*, 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 494–98 (Bruno Simma et al. eds., 3d ed. 2012).

harbouring the perpetrators, organizers and sponsors of such acts will be held accountable.<sup>197</sup>

Subsequent decisions have strengthened this path. Resolution 60/1, for example, contained the 2005 World Summit Outcome,<sup>198</sup> in which the General Assembly reiterated the prohibition of the use of force in a manner inconsistent with the Charter and reaffirmed that “[t]he relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security.”<sup>199</sup> The resolution proceeded with a section on terrorism, based on multilateral tools only. It recalled the need for States to refrain from supporting terrorist organizations in any way, the necessary cooperation between States in conformity with international law, and the role of the United Nations and the contribution of bilateral and regional cooperation to face this challenge, among other issues.

The United Nations Global Counter-Terrorism Strategy was adopted by the General Assembly in Resolution 60/288 of September 8, 2006.<sup>200</sup> It is based on four pillars: (i) measures to address the conditions conducive to the spread of terrorism; (ii) measures to prevent and combat terrorism; (iii) measures to build states’ capacity to prevent and combat terrorism and to strengthen the role of the United Nations system in this domain; and (iv) measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism.<sup>201</sup> The second pillar, measures to prevent and combat terrorism, listed 18 measures.<sup>202</sup> It started with a call for refraining from supporting terrorist activities—giving explicit support to the Council’s decision in this area<sup>203</sup>—and proceeded with calls to members for cooperation and extradition and

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<sup>197</sup> G.A. Res. 56/1, ¶ 4 (Sept. 12, 2001).

<sup>198</sup> See G.A. Res. 60/1, ¶ 5 (Oct. 24, 2005).

<sup>199</sup> *Id.* ¶ 79.

<sup>200</sup> See G.A. Res. 60/288 (Sept. 8, 2006).

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 5–7.

<sup>203</sup> See, S.C. Res. 1189, ¶ 5 (Aug. 13, 1998); Resolution 1373, *supra* note 44, ¶¶ 2(a), 2(c); see also Section VIII, *infra*.

for their becoming parties to the United Nations Convention against Transnational Organized crime and its protocols.<sup>204</sup> It also called for coordination between relevant regional organizations and for cooperation with the CTC and the Resolution 1267 Committee, among others.<sup>205</sup>

The first examination of the implementation of the strategy took place in Resolution 62/272 (2008), in which, among other statements of a multilateral nature, the General Assembly reaffirmed “[t]he need to enhance international cooperation in countering terrorism . . . .”<sup>206</sup> The second examination of the strategy was carried out by the General Assembly in Resolution 64/297 (2010). It contains a reaffirmation of several multilateral tools: international cooperation between States and coordination between regional organizations, guided by the following statement, among others: “Renewing its unwavering commitment to strengthening international cooperation to prevent and combat terrorism in all its forms and manifestations.”<sup>207</sup> The third examination of the strategy was made by the Assembly in Resolution 66/282 (2012), which followed the multinational orientation in terms already highlighted.<sup>208</sup> The fourth examination took place in 2014 in Resolution 68/276. It highlights again the multilateral instruments mentioned above, and reaffirms that acts of terrorism are aimed at “[t]hreatening territorial integrity and the security of States . . . .”<sup>209</sup> Furthermore, it “[u]nderlines the importance of multilateral efforts in combating terrorism and refraining from any practices and measures inconsistent with international law and the principles of the Charter.”<sup>210</sup>

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<sup>204</sup> G.A. Res. 60/288, *supra* note 200, at 5, ¶ 6.

<sup>205</sup> *See id.* at 5–7.

<sup>206</sup> G.A. Res. 62/272, ¶ 10 (Sept. 15, 2008).

<sup>207</sup> G.A. Res. 64/297, pmb. ¶ 4 (Oct. 13, 2010).

<sup>208</sup> *See* G.A. Res. 66/282 (July 12, 2012).

<sup>209</sup> G.A. Res. 68/276, pmb. ¶ 13 (June 24, 2014).

<sup>210</sup> *Id.* ¶ 26.

Clearly, there is no subsequent practice within the UN General Assembly related to the right to self-defense against autonomous non-State actors. Although this conclusion is not surprising, it lends further support to the lack of expansion of Article 51 to cover these actors.

#### VIII. **Can State Practice Under Article 51 on Its Own Have Expanded the Scope of Article 51 to Cover Armed Attacks from Any Autonomous Non-State Actor?**

The International Court included in the *Kosovo* opinion that State practice was an element to be considered regarding the interpretation of Security Council resolutions, which in turn could have an impact on the expansion of any Charter provision.<sup>211</sup> Whether State practice alone from 2002 to 2015, and in particular during the years 2014 and 2015, could have achieved this result regarding Article 51 is a different matter.<sup>212</sup> A thorough assessment of such practice goes beyond the scope of this article;<sup>213</sup> however, it is possible to say that the practice is far from being uniform, even between the permanent members of the Council, whose practice regarding ISIL before Resolution 2249 is evidence.

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<sup>211</sup> Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. Rep. 403, ¶ 94 (July 22) (“The interpretation of Security Council resolutions may require the Court to analyse . . . other resolutions of the Security Council on the same issue, as well as the subsequent practice . . . of States affected by those given resolutions.”).

<sup>212</sup> Reisman and Armstrong argue that the right to self-defense against autonomous non-State actors crystallized into customary practice on the basis of State practice shortly after 9/11. *See* Reisman & Armstrong, *supra* note 2, at 538; 548; *see also* Christian J. Tams, *The Use of Force Against Terrorists*, 20 EUR. J. INT’L L. 359, 391–92 (2009). *But see* Cassese, *supra* note 2, at 997; Guillaume, *supra* note 2, at 547:

It has thus been emphasized that it would be dubious to derive an instantaneous custom from one isolated precedent. It has further been observed that this evolution would amount to such radical change in international law that it would require a clearer practice and more constant *opinio juris*.

<sup>213</sup> A future project might assess the topic in detail, particularly in light of the International Law Commission’s Report on Identification of Customary International Law. *See* Bernard H. Oxman, *Some Observations on the Draft Conclusions on Identification of Customary Law Provisionally Adopted by the ILC’s Drafting Committee at the Sixty-Sixth Session*, AJIL UNBOUND (Dec. 23, 2014, 2:57PM), <https://www.asil.org/blogs/some-observations-draft-conclusions-identification-customary-law-provisionally-adopted-ilc’s>; Edward T. Swaine, *Identifying Customary International Law: First Thoughts on the ILC’s First Steps*, AJIL UNBOUND (Dec. 23, 2014, 3:03PM), <https://www.asil.org/blogs/identifying-customary-international-law-first-thoughts-ilc’s-first-steps>; Michael Wood & Omri Sender, *Identifying the Rules for Customary International Law: Response from Michael Wood and Omri Sender*, AJIL UNBOUND (Jan. 8, 2015, 9:09AM), <https://www.asil.org/blogs/identifying-rules-identifying-customary-international-law-response-michael-wood-and-omri>.

The United States and France, for example, have claimed Article 51 without Syrian consent,<sup>214</sup> while Russia and China opposed the invocation without Syrian consent,<sup>215</sup> and in September 2014 the United Kingdom similarly expressed that its intervention in Syria required such consent.<sup>216</sup> Later, in November 2014, the United Kingdom changed its position and notified the Council that it had taken collective self-defensive action against ISIL in Syria in support of Iraq without consent from Syria.<sup>217</sup> Subsequently, the United Kingdom invoked its own right to self-defense against ISIL in Syria, in addition to the collective-right of Iraq, in September 2015.<sup>218</sup> Then, after resolution 2249, the United Kingdom notified the Council that it was taking necessary and proportionate self-defensive measures against ISIL in Syria, citing the resolution as a legal basis.<sup>219</sup>

Although the United Kingdom changed its approach in 2015, its practice is recent,<sup>220</sup> and it is not without hesitations. After invoking Resolution 2249 and Article 51, an official document of the House of Commons, *Legal Basis for UK Military Action in Syria*, concluded: “However, when the armed attack comes from a ‘non-state actor’ such as ISIS/Daesh, based in a state that is

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<sup>214</sup> Permanent Rep. of the U.K. of Gr. Brit. and N. Ir. to the U.N., Identical Letters dated 25 November 2014 from the Permanent Rep. of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2014/851 (Nov. 26, 2014) [hereinafter Identical Letters dated 25 Nov. 2014].

<sup>215</sup> See Blanchard, *supra* note 57; Black & Roberts, *supra* note 57, at 2.

<sup>216</sup> Griff Witte & Rebecca Collard, *Britain, Denmark and Belgium Join Air Campaign Against Islamic State*, WASH. POST (Sept. 26, 2014), [https://www.washingtonpost.com/world/refugees-flee-islamic-state-bid-to-claim-strategic-town-as-airstrikes-expand/2014/09/26/332a73f2-4570-11e4-b437-1a7368204804\\_story.html?utm\\_term=.3a51bf5707d0](https://www.washingtonpost.com/world/refugees-flee-islamic-state-bid-to-claim-strategic-town-as-airstrikes-expand/2014/09/26/332a73f2-4570-11e4-b437-1a7368204804_story.html?utm_term=.3a51bf5707d0).

<sup>217</sup> See Identical Letters dated 25 November 2014, *supra* note 214..

<sup>218</sup> Permanent Rep. of the U.K. of Gr. Brit. and N. Ir. to the U.N., Letter Dated 7 September 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2015/688 (Sept. 8, 2015) [hereinafter Letter Dated 7 September 2015].

<sup>219</sup> Permanent Rep. of the U.K. of Gr. Brit. and N. Ir. to the U.N., Letter Dated 3 December 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/3 December 2015/928 (Dec. 3, 2015).

<sup>220</sup> One of the latest statements endorsing the new approach was made by the United Kingdom’s Attorney-General. Rt. Hon. Jeremy Wright, QC MP, U.K., Address at the International Institute for Strategic Studies (Jan. 11, 2017) (outlining the contemporary developments in the use of force and the United Kingdom’s position on self defence).

‘unwilling or unable’ to prevent the attack, the international law is not entirely clear.”<sup>221</sup> Without further reviewing State practice regarding Article 51 predating ISIL—carried out, among others, by the United States, the United Kingdom,<sup>222</sup> Israel,<sup>223</sup> Iran,<sup>224</sup> Russia,<sup>225</sup> and Kenya<sup>226</sup>—the above-mentioned limited review shows that the UN practice is not a model of uniformity. As such, States would face great difficulty in relying on the notion of State practice to demonstrate the expansion of Article 51 to cover autonomous non-State actors, especially since, following the *Kosovo* opinion, State actions were to be assessed in light of the 84 decisions adopted by the Council with its lack of reference to the right of self-defense. The bar is certainly high: as noted by Nolte and Randelzhofer, “[t]he conditions for the recognition of a significant reinterpretation of, or superseding exception to, Art. 51 are strict.”<sup>227</sup>

#### IX. The Indirect Expansion of Article 51 Through a New Standard of Attribution under the Security Council’s Resolutions on Terrorism 1998–2015

Sections IV to VI of this Article focused on what the Security Council did not do from 2002 to 2015: expand Article 51 to cover armed attacks from any autonomous non-State actor.<sup>228</sup> Section VIII will focus on what the Council did—the indirect expansion of Article 51—in relation to the right to self-defense during this period regarding threats to international peace and security caused by non-State actors in general. It did this through the creation, in the domain of terrorism,

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<sup>221</sup> Lang, *supra* note 69, ¶ 10. For the argument that the United Kingdom could invoke Article 51 against ISIL in Syria without Syrian consent (prior to Resolution 2249), see Letter Dated 7 September 2015, *supra* note 218.

<sup>222</sup> See Press Statement on Terrorist Threats, *supra* note **Error! Bookmark not defined.**

<sup>223</sup> See Permanent Rep. of Isr. to the U.N., Security Council, Identical Letters dated 8 October 2003 from the Permanent Representative of Israel to the United Nations Addressed to the Secretary-General and the President of the Security Council, U.N. Doc. A/58/424-S/2003/972 (Oct. 9, 2003).

<sup>224</sup> Iran invoked the right to self-defense against non-State actors operating from Iraq on April 18, 2001. See Rep. of the S.C., at 1016, Chapter XI (2001–2003).

<sup>225</sup> See Permanent Rep. of Russ. Federation to the U.N., Letter Dated 11 September 2001 from the Permanent Representative of the Russian Federation to the United Nations Addressed to the Secretary-General, U.N. Doc. S/2002/1012 (Sept. 12, 2002).

<sup>226</sup> See U.N. Secretary-General, *Report of the Secretary-General on Somalia*, U.N. Doc. S/2011/759 (Dec. 9, 2011).

<sup>227</sup> NOLTE & RANDELZHOFFER, *supra* note 15, at 1400.

<sup>228</sup> See *id.* at 1417.

of a standard of attribution to States of acts carried out by non-State actors that is less strict than that of customary international law.

The Court has established the standard of effective control to determine when actions by non-State actors could be attributed to a State. The standard has in the past been relevant to the application of Article 51 to determine when an armed attack carried out by a non-State actor can be attributed to a State.<sup>229</sup> The “effective control” test is based on the customary rule embodied in Article 8 of the International Law Commission’s Articles on State Responsibility, according to which “[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”<sup>230</sup> However, despite this provision there is nothing preventing the development of other standards of attribution applicable to the UN Charter and in particular to Article 51. In fact, some have suggested that Resolution 1373 lowered the threshold of attribution applicable to non-State actors in the domain of threats to international peace and security caused by terrorist acts.<sup>231</sup> In other words, the Security Council’s standard would cover armed attacks by non-State actors that would not meet the threshold of customary international law.

A lower threshold would be the result of the combined effect in Resolution 1373 of the reference to the right to self-defense in the preamble and of paragraph 2 of the operative part, providing:

2. *Decides also* that all States shall:

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<sup>229</sup> See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, ¶ 115 (June 27); *Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. Rep. 168, ¶ 146 (Dec. 19).

<sup>230</sup> Int’l Law Comm’n, Rep. on the Work of its Fifty-Third Session, U.N. Doc. A/56/10 (2001) [hereinafter Draft Articles on Responsibility]. Beginning on page 59, the International Law Commission provides commentaries on each of the Draft Articles on Responsibility of States for International Wrongful Acts.

<sup>231</sup> See Ruth Wedgwood, *The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense*, 99 AM. J. INT’L L. 52, 58 (2005).

(a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;

(c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;<sup>232</sup>

The argument would suggest that, on the basis of Resolution 1373, terrorist acts that qualify as armed attacks carried out by non-State actors with the active or passive support of a State would be attributed to the latter, and it would justify the invocation of the right to self-defense by the injured State. This Section, however, shows the legal foundations of this particular standard of attribution, based on decisions by the Council from 1998 to 2015, and most importantly, that the Council itself has already applied the standard.

In effect, the Council attributed the 9/11 attacks to the Taliban regime, despite the fact that Al-Qaida's attacks hardly met the requirements of the rules of attribution under customary international law.<sup>233</sup> In effect, the Council clearly did so in the presidential statement of September 11, 2002, which stated:

The international community has responded to the atrocities of 11 September with unyielding determination. A broad coalition of States has taken action against *the Taliban*, Al-Qaida, and their supporters. It did so in defense of common values and common security. Consistent with the high purposes of this institution and the provisions of the United Nations Charter, the coalition continues to pursue those responsible.<sup>234</sup>

As can be seen, the Council attributed the 9/11 attacks to the Taliban and regarded the self-defensive acts by United States and the United Kingdom as lawful under the Charter.

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<sup>232</sup> S.C. Res. 1373, *supra* note 45, ¶¶ 2(a), 2(c).

<sup>233</sup> See TOM RUYTS, 'ARMED ATTACK' AND ARTICLE 51 OF THE UN CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE 440 (2010).

<sup>234</sup> Statement by the President of the Security Council on Sept. 11, 2002, *supra* note 55, ¶ 4.



This determination by the Council in terms of attribution to the Taliban of Al-Qaida's 9/11 attacks had its roots in four previous resolutions; the Council's standard in the domain of terrorism was already in the making before Resolution 1373. Indeed, Resolution 1189 (1998) stressed a general obligation for UN membership: "[e]very Member State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts."<sup>235</sup> Later, Resolution 1193 (1998) demanded "Afghan factions to refrain from harbouring and training terrorists and their organizations and to halt illegal drug activities";<sup>236</sup> and Resolution 1214 (1998) condemned the Taliban for allowing territory controlled by it to be used "for the sheltering and training of terrorists and the planning of terrorist acts and reiterating that the suppression of international terrorism [was] essential for the maintenance of international peace and security."<sup>237</sup> In Resolution 1267 (1999), under Chapter VII, the Council made a similar condemnation and both in the preamble and in the operative part of this decision focused on the support the Taliban was giving to Bin Laden.<sup>238</sup> The Council went further in Resolution 1333 (2000) by ordering the Taliban "to close all camps where terrorists are trained within the territory under its control."<sup>239</sup>

State practice before the Council under Article 51 also supported this development. Prior to 9/11, the United States had already attributed to the Taliban regimen an Al-Qaida attack against U.S. embassies in Nairobi, Kenya, and Dar Es Salaam, Tanzania, and basing its action on Article 51, the United States had attacked Al-Qaida bases in Afghanistan. The United States expressed that its attacks "were carried out only after repeated efforts to convince the Government of the

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<sup>235</sup> S.C. Res. 1189, *supra* note 203, ¶ 5.

<sup>236</sup> S.C. Res. 1193, ¶ 15 (Aug. 28, 1998).

<sup>237</sup> S.C. Res. 1214, ¶ 12 (Dec. 8, 1998).

<sup>238</sup> S.C. Res. 1267, pmb. ¶¶ 5–6, ¶¶ 1–2.

<sup>239</sup> S.C. Res. 1333, *supra* note 93, ¶ 3.

Sudan and the Taliban regime in Afghanistan to shut these terrorist activities down and to cease their cooperation with the Bin Laden organization.”<sup>240</sup>

In sum, the set of resolutions from 1998 to 2001 established a new standard of attribution for non-State actors’ actions to States in the realm of terrorism, and the presidential statement made by the Council on September 11, 2002, applied this standard by attributing Al-Qaida’s actions to the Taliban regime in Afghanistan. Consequently, the existence of this special standard of attribution is not only an inference to be made in light of Resolutions 1189 (1998), 1193 (1998), 1214 (1998), 1267 (1999), 1333 (2000), and 1373 (2001), but a reality in light of its application by the Council in its September 11, 2002, presidential statement.

Could it be said that this presidential statement does not imply an attribution of the 9/11 attacks to Afghanistan, since Afghanistan is not explicitly mentioned there? The key issue is not whether Afghanistan is mentioned, but whether the Taliban were sometimes regarded by the Council as public authorities or with sufficient links to Afghan public organs. Once it has been shown that in the eyes of the Council the Taliban was a public authority, not a mere non-State actor, then the presidential statement connecting Al-Qaida’s 9/11 attacks to a State authority and its attribution to Afghanistan necessarily follows by virtue of Article 10.1 of the International Law Commission’s Articles on State Responsibility.<sup>241</sup>

After its removal from power at the end of 2001, the Taliban became a non-State actor, but after taking Kabul in September 1996 and until 9/11, the Security Council and the United Nations

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<sup>240</sup> Permanent Rep. of U.S. to the U.N., Letter Dated August 20, 1998 from the Permanent Rep. of the U.S. to the United Nations Addressed to the President of the Security Council, UN. Doc. S/1998/70 (Aug. 20, 1998).

<sup>241</sup> The basis of this attribution is Article 10.1 of the International Law Commission’s Articles on State Responsibility, which provides for:

The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law.

Draft Articles on Responsibility, *supra* note 230, at 45 art. 10(1).

sometimes treated the Taliban as public authorities. Evidence of this treatment abounds. First, in the fact that the Council sometimes made reference to the “Taliban authorities.” In effect, when commenting on Resolution 1267 (1999), the Repertoire of the Practice of the Security Council spoke of the “failure of the Taliban authorities to respond to the demands in resolution 1214 (1998). . . .”<sup>242</sup> Second, Taliban decisions were sometimes called “measures” in Security Council Resolutions.<sup>243</sup> In addition, the Council determined that certain sanctions against the Taliban should also be extended to certain Afghan entities.<sup>244</sup> Next, the UN recognized the political relevance of the Taliban by inviting it to negotiations the UN were promoting in Afghanistan, and the Council regretted the Taliban’s decision to withdraw from them.<sup>245</sup> Fifth, the Council requested in Resolution 1333 (2000) that the Taliban comply with international conventions, such as the 1971 Convention on Psychotropic Substances and the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.<sup>246</sup> And finally, the Council tacitly accepted (in Chapter VII resolutions) the existence of diplomatic relations between the Taliban and States by urging those States to reduce the number and level of staff in Taliban missions and control their movement,<sup>247</sup> and by ordering States to restrict the entry or transit of “all senior officials of the

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<sup>242</sup> REPERTOIRE OF THE PRACTICE OF THE U.N. SECURITY COUNCIL: SUPPLEMENT 1996–99, *supra* note 170, Chapter XI at 11116.

<sup>243</sup> See S.C. Res. 1193, *supra* note 236, pmb. ¶ 8; S.C. Res. 1214, *supra* note 237, pmb. ¶ 10. The word “measure” is often used in international law as referring to States’ and international organizations’ actions. It is not used to allude to those of purely non-State actors. Examples of the former abound. See, e.g., U.N. Charter arts. 14, 41; GATS: General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, art. XXVIII(1), 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994); DSU, Dispute Settlement Rules: Understanding on Rules and Proceedings Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Annex 2, art. 12, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994); Adoption of the Paris Agreement, annex, art. 12, U.N. Doc. FCCC/CP/2015/L.9 (Dec. 12, 2015).

<sup>244</sup> See Rep. of S.C., at 2, U.N. Doc. A/56/2 (2001–2002).

<sup>245</sup> See Rep. of S.C., at 458, U.N. Doc. A/54/2 (1998–1999).

<sup>246</sup> See S.C. Res. 1333, *supra* note 93, pmb. ¶ 8.

<sup>247</sup> See *id.* ¶ 7.

rank of Deputy Minister or higher in the Taliban . . . and other senior advisors and dignitaries of the Taliban . . . .”<sup>248</sup>

Each of these factors is relevant for the purpose of categorizing the Taliban as a public authority, but two deserve particular attention. First, the Council’s order to the Taliban to comply with international conventions; and second, the extension by the Council of sanctions against the Taliban to Afghan entities shows that, for the UN organ, there was not a clear cut distinction, in practical terms, between the Taliban and the given public Afghan entities. The Taliban, as a non-State actor, could not be demanded to comply with the said treaties. In effect, the 1971 Convention on Psychotropic Substances provides rights and obligations for “the Parties,” not non-State actors,<sup>249</sup> as does the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.<sup>250</sup> The fact that the Taliban regime is in fact Afghanistan for the purpose of the Conventions is the underlying basis of the Security Council’s order. These facts reveal that, for

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<sup>248</sup> *Id.* ¶ 14.

<sup>249</sup> Article 25.1 of the Convention, titled Procedure for Admission, Signature, Ratification and Accession, sets forth:

Members of the United Nations, States not Members of the United Nations which are members of a specialized agency of the United Nations or of the International Atomic Energy Agency or Parties to the Statute of the International Court of Justice, and any other State invited by the Council, may become Parties to this Convention.

Convention on Psychotropic Substances art. 25.1, Feb. 21, 1971, 1019 U.N.T.S. 175.

<sup>250</sup> Article 26 provides:

This Convention shall be open for signature . . . by:

- a) All States;
- b) Namibia, represented by the United Nations Council for Namibia;
- c) Regional economic integration organizations which have competence in respect of the negotiation, conclusion and application of international agreements in matters covered by this Convention, references under the Convention to Parties, States or national services being applicable to these organizations within the limits of their competence.

Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances art. 26, Dec. 20, 1988, 1582 U.N.T.S. 95.

the Council at the time of the 9/11 attack, the Taliban regime had, by virtue of its operation, a public character.<sup>251</sup> All this took place before 9/11. Afterwards, no similar language was used.<sup>252</sup>

It has been shown that a new standard of attribution in the realm of terrorism started to be crafted by the Council in five resolutions prior to Resolution 1373. The specific standard of attribution in the domain of terrorism has been subsequently and explicitly reaffirmed and expanded several times from 2002 to 2016, with particular intensity after the emergence of ISIL. In effect, the operative part 2(a) of Resolution 1373 has explicitly been reaffirmed in the operative or the preambular parts of Resolutions 2133 (2014),<sup>253</sup> 2170 (2014),<sup>254</sup> 2199 (2015),<sup>255</sup> and 2214 (2015)<sup>256</sup> (the latter three being Chapter VII decisions), and in the presidential statements of September 27, 2010,<sup>257</sup> May 2, 2011,<sup>258</sup> and May 11, 2016.<sup>259</sup> On the other hand, operative part

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<sup>251</sup> It is important to mention that, although the Taliban ruled Afghanistan from 1996 to 2001, it was not recognized as the official government by the United Nations. The official Afghan government opposed the Taliban and was a strong supporter of the measures against it before 9/11, mainly Security Council Resolution 1267 (1999). See REPERTOIRE OF THE PRACTICE OF THE U.N. SECURITY COUNCIL: SUPPLEMENT 1996–99, *supra* note 170, Chapter XI at 1123.

It seems paradoxical that, despite the fact that the Taliban were not the recognized Afghan government, private acts could be attributed to the Taliban as public Afghan authorities. However, as the International Law Commission has expressed:

The question of attribution of conduct to the State for the purposes of responsibility is to be distinguished from other international law processes by which particular organs are authorized to enter into commitments on behalf of the State. Thus the Head of State or Government or the minister of foreign affairs is regarded as having authority to represent the State without any need to produce full powers. Such rules have nothing to do with attribution for the purposes of State responsibility. In principle, the State's responsibility is engaged by conduct incompatible with its international obligations, irrespective of the level of administration or government at which the conduct occurs.<sup>251</sup>

Draft Articles on Responsibility, *supra* note 230, at 39, cmt. 5 .

<sup>252</sup> It is important to mention that, prior to taking the Afghan capital in September 1996, the Taliban was mainly a non-State actor receiving strong support from, but not under the control of, Pakistan. For a detailed history of the Taliban in the context of the history of Afghanistan over the last 40 years, see William Maley, *The Foreign Policy of the Taliban*, COUNCIL ON FOREIGN REL., <http://www.cfr.org/afghanistan/foreign-policy-taliban/p8609> (last updated Feb. 10, 2016).

<sup>253</sup> See S.C. Res. 2133, *supra* note 138, ¶ 1.

<sup>254</sup> See S.C. Res. 2170, *supra* note 143, ¶ 11.

<sup>255</sup> See S.C. Res. 2199, *supra* note 58.

<sup>256</sup> See S.C. Res. 2214, *supra* note 153, pmb. ¶ 8.

<sup>257</sup> See S.C. Pres. Statement 2010/19, *supra* note 123, ¶ 17.

<sup>258</sup> S.C. Pres. Statement 2011/9, *supra* note 128, ¶ 7.

<sup>259</sup> See S.C. Pres. Statement 2016/6, ¶ 7 (May 11, 2016).

2(c) of Resolution 1373 was also reaffirmed in the operative part of Resolution 1566 (2004), a Chapter VII decision,<sup>260</sup> and Resolution 1624 (2005),<sup>261</sup> and also in the presidential statements of September 27, 2010,<sup>262</sup> and of May 4, 2011.<sup>263</sup> These subsequent decisions added a new element to the above-mentioned provision of Resolution 1373: as part of the duty to deny safe haven, members must prosecute or extradite persons who support, facilitate, participate or attempt to participate in the financing, planning, preparation or commission of terrorist acts.<sup>264</sup>

What are the general contents of the standard of attribution that the Security Council has crafted in the domain of terrorism? From the above-mentioned set of Resolutions and Presidential Statements from 1998 to 2015, the contents of the standard can be so defined: terrorist acts carried out by non-State actors that reach the threshold of armed attacks and that take place as a result of a given State's instigation, assistance, participation, or active or passive support will be attributed to the said State for the purpose of self-defensive action under Article 51. In addition, armed terrorist acts committed, financed, facilitated, incited, prepared, or planned by individuals who had been previously identified, whose prosecution and punishment or extradition to a State have been unsuccessfully required by others or the Security Council, will be attributed to the passive State for the foregoing purpose.

A final question is whether a Security Council's previous decision declaring that a UN member is actively or passively supporting terrorism, or has failed to prosecute or extradite individuals accused of participating in the different phases of terrorist acts, is required as a precondition to attribute armed terrorist attacks to the supportive State. The answer should be no. The

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<sup>260</sup> See S.C. Res. 1566, *supra* note 38, ¶ 2.

<sup>261</sup> See S.C. Res. 1624, *supra* note 100, pmb. ¶ 15, ¶ 2.

<sup>262</sup> See S.C. Pres. Statement 2010/19, *supra* note 123, ¶ 13.

<sup>263</sup> See S.C. Pres. Statement 2012/17, *supra* note 133, ¶ 11.

<sup>264</sup> See, e.g., S.C. Res. 1566, *supra* note 38, ¶ 2; S.C. Res. 1624, *supra* note 100, pmb. ¶ 15; S.C. Res. 2170, *supra* note 143, ¶ 5; S.C. Pres. Statement 2010/19, *supra* note 123, ¶ 13.

events of 9/11 led to the only occasion in which the Council attributed an armed terrorist attack to a State: the Taliban and Afghanistan. This was preceded by explicit Council's condemnations in Resolutions 1214 (1998) and 1267 (1999).<sup>265</sup> However, the text of the Resolutions and Presidential Statements in which the special standard of attribution has been established does not impose such a pre-condition.

It could be claimed that the fact that the set of resolutions adopted by the Council after 2002 reaffirms States' obligation to deny safe haven to terrorists and to avoid active or passive support to terrorist groups without expressly affirming the right to self-defense, as the Council did in Resolution 1373, would mean that such support to terrorist groups would just entail a violation of the resolutions but not trigger Article 51. To respond, it can be said that once a non-State actor's action, which qualifies as an armed attack, is attributed to a State on the basis of the support given by the latter to the former, the applicability of Article 51 becomes directly possible. There is no need for a specific reaffirmation of the right in the Council's resolutions setting forth the particular test of attribution.

The differences between the Council's specific standard of attribution in the realm of terrorism and the standard of attribution under customary international law are important. The Council requires neither evidence of effective control by a State of the non-State actor when carrying out the given armed attack nor the State's effective instructions to do so. Thus, active or passive support that has made the armed attack possible is enough to attribute to the supporting State the terrorist armed attack. The Council's standard of attribution catches much more private actions than that of customary international law and, for this reason, significantly expands the scope of the lawful invocation of the right to self-defense against terrorist armed attacks.

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<sup>265</sup> See *supra* notes 233–36 and accompanying text.

## X. The Notion of Armed Attacks in the Security Council's Decisions Related to Terrorism from 2002 to 2015

The preceding sections of this Article have shown that there is no subsequent practice by the Security Council on the right to self-defense against autonomous non-State actors from 2002 to 2015, save the important but exceptional Resolution 2249. On the contrary, there have been decisions by the Council that set forth a special standard of attribution to States of non-State actors' actions in the domain of threats to international peace and security caused by terrorist acts. These two elements combined suggest that the existence of a terrorist attack against a State that could qualify as an armed attack is not in itself enough to trigger self-defensive actions under Article 51. The self-defensive action needs to be attributed to a State under the Council's test of attribution or, if this is not the case, have the innocent State's consent to the self-defensive operation or—after Resolution 2249—the Council's endorsement or a Chapter VII authorization.

As shown above, the Security Council has condemned terrorist attacks in 12 resolutions and 32 presidential statements.<sup>266</sup> Never, however, has the Council explicitly labelled the terrorist acts as “armed attacks.” For instance, the Council used the words “horrifying terrorist attacks”<sup>267</sup> in Resolution 1368, and “terrorist attacks” in Resolution 1373, Resolution 1390 (2002), and Resolution 1516 (2003).<sup>268</sup> The Council also used the expression “bomb attacks” in Resolutions 1438 (2002) and Resolution 1465 (2002),<sup>269</sup> “terrorist bomb attack” in Resolution 1450 (2002),<sup>270</sup> and “shameless and horrific attacks” in Resolution 1618.<sup>271</sup> In recent months, ISIL's actions have been labeled by the Council as “attacks” in the Presidential Statement of January 10, 2014,<sup>272</sup>

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<sup>266</sup> See *supra* notes 160–62 and accompanying text.

<sup>267</sup> S.C. Res. 1368, *supra* note 6, ¶ 1.

<sup>268</sup> S.C. Res. 1373, *supra* note 45, pmb. ¶ 2; S.C. Res. 1390, *supra* note 80, pmb. ¶ 4; S.C. Res. 1516, *supra* note 89, ¶ 2; S.C. Res. 1530, *supra* note 96, ¶ 2; S.C. Res. 1611, *supra* note 102, ¶ 1.

<sup>269</sup> S.C. Res. 1438, *supra* note 83, ¶ 1; S.C. Res. 1465, *supra* note 89, ¶ 1.

<sup>270</sup> S.C. Res. 1450, *supra* note 83, ¶ 1.

<sup>271</sup> S.C. Res. 1618, *supra* note 103, ¶ 2.

<sup>272</sup> S.C. Pres. Statement 2014/1, *supra* note 147.



“large-scale offensive” in the Presidential Statement of September 19, 2014,<sup>273</sup> and both “criminal terrorist acts” and “terrorist acts” in Resolution 2170 (2014).<sup>274</sup>

Nonetheless, the lack of the term “armed attack” does not mean that a terrorist attack cannot be regarded as an armed attack attributed to a State by the Council. As was shown, the 9/11 attacks were regarded by the Council as armed attacks in its Presidential Statement of September 11, 2002, since the self-defensive action was deemed by the Council as carried out in defense of “common values and common security.”<sup>275</sup> The self-defensive operation was lawful, so inevitably the 9/11 terrorist attack met the threshold of an armed attack. In addition, although the Council labelled ISIL’s actions as “continued gross systematic and widespread attacks,”<sup>276</sup> the Council, for all practical purposes, regarded them as armed attacks by calling upon UN members to take any necessary measure, the use of force in self-defense included. The Council retains the power to make such calls even if the terrorist attack or threat is not explicitly deemed as an armed attack.<sup>277</sup>

However, the Presidential Statement of September 11, 2002, and Resolution 2249, do not imply that the existence of a terrorist armed attack, on its own, can serve as the sole basis for the invocation of Article 51. Neither can it be said that the use of the word “attack” by the Council in association with a terrorist attack in itself, and without evidence of attribution to a State, opens the door for lawful self-defensive actions, as some have suggested recently.<sup>278</sup> As has been stated, nothing in the decisions and practices of the Council from 2002 to 2015 supports this wide view.

## **XI. The Right to Self-Defense Against Autonomous Non-State Actors Operating from Unable but Willing States**

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<sup>273</sup> S.C. Pres. Statement, 2014/20, ¶ 4 (Sept. 19 2014).

<sup>274</sup> See S.C. Res. 2170, *supra* note 143, pmb. ¶ 5, ¶ 1.

<sup>275</sup> See *supra* note 55 and accompanying text.

<sup>276</sup> See S.C. Res. 2249, *supra* note 59, pmb. ¶ 5.

<sup>277</sup> The legal bases of such powers are, among others, Articles 24, 36, 39, 48, and 51 of the UN Charter

<sup>278</sup> See Marc Weller, *Striking ISIL: Aspects of the Law on the Use of Force*, AM. SOC’Y INT’L L.: INSTIGHTS (Mar. 11, 2014), <http://www.asil.org/insights/volume/19/issue/5/striking-isil-aspects-law-use-force>.

Fourteen months before Resolution 2249, the United States invoked Article 51 in support of Iraq, and in so doing claimed that Syria's consent was not required because it had lost control of significant portions of its territory.<sup>279</sup> A similar approach was embraced later by the United Kingdom.<sup>280</sup> There is no need to make this type of argument when the innocent State is willing to offer consent for the military action against the autonomous non-State actor operating in its territory, as was the case with Syria.<sup>281</sup> The fact that the innocent State lacks effective control over the territory from which the autonomous non-State actors operate does not mean that the territory has legally ceased to belong to the said State for the purpose of the principles of sovereignty and territorial integrity under the UN Charter.<sup>282</sup> Neither Resolutions 1368 nor 1373 (nor any of the other 37 resolutions and 48 presidential statements issued by the Council from 2002 to 2015 in relation to terrorist acts as threats to international peace and security) support the view that, in the event of an armed attack by an autonomous non-State actor that cannot be attributed to a State

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<sup>279</sup> See *supra* note 56.

<sup>280</sup> The British Prime Minister expressed in November 2015, when explaining why UK should expand its mission in Syria:

Isil is not just present in Iraq. It operates across the border in Syria, a border that is meaningless to it because as far as Isil is concerned this is all one space. It is in Syria, in Raqqa, that Isil has its headquarters. It is from Raqqa that some of the main threats against this country are planned and orchestrated. Raqqa, if you like, is the head of the snake.

Nicholas Watt, *Cameron Announces Plan for Commons Vote on Syria Airstrikes*, GUARDIAN (Nov. 17, 2015), <https://www.theguardian.com/world/2015/nov/17/david-ferman-plan-commons-vote-syria-airstrikes>.

<sup>281</sup> Syria expressed this willingness. Its Foreign Minister stated, "Syria is ready to cooperate and coordinate on the regional and international level in the war on terror[.] . . . But any effort to combat terrorism should be coordinated with the Syrian government." Liz Sly, *Syria Warns Against U.S. Strikes on Islamic State on its Soil*, WASH. POST (Aug. 25, 2014), [http://www.washingtonpost.com/world/middle\\_east/syria-warns-against-strikes-on-islamic-state-on-its-soil/2014/08/25/6fe98b38-2c5d-11e4-994d-202962a9150c\\_story.html?tid=pm\\_world\\_pop\\_2](http://www.washingtonpost.com/world/middle_east/syria-warns-against-strikes-on-islamic-state-on-its-soil/2014/08/25/6fe98b38-2c5d-11e4-994d-202962a9150c_story.html?tid=pm_world_pop_2). The fact that the offer was an attempt to rein in the opposition and to gain legitimacy internally and internationally does not deprive the offer of its legal significance under the Charter to ensure the territorial integrity of Syria. Differently put, nothing in the decisions and practice of the Security Council in the domain of terrorism suggest that the political motivations of the unable but willing State can prevent a self-defending State from requiring its consent.

<sup>282</sup> See U.N. Charter, art. 2.4. See in this regard, Albrecht Randelzhofer & Oliver Dörr, *Article 2 (4)*, in THE CHARTER OF THE UNITED NATIONS. A COMMENTARY. 3d ed. VOL. I 200, 216 – 17 (Bruno Simma, Daniel-Erasmus Khan, Georg Nolte & Andreas Paulus eds., 2012).

under the Council's standard, the affected State does not need the innocent State's consent,<sup>283</sup> much less that the former can disregard the latter's offer of consent to proceed to respond on its own terms. As with the Assad regime, the fact that consent was politically difficult for States invoking Article 51 in light of the substantial human rights abuses carried out by the willing State<sup>284</sup> is not legally relevant; there is no international law or rule establishing an exception to the principle of the territorial integrity of the unable but willing State for this reason.

State practice highlighted by members of the Council provides evidence of this important consent requirement in operations against autonomous non-State actors operating within unable but willing States. For instance, in February 2015 the members of the Council condemned Boko Haram attacks against Chadian soldiers in the border between Cameroon and Nigeria, expressing:

The members of the Security Council noted that the Chadian military counter-attack against Boko Haram into Nigerian territory was conducted with the consent and the collaboration of the Federal Republic of Nigeria whose territorial integrity remained intact.<sup>285</sup>

## **XII. Potential Explanations for the Lack of Explicit Subsequent Decisions and Practice Enlarging Article 51 to Cover Autonomous Non-State Actors In General**

This Article has shown that there has not been any explicit subsequent decision by the Council in relation to the expansion of Article 51 to cover armed attacks by any autonomous non-State actor, with the exception of ISIL and ANF. Finally, we address possible explanations for the Council's stand. The first explanation is that 13 years of decision-making by the Council on threats

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<sup>283</sup> Recent events may be creating another evolution: the existence of the obligation to request consent in the event of failed States. This is a topic to be fully explored in the future.

<sup>284</sup> The UN General Assembly, for instance, declared:

Deplores and condemns in the strongest terms the continued armed violence by the Syrian authorities against its own people since the beginning of the peaceful protests in 2011, and demands that the Syrian authorities immediately put an end to all indiscriminate attacks in civilian areas and public spaces, including those involving the use of terror tactics, airstrikes, barrel and vacuum bombs, chemical weapons and heavy artillery.

Rep. of the S.C., ¶ 2, U.N. Doc. A/C.3/70/L.47 (Nov. 2, 2015).

<sup>285</sup> Press Release, Security Council, Boko Haram Attacks Against Chadian Troops and Civilians alongside Border between Cameroon and Nigeria, U.N. Press Release SC/11768-AFR/3070 (Feb. 5, 2015).

to international peace and security caused by terrorist acts have brought about a vast multilateral framework whose operation in international domestic spheres is closely monitored by the Council, and including: 1) an indirect, but significant, expansion of Article 51 through the specific test of attribution in this realm; and 2) the exceptional endorsement to act in self-defense, among other necessary measures, against mainly a single autonomous non-State actor, i.e. ISIL. The Council and its 73 members have reached agreement on these three strategies, which constitute in themselves outstanding developments in international law. The fact that the Council has not extended Article 51 even more does not necessarily mean that aggrieved States are left unprotected in legal terms, since consent from the State from which the autonomous actor is operating can be obtained before or even after the self-defensive action.

The second explanation is that, while some prominent members may be claiming the right to self-defense against autonomous non-State actors, they have not been able to carry the Council with them, as the situation regarding ISIL reveals. The permanent members disagree over the general applicability of Article 51 in the absence of consent from the State from which the non-State actors operate. As previously stated, China and Russia did not endorse U.S. operations in Syria without Syrian consent.<sup>286</sup> Thus, a permanent member unilaterally invoked the right, but the Council did not support it, owing to the exercise of a veto power by one of its other permanent members.

Finally, the Council surely is not unaware of the risk for international peace and security that the recognition of the right to self-defense against autonomous non-State actors sometimes poses. A threat to international peace prompted by an autonomous non-State actor involves the actor and a State. After the self-defensive State has acted without the innocent State's consent,

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<sup>286</sup> See *supra* note 57 and accompanying text.

there is a new risk to international peace and security caused by the actual or potential reaction by the latter State against the self-defending State. In other words, in the present author's view, the invocation of Article 51 may lead to higher, not lower, risks to international peace and security. Thus, the indirect expansion of Article 51, combined with the multilateral framework, the different perspectives among the permanent members, the risks to international peace and security that the right to self-defense against autonomous non-State actors would involve may explain the Council's decision to not promote a right of this character.

### **XIII. Conclusion**

This Article has illustrated that in order to address the threat to international peace and security caused by terrorist acts, the Security Council developed three strategies between the years of 2001 to 2015. The first is a large multilateral scheme based on UN members' cooperation and compliance with the Council's decisions on terrorism. Second, through the design of a specific test of attribution to States of non-State actors' actions in the realm of terrorism, the Council indirectly expanded Article 51. This test is notably less strict than its corollary in customary international law. Thus, the expansion through the Council's subsequent decisions and practices has taken place within the traditional structure of Article 51, and attribution to a State of the terrorist attack remains as a fundamental requirement for the invocation of Article 51 by self-defending States, even more so when such attribution has been freed from the strict criteria of customary international law. The third strategy, and the latest to come into play, is the call upon UN members to adopt "all necessary measures" to deal with a particular autonomous non-State actor, ISIL being the first group subject to this new element. It remains to be seen whether or not the Council will resort to this type of decision in relation to other autonomous groups in the future. The Security Council's decisions

and practices over the given time period do not contemplate an *inherent* right to self-defense against autonomous non-State actors.

Article 51 remains, in the field of threats to international peace and security caused by terrorist groups, in a process of evolution pushed by the United States, the United Kingdom, France, and their closest allies. However, although the process in the Security Council has gone a very long way, its decisions have not expanded Article 51 to the point that these States have individually claimed.

“He had the right, since he had the might,” says the narrator in *WAR AND PEACE*, referring to Napoleon.<sup>287</sup> Thirteen years of the Security Council’s decisions subsequent to 9/11 have passed, and Tolstoy’s words are not yet totally true for the said States in relation to Article 51 and autonomous non-State actors.

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<sup>287</sup> LEO TOLSTOY, *WAR AND PEACE* 1587 (1869).