

# AMERICA'S NEW WAR ON TERROR: THE CASE FOR SELF-DEFENSE UNDER INTERNATIONAL LAW

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## I. INTRODUCTION

When representatives of fifty countries assembled in San Francisco in 1945 to draw up the United Nations Charter, modern threats of terrorism such as those posed by the Al Qaeda terrorist network were not yet known. The devastation caused by the September 11 terrorist attacks on the United States would not, however, have been an unfamiliar spectacle to the survivors of World War II. The "inherent" right of self-defense in responding to such violent attacks, a right enshrined in Article 51 of the U.N. Charter and understood by the delegates of all states as a long-established principle of customary international law, was a familiar concept in 1945.<sup>1</sup>

It was in accordance with these long-established principles of customary international law and Article 51 that the United States Government reported in a letter to the U.N. Security Council on October 7, 2001, that it had "initiated actions in the

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1. Article 51 of the U.N. Charter provides:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

U.N. CHARTER art. 51.

exercise of its inherent right of individual and collective self-defence following the armed attacks that were carried out against the United States on 11 September 2001.”<sup>2</sup> The letter went on to note that since the September 11 attacks, the U.S. Government had obtained “clear and compelling information that the al-Qaeda organization, which is supported by the Taliban regime in Afghanistan, had a central role in these attacks” and that United States armed forces had initiated actions “designed to prevent and deter further attacks on the United States” including “measures against al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan.”<sup>3</sup>

The letter of October 7, 2001 was not the first time the United States has notified the U.N. Security Council of actions involving the use of force against other states and has invoked its inherent right of self-defense in response to terrorist attacks. As discussed below, previous uses of force by the United States against terrorist-supporting states have received varying responses from the international community, given rise to some criticism, and raised a number of international legal questions involving the right of guaranteed self-defense under Article 51 of the U.N. Charter. In contrast, the unprecedented response of the international community to the September 11 terrorist attacks on the United States and important factual and legal distinctions between the circumstances surrounding the September 11 attacks and previous attacks giving rise to the use of force by the United States, demonstrate the propriety of the exercise of self-defense in this case under the U.N. Charter and customary international law.

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2. Letter from the Permanent Representative of the United States of America, to the United Nations, Addressed to the President of the Security Council (Oct. 7, 2001), U.N. SCOR, 56th Sess., at 1, U.N. Doc. S/2001/946 (2001).

3. *Id.* The letter also noted that the United States was “the victim of massive and brutal attacks in the states of New York, Pennsylvania and Virginia,” that were “specifically designed to maximize the loss of life; they resulted in the death of more than 5,000 persons, including nationals of 81 countries, as well as the destruction of four civilian aircraft, the World Trade Center towers and a section of the Pentagon.” The U.S. Government further stated, “Our inquiry is in its early stages. We may find that our self-defence requires further actions with respect to other organizations and other States.” *Id.*

## II. PREVIOUS USES OF FORCE AGAINST TERRORIST-SUPPORTING STATES BY THE UNITED STATES

On April 14, 1986, in response to a bombing of a West German discotheque in which an American serviceman and a Turkish woman were killed and more than 230 other persons injured, the United States launched air strikes against five terrorist-related targets in Libya. Based on intercepted and decoded exchanges between Tripoli and the Libyan embassy in East Berlin, the United States claimed that this attack was one of a continuing series of Libyan state-ordered terrorist attacks.<sup>4</sup> The U.S. Ambassador to the United Nations, Vernon Walters, informed the U.N. Security Council that the United States had acted in self-defense, consistent with Article 51, and that the air strikes were necessary to end Libya's "continued policy of terrorist threats and the use of force, in violation of . . . Article 2(4) of the Charter."<sup>5</sup>

On June 26, 1993, the United States launched a cruise missile attack on Iraq in response to a foiled assassination attempt against former President Bush. Twenty-three Tomahawk missiles were launched at the Iraqi Intelligence Service in Baghdad, causing a number of civilian deaths and destroying much of the complex. On June 27, 1993, U.S. Ambassador to the United Nations Madeleine Albright reported to the U.N. Security Council in this regard: "We responded directly, as we were entitled to do under Article 51 of the United Nations Charter, which provides for the exercise of self-defence in such cases."<sup>6</sup>

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4. Bob Woodward & Patrick E. Tyler, *Libyan Cables Intercepted and Decoded*, WASH. POST, Apr. 15, 1986, at A1. Libya disclaimed responsibility for the discotheque bombing. Eleven years later the United States permitted decoded interception transcripts to be made public in the Berlin Chamber Court where persons employed by or affiliated with the Libyan embassy in East Berlin were indicted for the bombing. See Bill Gertz, *U.S. Intercepts from Libya Play Role in Berlin Bomb Trial*, WASH. TIMES, Nov. 19, 1997, at A13. The decoded transcripts indicated that Libyan authorities had ordered the raid and that Libyan operatives in Berlin had confirmed the successful attack. On November 13, 2001, four people, including one Libyan diplomat and a Libyan Embassy worker, were convicted of the bombing, after prosecutors had argued that Libya was guilty of "state-sponsored terrorism." Steven Erlanger, *4 Guilty in 1986 Disco Bombing Linked to Libya*, in *West Berlin*, N.Y. TIMES, Nov. 14, 2001, at A5.

5. U.N. SCOR, 41st Sess., 2674th mtg. at 18, U.N. Doc. S/PV.2674 (1986). See Letter from the Acting Permanent Representative of the United States of America, to the United Nations, Addressed to the President of the Security Council (Apr. 14, 1986), U.N. SCOR, 41st Sess., U.N. Doc. S/17990.

6. U.N. SCOR, 48th Sess., 3245th mtg. at 6, U.N. Doc. S/PV.3245 (1993).

In response to the suicide bombings of the U.S. embassies in Tanzania and Kenya, which killed more than two hundred people, including twelve U.S. citizens, and were allegedly perpetrated by the Al Qaeda terrorist network, on August 20, 1998, the United States launched seventy-nine Tomahawk missiles at terrorist training camps in Afghanistan and against a Sudanese pharmaceutical plant that the United States identified as a "chemical weapons facility" associated with Osama bin Laden.<sup>7</sup> The Government of the United States informed the U.N. Security Council that it had repeatedly warned the Government of Sudan and the Taliban regime to shut terrorist organizations down in their respective countries and to "cease their cooperation with the Bin Laden organization."<sup>8</sup> Because the Al Qaeda organization had continued to issue "blatant warnings that 'strikes will continue from everywhere' against American targets" and because further attacks appeared to be in preparation, the United States stated that it "had no choice but to use armed force to prevent these attacks from continuing. In doing so, the United States ha[d] acted pursuant to the right of self-defence confirmed by Article 51 . . . ."<sup>9</sup>

### III. INTERNATIONAL REACTION TO PREVIOUS USES OF FORCE BY THE UNITED STATES AGAINST TERRORIST-SUPPORTING STATES

Previous military actions by the United States against terrorist-supporting states elicited varying responses from the international community and the United Nations. In the case of the 1986 raid on Libya, the United States action was not widely supported. A resolution condemning the U.S. action was introduced in the U.N. Security Council but was vetoed by the

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Ambassador Albright went on to note that the U.S. response had been "proportionate and aimed at a target directly linked to the operation against President Bush. It was designed to damage the terrorist infrastructure of the Iraqi regime, reduce its ability to promote terrorism and deter further acts of aggression against the United States." *Id.*

7. See Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT'L L. 161, 161 (1999).

8. Letter from the Permanent Representative of the United States of America, to the United Nations, Addressed to the President of the Security Council (Aug. 20, 1998), U.N. SCOR, 53d Sess., at 1, U.N. Doc. S/1998/780.

9. *Id.*

United States, France, and the United Kingdom.<sup>10</sup> The U.N. General Assembly adopted a resolution condemning the United States for the attack by a vote of seventy-nine to twenty-eight, with thirty-three abstentions.<sup>11</sup>

In contrast, most states either supported or did not object to the 1993 cruise missile attack on Baghdad in response to the foiled Iraqi assassination attempt on former President Bush, although most of the Arab world expressed regret regarding the attack.<sup>12</sup> In response to the American presentation before the U.N. Security Council, the representatives of other member states either expressed support for the U.S. action or refrained from criticizing it; only China questioned the attack.<sup>13</sup> The General Assembly took no action.

World reaction to the 1998 U.S. cruise missile strikes against terrorist targets in Afghanistan and Sudan in response to the U.S. embassy bombings in East Africa was mixed, with the

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10. U.N. SCOR, 41st Sess., 2682d mtg. at 43, U.N. Doc. S/PV.2682 (1986). Australia and Denmark also voted against the resolution, while Venezuela abstained. *Id.*

11. G.A. Res. 41/38, U.N. GAOR, 41st Sess., Supp. No. 53, at 34, U.N. Doc. A/41/53 (1986). While international criticism was considerable at the time, one commentator noted that the international reaction changed over the course of several years: "In this incident, as in others, an elongation of the time horizon yields a different picture of international responses. After the immediate reaction to the raid and the regional and national condemnations, Western European nations began to adopt economic and diplomatic sanctions against Libya." W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT'L L. 3, 34 (1999).

12. See Stephen Robinson, *UN Support for Raid on Baghdad*, DAILY TELEGRAPH (LONDON), June 28, 1993, at 1 ("Countries in the United Nations Security Council including Britain and France queued up last night to support America's missile attack on Iraqi intelligence headquarters in Baghdad. There was a widespread feeling at the council's emergency meeting in New York that yesterday's pre-dawn raid . . . was justified following evidence that Iraq had been deeply involved in an attempt to assassinate former President Bush."); Craig R. Whitney, *European Allies Are Giving Strong Backing to U.S. Raid*, N.Y. TIMES, June 28, 1993, at A7 ("With rare unanimity, the European allies reacted with approval today to the United States missile strike against Iraq. . . . Russia said the action was justifiable self-defense in accordance with the United Nations Charter . . ."); *Arab Governments Critical*, N.Y. TIMES, June 28, 1993, at A7 ("The Arab League . . . expressed its 'extreme regret' at the attack.").

13. See Robinson, *supra* note 12, at 1. Although most Arab and Muslim states did not support the U.S. action, the three Islamic countries on the Security Council—Djibouti, Morocco, and Pakistan—remained silent during the Council's discussions and expressed no support for Iraq. See *id.* See also Stanley Meisler, *U.N. Reaction Mild as U.S. Explains Raid*, L.A. TIMES, June 28, 1993, at A1 (noting the somewhat lukewarm but still supportive reactions of most U.N. ambassadors to the attacks on Iraq); Julia Preston, *Security Council Reaction Largely Favorable to U.S. Raid*, WASH. POST, June 28, 1993, at A12 (citing the largely favorable response from the U.N. Security Council).

most intense criticism focused on the Sudan attack. Western European nations supported the U.S. actions to varying degrees, while the Russian President Boris Yeltsin declared that he was "outraged" by the "indecent" behavior of the United States.<sup>14</sup> China issued an ambiguous statement condemning terrorism, and Japan said it "understood America's resolute attitude towards terrorism."<sup>15</sup> In spite of public opinion generally hostile to the United States in the Arab and Muslim world, "most Arab and Muslim Governments remained silent or equivocal about their views on the missile strikes."<sup>16</sup> The U.N. Security Council discussed the matter only briefly, ultimately deferring requests to send an international team of inspectors to the bombed facility in Khartoum to search for evidence of chemical weapons after the United States rebuffed Sudan's requests to produce such evidence.<sup>17</sup> Neither the Security Council nor General Assembly took any formal action in response to the U.S. action against Sudan and Afghanistan.

Previous uses of force by the United States against terrorist-supporting states have thus enjoyed varying levels of support among states and have raised a number of international legal questions. In particular, as noted above, the U.S. raid against Libya in 1986 was not well received. While a significant part of the reaction of the United Nations to America's raid on Libya can be explained by Cold War politics, serious legal questions were also raised. A perceived lack of evidence tying the West Berlin discotheque bombing and other terrorist activities to Libya, questions regarding the propriety under Article 51 of an armed response against a state for the actions of terrorists, the suggestion of retaliatory motives, related arguments against the necessity and proportionality of U.S. actions, and the absence of an "armed attack" owing in part to an isolated murder of American servicemen abroad, all contributed to criticism by states and scholars of the raid on Libya as an illegitimate act of

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14. Phil Reeves, *Outraged Yeltsin Denounces "Indecent" US Behavior*, INDEPENDENT (LONDON), Aug. 22, 1998, at 2.

15. *Id.*

16. Douglas Jehl, *U.S. Raids Provoke Fury in Muslim World*, N.Y. TIMES, Aug. 22, 1998, at A6.

17. See Barbara Crossette, Judith Miller, Steven Lee Myers & Tim Weiner, *U.S. Says Iraq Aided Production Of Chemical Weapons in Sudan*, N.Y. TIMES, Aug. 25, 1998, at A1 ("The United States . . . rebuffed calls from the Sudan and other countries to turn over its evidence.").

self-defense.<sup>18</sup> The unprecedented response of the U.N. Security Council and the international community in general to the September 11 terrorist attacks on the United States provides a stark contrast to the reaction to the raid on Libya. Assessing a number of factual and legal distinctions between the circumstances surrounding the September 11 attacks and previous terrorist attacks giving rise to the use of force by the United States helps to demonstrate the propriety of the most recent exercise of self-defense under Article 51 and customary international law.

#### IV. RESPONSE OF THE U.N SECURITY COUNCIL

At the outset, the willingness of states and the U.N. Security Council to invoke and affirm the right of self-defense in response to the September 11 terrorist attacks on the United States contrasts sharply with previous terrorist attacks. Before the September 11 terrorist attacks, the U.N. Security Council had never approved a resolution explicitly invoking and reaffirming the inherent right of individual and collective self-defense in response to a particular terrorist attack. It is significant, then, that while the U.N. Security Council stated that it "[u]nequivocally condemn[ed] in the strongest terms the horrifying terrorist attacks which took place on 11 September," it also explicitly and unanimously "[r]ecogniz[ed] the inherent right of individual or collective self-defence in accordance with the Charter."<sup>19</sup> Sixteen days later, the U.N. Security Council again unanimously condemned the terrorist attacks on the United States, explicitly "[r]eaffirming the right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001) . . . ."<sup>20</sup>

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18. Among other things, U.N. Security Council delegates criticized the U.S. raid on Libya for neither being in response to an "armed attack" nor being based on substantiated Libyan involvement in "terrorist" activities. See William V. O'Brien, *Reprisals, Deterrence and Self-Defense in Counterterror Operations*, 30 VA. J. INT'L L. 421, 464-65 (1990). Some commentators, while questioning Libyan involvement, strongly criticized the raid as a reprisal. See Francis A. Boyle, *Military Responses to Terrorism*, 81 PROC. AM. SOC'Y INT'L L. 288, 294 (1987) ("The April 14 devastation wreaked upon Tripoli and Benghazi by the Reagan Administration was a classic case of what international law professors call actions of military retaliation and reprisal.").

19. S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg. at 1, U.N. Doc. S/RES/1368 (2001).

20. S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg. at 1, U.N. Doc. S/RES/1373 (2001).

The Council's unprecedented willingness to invoke and reaffirm self-defense under Article 51 in response to the September 11 terrorist attacks is an important act and, for some states, helped legitimize the U.S. military response as a legal use of force.<sup>21</sup>

## V. OVERVIEW OF SELF-DEFENSE UNDER ARTICLE 51

Assessing the legality of the use of force begins with review of two obligations under the U.N. Charter. First, Article 2(3) requires all members to settle their international disputes by peaceful means.<sup>22</sup> Second, and more importantly, Article 2(4) provides that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."<sup>23</sup> According to the International Court of Justice ("I.C.J."), this obligation to refrain from the threat or use of force is not just a U.N. Charter provision but is now also regarded as a rule of customary international law.<sup>24</sup> Thus, the use of force against any state may be undertaken only as an

21. See Charles Bremner, *Europeans Support 'Legitimate' US Action*, *TIMES* (LONDON), Sept. 22, 2001, at 2 ("At an emergency EU summit Tony Blair and the other 14 leaders pledged 'total solidarity' with Washington in the fight against terrorism . . . . An American military riposte was legitimate, the leaders said, noting that the U.N. Security Council had backed the principle of American self-defense."). Similarly, Sweden's Premier noted that "the USA has a right to defend itself against terrorism . . . . The Social Democrats stand behind the UN's work and the Security Council has unanimously supported the US' right to self-defense." *Dagens Nyheter, Swedish Premier Reiterates Support for US Military Response*, *BBC WORLDWIDE MONITORING*, Sept. 25, 2001.

22. The United Nations Charter, Article 2(3) provides: "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." U.N. CHARTER art. 2, para. 3. In this regard, after September 11 and before military action against Afghanistan commenced on October 7, the United States made repeated efforts to seek the Taliban regime's cooperation in delivering Osama bin Laden. These efforts at peaceful resolution of the conflict were categorically rejected by the Taliban regime. See John F. Burns, *Clerics Answer 'No, No, No!' and Invoke Fates of Past Foes*, *N.Y. TIMES*, Sept. 22, 2001, at B3 ("Within hours of President Bush's speech to Congress on Thursday night demanding that the militant Muslim clerics who rule Afghanistan hand over Osama bin Laden, their envoy gave today what was described as their final answer: 'No, no, no!'"'). After the air campaign had commenced, President Bush offered the Taliban a "second chance" to turn over Osama bin Laden, but that offer was also rejected. See Paul Richter, *Errant Bomb Hits Housing Row in Kabul*, *L.A. TIMES*, Oct. 14, 2001, at A1.

23. U.N. CHARTER art. 2, para. 4.

24. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 100 (June 27).

exception to a norm of customary international law.

While Article 51 of the U.N. Charter provides such an exception for self-defense and recognizes this "inherent" and long-established right under customary international law, the requirements for self-defense under Article 51, particularly the "armed attack" requirement, have been much debated. Because Article 51 explicitly provides for self-defense "if an armed attack occurs against a Member of the United Nations,"<sup>25</sup> the I.C.J., along with numerous publicists and scholars, has taken a narrow or stringent view of self-defense under Article 51 and customary international law, concluding that "[s]tates do not have a right of 'collective' armed response to acts which do not constitute an 'armed attack'."<sup>26</sup> Another focus, however, is on a broader "inherent" right of self-defense that existed under customary international law before the U.N. Charter and presumably continues to the present day.<sup>27</sup> While numerous scholars and commentators vigorously argue that customary international law and the inherent right of self-defense contain no "armed attack" requirement,<sup>28</sup> the September 11 terrorist attacks justify the exercise of self-defense by the United States under even a narrow or stringent reading of Article 51.

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25. U.N. CHARTER art. 51.

26. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. at 110.

27. D.W. Bowett noted in this regard:

It is, therefore, fallacious to assume that members have only those rights which the Charter accords to them; on the contrary they have those rights which general international law accords to them except and in so far as they have surrendered them under the Charter. . . . As we have seen, the view of Committee I at San Francisco was that this prohibition left the right of self-defence unimpaired; in the words of the rapporteur 'the use of arms in legitimate self-defence remains admitted and unimpaired.' . . . The history of Art. 51 suggests nothing of an additional obligation; the *travaux préparatoires*, to which we may legitimately resort in the case of ambiguity, suggest only that the article should safeguard the right of self-defence, not restrict it.

D.W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 185, 188 (1958). See also Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1634 (1984) ("It is therefore not implausible to interpret article 51 as leaving unimpaired the right of self-defense as it existed prior to the Charter.")

28. Former State Department Legal Advisor Abraham Sofaer wrote: "Self-defense allows a proportionate response to every use of force, not just 'armed attacks.'" Abraham D. Sofaer, *U.S. Acted Legally in Foreign Raids*, NEWSDAY (NEW YORK), Oct. 19, 1998, at A29. In his assessment of customary international law before the U.N. Charter era, Bowett stated, "[I]t is quite certain that under the general law the right was not limited to cases of an armed attack." BOWETT, *supra* note 27, at 188.

VI. INTERNATIONAL SUPPORT FOR THE U.S. MILITARY  
RESPONSE UNDER ARTICLE 51

*A. Decisive Support by Allies and Other States Throughout  
the World in Response to the "Armed Attack"*

That the September 11 terrorist attacks can be described as an "armed attack" is implicit in the U.N. Security Council's invocation and reaffirmation of the right of self-defense under Article 51 in Resolutions 1368<sup>29</sup> and 1373,<sup>30</sup> noted above. Furthermore, the clear and decisive reaction of so many states to the September 11 attacks is significant on this point. In an unprecedented move, the nineteen member countries of the North Atlantic Council of NATO issued a statement on September 12, 2001, agreeing that if it was determined that the September 11 terrorist attacks were directed from abroad against the United States, "it shall be regarded as an action covered by Article 5 of the Washington Treaty, which states that an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all."<sup>31</sup> On the basis of subsequent briefings by the United States, NATO determined that the September 11 terrorist attack was indeed directed from abroad and the NATO Secretary General concluded that the attack was an action covered by Article 5 of the Washington Treaty.<sup>32</sup>

In another unprecedented action, this time at a special Washington D.C. meeting of the Organization of American States ("OAS") foreign ministers on September 22, 2001, the twenty-two states of the Western Hemisphere party to the Inter-American Treaty of Reciprocal Assistance ("Rio Treaty")<sup>33</sup> unanimously passed a resolution declaring:

These terrorist attacks against the United States of America are attacks against all American states, and . . . in accordance with all the relevant provisions of the [Rio Treaty] and the

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29. See S.C. Res. 1368, *supra* note 19.

30. See S.C. Res. 1373, *supra* note 20.

31. Press Release, NATO, Statement by the North Atlantic Council (Sept. 12, 2001), available at <http://www.nato.int/docu/update/2001/p01-124e.htm>.

32. Press Release, NATO, Invocation of Article 5 Confirmed (Oct. 2, 2001), available at <http://www.nato.int/docu/update/2001/1001/e1002a.htm>.

33. Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, T.I.A.S. NO. 1838 [hereinafter Rio Treaty].

principle of continental solidarity, all States Parties to the Rio Treaty shall provide effective reciprocal assistance to address such attacks and the threat of any similar attacks . . .

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Article 3 of the Rio Treaty, which underlies the September 21 resolution, specifically refers to an "armed attack by any State against an American State."<sup>35</sup>

The unambiguous NATO statements and the OAS delegates' reaffirmation of the Rio Treaty clearly suggest that NATO member states and the states party to the Rio Treaty regarded the September 11 terrorist attacks on the United States as "armed attacks," fully justifying the exercise of the inherent right of self-defense under Article 51 of the U.N. Charter. The European Union ("EU"), along with its member states individually, pledged to support U.S. action against terrorism.<sup>36</sup> Similar views and various offers of support were made by America's Pacific allies, including Australia, New Zealand, Japan, the Philippines, and South Korea.<sup>37</sup> In addition to the Pacific allies, EU, NATO, and OAS members, numerous states throughout Eastern Europe, Africa, and Asia expressed their

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34. Twenty-fourth Meeting of Consultation of Ministers of Foreign Affairs, Terrorist Threat to the Americas, OAS Doc. RC.24/Res.1/01 (Sept. 21, 2001), available at <http://www.oas.org/OASpage/crisis/RC.24e.htm>.

35. Rio Treaty, *supra* note 33, art. 3, §1. Article 3, §1 of the Rio Treaty provides:

The High Contracting parties agree that an armed attack by any State against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations.

*Id.*

36. See *America Strikes Back: Allies*, DENVER POST, Oct. 9, 2001, at A8.

37. See *Actions Taken Around the World as Coalition Begins Air Strikes in Afghanistan*, ASSOCIATED PRESS NEWSWIRES, Oct. 14, 2001, WL APWIRES File. While Australia invoked the ANZUS Treaty and put military personnel and aircraft on standby to join in any U.S. military action, New Zealand, not currently a participating member in the treaty, nonetheless offered an unspecified number of commandos to assist in America's self-defense efforts, with New Zealand's Foreign Minister stating: "We don't need a treaty to tell us what is right and what is wrong." *Id.* Japanese Prime Minister Koizumi expressed a desire to send non-combat support for anticipated U.S. military responses to the terrorist attacks. *Id.* Philippines President Arroyo pledged "unequivocal" support for the U.S.-led international campaign against terrorism in response to the September 11 attacks . . . ." *Philippines Updates Disaster Contingency Plan*, DEUTSCHE PRESSE-AGENTUR, Oct. 5, 2001, LEXIS, Nexis Library, Deutsche Presse-Agentur File. The Philippines also "opened up its airspace and other facilities for use by U.S. forces in the war against terrorism, and expressed willingness to deploy combat troops with the approval of Congress." *Id.*

support for the U.S. military response to the September 11 terrorist attacks.<sup>38</sup>

### B. Muslim and Arab States' Reactions

While public opinion in the Arab and Muslim world opposed the U.S. action against Afghanistan, several Arab states such as Bahrain, Egypt, and Jordan expressed support for the U.S. anti-terror campaign.<sup>39</sup> Other Arab states also made significant contributions to U.S. military efforts, including Pakistan by agreeing to support various U.S. military operations in Afghanistan, Saudi Arabia by allowing various operations from Prince Sultan Air Base, and Persian Gulf states such as Oman and Kuwait by allowing use of air bases on their territories.<sup>40</sup> Saudi Arabia and the United Arab Emirates also quickly cut their diplomatic ties with the Taliban, leaving Pakistan as the only state recognizing the Taliban regime,<sup>41</sup> and

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38. See *Actions Taken Around the World as Coalition Begins Air Strikes in Afghanistan*, *supra* note 37. Other European countries voicing support for U.S. air strikes included Albania, Bulgaria, Croatia, Cyprus, Estonia, Latvia, Lithuania, Slovenia, and Slovakia; African states expressing varying degrees of support for the U.S. response included Botswana, Cameroon, Congo, Kenya, Liberia, Malawi, Sao Tome and Principe, Senegal, Sierra Leone, Uganda, and Zambia; Asian states included Armenia, Azerbaijan, Bangladesh, Cambodia, China, Georgia, India, Israel, Kazakhstan, Kyrgyzstan, Russia, Singapore, Taiwan, Tajikistan, and Uzbekistan. See *id.*; *America Strikes Back*, *supra* note 36; *Terrorism: World Governments' Reactions*, S. FLA. SUN-SENTINEL, Sept. 18, 2001, at A12; *Kazakh Leader Offers Full Support for U.S. Strike*, REUTERS, Sept. 24, 2001, LEXIS, Nexis Library, Reuters News File; Samuel Loring Morison, *The Coalition Against Terrorism*, NAVY NEWS WEEK, Oct. 22, 2001; *Kyrgyzstan Voices Full Support for U.S. Strikes in Afghanistan*, XINHUA GEN. NEWS SERV., Oct. 16, 2001, LEXIS, Nexis Library, Xinhua Gen. News Serv. File; *Forces Available to US-led Coalition as Afghan Strikes Continue*, AGENCE FRANCE PRESSE, Oct. 11, 2001, LEXIS, Nexis Library, Agence France Presse File.

39. See *AFP World News Summary*, AGENCE FRANCE PRESSE, Oct. 26, 2001, LEXIS, Nexis Library, Agence France Presse File (citing Bahrain's Crown Prince pledging "unreserved support for US-led war on terrorism"); *Relaunching the Propaganda War*, ECONOMIST, Nov. 10, 2001, at 15-16 (quoting Egypt's foreign minister, Ahmad Maher, as saying, "There is war between bin Laden and the whole world").

40. See Mark Mazzetti, Richard J. Newman, Thomas Omestad & Linda Robinson, *Taking Aim From Up Close*, U.S. NEWS & WORLD REP., Oct. 29, 2001, at 18-20; *America Strikes Back*, *supra* note 36. Oman and Bahrain also made particularly strong statements of support accompanying their offers of assistance. See *Terrorism: World Governments' Reactions*, *supra* note 38 (citing Oman's leader, Sultan Qaboos, and his pledge to stand "side by side" with the United States to fight terrorism); Alice Thompson, *Emir Praises the 'Good Fight' to Liberate Afghanistan*, DAILY TELEGRAPH (LONDON), Nov. 13, 2001 (quoting the Emir of Bahrain as saying that the U.S. and British actions in Afghanistan are "[l]iberating it from this evil Taliban" and are "a very good war of liberation.").

41. See *America Strikes Back*, *supra* note 36. Pakistan completely severed

several Arab states such as Yemen closed their borders to would-be volunteers seeking to leave and join their Afghan *mujahedeen* in a holy war against the United States.<sup>42</sup> An emergency meeting of the Organization of the Islamic Conference (OIC), an organization composed of representatives of fifty-six Muslim countries, was nearly unanimous in condemning the September 11 attacks.<sup>43</sup> The OIC ignored the Taliban's call for a *jihad* against the United States and, rather than demanding an end to the U.S. strikes against Afghanistan, instead "pushed for assurances that the American-led campaign against terrorism would not spill over to other Muslim countries."<sup>44</sup>

### C. *Unprecedented Offers of Airspace and Territory and Unusual Statements of Support*

While statements of support for America's right of self-defense were numerous and impressive, the unprecedented types of assistance that states were willing to offer the United States provide another important and powerful representation of state practice affirming the right of self-defense in this case. Aware of the political and international legal significance of a state making its territory and airspace available for U.S. and coalition military operations against Afghanistan,<sup>45</sup> states nonetheless made numerous offers of such assistance to the United States. Seven days after the U.S. had commenced its air

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diplomatic relations with the Taliban when, on November 22, 2001, the Pakistani government ordered the regime to close its Islamabad embassy, the only remaining Taliban embassy. See Maura Reynolds, *Response to Terror on the Battlefield*, L.A. TIMES, Nov. 23, 2001, at A1.

42. See Yaroslav Trofimov, *Nations Supporting Jihads of Yesteryear Now Close Borders*, WALL ST. J., Nov. 16, 2001, at A1.

43. See *Soft Words, Uneasy Thoughts*, ECONOMIST, Oct. 13, 2001, at 23.

44. *Id.* OIC Secretary General Abdulwahid Belkeziz also said in a statement that he supports, among other U.N. Security Council actions, Resolution 1368 (affirming the right of self-defense in response to the September 11 terrorist attacks), although he failed to mention Resolution 1373. *Pan-Islamic Body Condemns Terrorism But Says Nothing on U.N. Resolution*, AGENCE FRANCE PRESSE, Oct. 1, 2001, LEXIS, Nexis Library, Agence France Presse File.

45. States have often noted the serious responsibilities associated with permitting their territories and airspace to be used by the military forces of other states, as reflected in the U.N. General Assembly's "Definition of Aggression" Resolution, G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142-43, U.N. Doc. A/9631 (1974) (referring to Article 3(f), which specifically provides that "the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State" itself qualifies as an "act of aggression").

campaign against Afghanistan, the *Washington Post* reported that thirty-six countries had offered the United States troops or equipment, forty-four countries had allowed U.S. use of their airspace, thirty-three countries were offering landing rights, and thirteen countries had permitted storage of equipment.<sup>46</sup>

The willingness of states to make their territories and airspace available for use by U.S. forces in military actions against Afghanistan stands in sharp contrast to previous U.S. actions against terrorists. In 1986, when the United States sought permission for its military aircraft to overfly territories in order to attack Libya in response to the West Berlin discotheque bombing, France refused to allow American F-111s from bases in the United Kingdom to overfly French territory.<sup>47</sup> When, in 1998, the United States responded to embassy bombings in Tanzania and Kenya by directing cruise missiles at Afghani terrorist training camps, Pakistan refused to sanction U.S. use of its airspace, instead filing a diplomatic protest with the U.N. Security Council after the raid.<sup>48</sup>

Even states that often opposed U.S. military action, including Russia and China, displayed support after September 11. While China has condemned or questioned most previous uses of force by the United States and even abstained in the U.N. Security Council vote authorizing the use of force against Iraq in 1990,<sup>49</sup> China joined in immediately to condemn the September 11 terrorist attacks, vote for the Security Council resolutions affirming the right of self-defense, and offer a "wary endorsement of military strikes on Afghanistan."<sup>50</sup> While Iran, a vocal opponent of U.S. military intervention,

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46. *Inside Afghanistan*, WASH. POST, Oct. 14, 2001, at A20.

47. See James Adams, *How Europe Got Tough on Terrorism*, WASH. POST, Feb. 14, 1988, at C1.

48. See Letter from the Permanent Representative of Pakistan, to the United Nations, Addressed to the President of the Security Council (Aug. 24, 1998), U.N. SCOR, 53d Sess., at 1, U.N. Doc. S/1998/794. Pakistan also vigorously denied prior knowledge of the cruise missile attack. See Betsy Pisik, *Pakistan Files Complaint Over Attack; Angry Letter to U.N. Tells of Unexploded Missile*, WASH. TIMES, Aug. 25, 1998, at A1.

49. See U.N. SCOR 678, 45th Sess., 2963d mtg. at 27, U.N. Doc S/RES/678 (1990).

50. Philip P. Pan, *For Bush and Jiang, Question of Risk and Reward*, WASH. POST, Oct. 18, 2001, at A26. Chinese Foreign Ministry spokesman Zhu Bangzao stated, "We are in favor of the fight against terror, but the strikes should be aimed at clear targets and refrain from injuring innocent civilians." Robin Wright & Edwin Chen, *China, Russia Urge Quick End to Strikes*, L.A. TIMES, Oct. 21, 2001, at A3.

criticized America's use of force against Afghanistan, the Iranian Government was reported to have taken the unusual step of agreeing to help rescue any downed U.S. military personnel in its territory.<sup>51</sup> Even the Vatican's senior spokesman said that Pope John Paul II understood that the United States might need to use force against terrorists in self-defense.<sup>52</sup> Finally, of special note, Libyan leader Moammer Gaddafi condemned the September 11 terrorist attacks as "horrific" and endorsed U.S. retaliation, an action described by some commentators as "a notable development by a onetime militant anti-American targeted in 1986 by U.S. bombs."<sup>53</sup>

## VII. FACTS AND LAW: DISTINGUISHING BETWEEN THE SEPTEMBER 11 ATTACKS AND PREVIOUS TERRORIST ATTACKS

The actions of the U.N. Security Council and the decisive, widespread, and unprecedented actions and statements by states supporting the U.S. right of self-defense against the September 11 terrorist attacks are compelling evidence of the international community's assessment of the applicability of Article 51 of the U.N. Charter to America's new war on terror. These state actions also highlight various factual and legal distinctions between the September 11 terrorist attacks and previous terrorist attacks that resulted in more widely criticized uses of force by the United States against terrorist-supporting states.

### A. *Location of the Attack*

Opponents of the United States's previous resorts to force in the face of terrorist acts argued that states may only respond to

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51. See Hugh Pope & Peter Waldman, *Winds of Change: Iran's Islamic Leaders Face Sudden Unrest Since Terror Attacks*, WALL ST. J., Nov. 5, 2001, at A1; see also Elaine Sciolino & Neil A. Lewis, *U.S. Gets Closer to Iran, Wins Pledge to Aid GIs in Distress*, CHI. TRIB., Oct. 16, 2001, at 4 (describing Iran's offer to rescue distressed American military personnel in its territory as "an important sign of growing cooperation with the United States in its war against Afghanistan").

52. Sharon LaFraniere, *Vatican Says Use of Force by U.S. Can be Justified*, WASH. POST, Sept. 25, 2001, at A14. The Vatican spokesman stated: "It is certain that, if someone has done great harm to society, and there is a danger that if he remains free he may be able to do it again, you have the right to apply self-defense for the society which you lead . . ." *Id.*

53. Peter Slevin & Alan Sipress, *Tests Ahead for Cooperation on Terrorism, Several Countries on Blacklist Have Helped U.S., but Only Marginally So Far*, WASH. POST, Dec. 31, 2001, at A10.

terrorist attacks within their own territory and that attacks on nationals overseas cannot meet the "armed attack" requirement of Article 51.<sup>54</sup> This was of particular concern to critics of the 1986 air strikes on Libya and is much debated among scholars,<sup>55</sup> yet it is clearly not at issue with regard to the September 11 attacks, a fact that has added to the willingness of the international community to condemn the horrific actions on the territory of the United States as "armed attacks."

*B. Magnitude of the Attack and Sustained and Continuing Terrorist Campaign*

Another objection to the 1986 action against Libya was that isolated or "sporadic or minor attacks do not warrant such a serious and conspicuous response as the use of force in self-defense."<sup>56</sup> Such a criticism does not appear to be applicable with regard to the September 11 attacks. While relatively isolated or limited injuries caused by an attack on a few citizens

54. See Francis A. Frowein, *The Present State of Research Carried Out by the English-Speaking Section of the Center for Studies and Research, in LEGAL ASPECTS OF TERRORISM* 55, 64 (1988) ("[T]here cannot be any question that an armed attack cannot consist of a terrorist action against citizens on foreign territory, even if tolerated by the territorial state."); see also James P. Rowles, *Military Responses to Terrorism: Substantive and Procedural Constraints in International Law*, 81 PROC. AM. SOC'Y INT'L L. 307, 314 (1987) ("Isolated terrorist attacks . . . do not constitute armed attacks justifying the use of force in the exercise of the right of self-defense, even assuming state sponsorship . . . . Large-scale, continuing campaigns of terrorist attacks could, depending on the facts . . . give rise to the right of self-defense, but even then only within the limits of necessity and proportionality . . .").

55. See Abraham D. Sofaer, *The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 96 (1989) ("No nation should be limited to using force to protect its citizens, from attacks based on their citizenship, to situations in which they are within its boundaries."). The Al Qaeda attacks on the U.S. embassies in Kenya and Tanzania in 1998 clearly challenged the view that attacks must be on the territory of the United States to qualify for self-defense under Article 51. See Ruth Wedgwood, *Responding to Terrorism: The Strikes Against bin Laden*, 24 YALE J. INT'L L. 559, 564 (1999) ("The massively destructive bombings of the embassies in Kenya and Tanzania, with a horrific loss of life, were clearly 'armed attacks' that allowed forcible measures of self-defense, even under the most stringent reading of U.N. Charter requirements."). See also Richard B. Lillich, *Forcible Self-Help Under International Law*, in 62 U.S. NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES: READINGS IN INTERNATIONAL LAW FROM THE NAVAL WAR COLLEGE REVIEW 1947-1977, at 129, 134 (Richard B. Lillich & John Norton Moore eds., 1980) (citing numerous instances in which the United States has sought to protect its nationals overseas with force and stating that there is no doubt that states may use force to protect their nationals as a matter of self-defense under international law).

56. Antonio Cassese, *The International Community's "Legal" Response to Terrorism*, 38 INT'L & COMP. L.Q. 589, 596 (1989).

may not serve as a basis for an armed response against terrorists under Article 51, in response to September 11, even the U.N. General Assembly has taken the unusual step of meeting in a special session to condemn the "heinous acts of terrorism, which have caused enormous loss of human life, destruction and damage in the cities of New York [and] Washington, D.C., and in Pennsylvania."<sup>57</sup> The fact that the September 11 terrorist attacks occurred on the territory of the United States, that Al Qaeda's ongoing terrorist attacks against American targets represent a sustained and continuing injury to the United States, and that the attacks caused an enormous loss of life and severe damage to both private and government property, bring these terrorist attacks into a category that would implicate a state's right to self-defense, even under a less permissive standard than that reflected in contemporary international practice.<sup>58</sup>

### C. *Evidentiary Support*

Another criticism of previous American uses of force against states supporting terrorists is the perceived lack of evidence tying the terrorists to a particular organization and tying that organization to a particular state. Some critics have argued that the U.S. Government has shown "consistent disregard of evidentiary showings" in such previous uses of force and that it has effectively taken the position that the factual premises of these actions were unreviewable.<sup>59</sup> Evidentiary concerns about the identity of the bombers of the West Berlin discotheque and their ties to Libya were aggravated by the inability of the Reagan Administration to fully disclose the compelling records of intercepted communications between Tripoli and the Libyan

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57. GA Res. 56/1, U.N. GAOR, 56th Sess., at 1, U.N. Doc. A/RES/56/1 (2001). See also *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 103-04 (June 27) (regarding the requirement set forth by the I.C.J. that armed bands must occur on a "significant scale" before they can constitute an "armed attack"). The related criticism that Article 51 cannot apply to sporadic incidents that are not part of a recurring series of attacks is addressed below.

58. See Robert J. Beck & Anthony Clark Arend, "Don't Tread on Us": *International Law and Forcible State Responses to Terrorism*, 12 WIS. INT'L L.J. 153, 216-18 (1994). Based on a survey of legal scholarship and state practice, the authors propose the three factors applied here for establishing the "armed attack" threshold: locus, temporal duration, and severity of injury to a state. *Id.*

59. Jules Lobel, *The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan*, 24 YALE J. INT'L L. 537, 548, 553 (1999).

Embassy in East Berlin regarding that bombing and contributed to criticism of the raid.<sup>60</sup> To a lesser extent, evidentiary concerns were also raised regarding the alleged plot to kill former President Bush that resulted in the 1993 cruise missile attack on the Iraqi Intelligence Service Complex in Baghdad.<sup>61</sup> Finally, doubts about the undisclosed "sensitive" evidence supporting the U.S. attack on the alleged chemical weapons complex in Sudan in 1998 continue to persist and contributed significantly to criticism of U.S. actions in response to the bombing of the U.S. embassies in Tanzania and Kenya.<sup>62</sup>

In contrast to some previous uses of force against terrorists, the U.S. Government made presentations of relevant sensitive and classified information about the attacks of September 11 to a number of foreign governments and subjected this evidence

60. See discussion *supra* note 4. Some states on the U.N. Security Council had alleged that Libyan involvement in terrorist activities was not substantiated. See O'Brien, *supra* note 18. Some commentators, skeptical of the classified information that the U.S. Government could not disclose, were highly critical of the U.S. case. See Boyle, *supra* note 18, at 293 ("The only evidence the American people have to go on is the Reagan Administration's claim that intercepted cable traffic between Tripoli and the People's Bureau in East Berlin somehow established Libyan responsibility for the April 5 bombing. We are expected to accept its obviously self-interested word for . . . the existence this evidence.").

61. See Seymour Hersh, *A Case Not Closed*, THE NEW YORKER, Nov. 1, 1993, at 80. Commentators criticized the failure of the U.S. Government to disclose relevant facts and its statements unilaterally characterizing those facts. See Lobel, *supra* note 59, at 547; Louis Henkin, *Notes from the President*, ASIL NEWSL. (The American Society of International Law, Washington, D.C.), June 1993, at 2. In addition to criticizing the "unilateral" U.S. action on the basis of its own findings and its own characterization of the facts, Mr. Henkin strongly criticized the legal basis of the U.S. attack on Iraq, questioning the use of such "flabby questions of self defense" in both this case and in earlier U.S. actions, including the 1986 air strikes against Libya. In spite of this scholarly criticism, many representatives to the U.N. Security Council found that the United States had presented a strong evidentiary case. See Alan D. Surchin, Note, *Terror and the Law: The Unilateral Use of Force and the June 1993 Bombing of Baghdad*, DUKE J. COMP. & INT'L L. 457, 467 n.63, 468 (1995) (noting that the Japanese Ambassador found the evidence "compelling;" Brazil sided with the United States because of the "clear evidentiary link," and New Zealand cited the "professionalism" and credibility of U.S. law enforcement agencies involved in the investigation).

62. Sean Murphy notes that:

Although the United States had claimed the plant was linked to Osama bin Laden and (based, in part, on a soil sample taken outside the plant) was involved in the production of chemical weapons for his terrorist purposes, there was very little publicly available evidence connecting the plant to chemical weapons production.

Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 94 AM. J. INT'L L. 348, 368 (2000). Mr. Murphy further notes that the United States was still not prepared to release "sensitive information" even to defend itself in a civil suit in 1999. *Id.*

to considerable scrutiny. The result was decisive. Following a briefing of the North Atlantic Council by the United States and speaking on behalf of the 19 members of NATO, the Secretary General of NATO, Lord Robertson, said: "The facts are clear and compelling. The information presented points conclusively to an Al-Qaida role in the 11 September attacks."<sup>63</sup> The British Government even took the unusual step of establishing a website with continuously updated information on Al Qaeda's and Osama bin Laden's responsibility for the September 11 terrorist attacks.<sup>64</sup>

Any denials of responsibility by Osama bin Laden have also been undermined by his own remarks. His statements alone have been persuasive evidence of his guilt to some government leaders. While noting that "the evidence presented by the United States proves [Osama bin Laden's] guilt of the terrorist attacks on New York and Washington," the Prime Minister of Finland, Paavo Lipponen, also noted that "'the statements by al-Qa'ida and the Taliban perhaps present their own, clear proof of guilt.'"<sup>65</sup> Although Osama bin Laden initially denied responsibility for the September 11 attacks while at the same time praising the attackers, his later comments were increasingly self-incriminating. After reviewing transcripts from videos which were made but not broadcast by Osama bin Laden, Prime Minister Tony Blair told the British Parliament that "'the intelligence material now leaves no doubt

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63. Statement by NATO Secretary General Lord Robertson (Oct. 2, 2001), available at <http://www.nato.int/docu/speech/2001/s011002a.htm>. A NATO press release further noted the following: "As a result of the information he [U.S. Ambassador at Large Frank Taylor] provided to the Council, it has been clearly determined that the individuals who carried out these attacks were part of the world-wide terrorist network of al Qaeda, headed by Osama bin Laden and protected by the Taliban regime in Afghanistan." Press Release, NATO, *supra* note 32.

64. Responsibility for the Terrorist Atrocities in the United States, 11 September 2001, 10 DOWNING STREET NEWSROOM, Oct. 4, 2001, at <http://www.number-10.gov.uk/news.asp?NewsId=2686>. The U.K. Government would later use this website to publicize new findings that focus on links between the majority of the hijackers and the Al Qaeda network.

65. *Finnish Premier Convinced by US Evidence of Bin-Ladin Link with Attacks*, BBC WORLDWIDE MONITORING, Oct. 14, 2001, LEXIS, Nexis File, BBC Worldwide Monitoring File. Other countries such as Russia that have traditionally been less than convinced by U.S. presentations of evidence supporting U.S. military intervention were uncharacteristically supportive. "Mr. Putin, for his part, needed no convincing of bin Laden's guilt. He had said that he recognized Mr. bin Laden's 'signature.'" The Economist Intelligence Unit, Ltd., EIU VIEWSWIRE, Oct. 8, 2001.

whatsoever of the guilt of bin Laden and his associates. . . . Far from hiding their guilt, they gloat about it."<sup>66</sup>

Even clearer is the evidentiary link between the Al Qaeda organization and the Taliban Regime, a link explicitly recognized by the U.N. Security Council in its imposition of economic sanctions on the Taliban Regime.<sup>67</sup> Statements by the British Government that Osama bin Laden's Al Qaeda and the Taliban have a "close and mutually dependent alliance"<sup>68</sup> were further demonstrated to be true by discoveries of Al Qaeda facilities and infrastructure throughout Afghanistan after the Taliban's retreat from these areas.<sup>69</sup>

#### VIII. ATTRIBUTING STATE RESPONSIBILITY FOR TERRORIST ACTIONS UNDER INTERNATIONAL LAW

While a link between the Taliban Regime and the Al Qaeda terrorists who launched the September 11 attacks is well established, the issue of attributing state responsibility for these terrorist actions raises a number of international legal questions. This is particularly true in finding that the Taliban Regime's support, protection, or sponsorship of terrorists constitutes an "armed attack" under Article 51 of the U.N. Charter or that it violates Article 2(4) of the U.N. Charter prohibiting a state from the threat or use of force against the territorial integrity or political independence of another state. While Article 2(4) explicitly prohibits only "members" of the

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66. Andrew Miga, *War on Terrorism; On The Run—U.S. Rescues Aid Workers as Taliban Turns Tail*, BOSTON HERALD, Nov. 15, 2001, at 1. Osama bin Laden was quoted as saying in the tape: "If avenging the killing of our people is terrorism, let history be a witness that we are terrorists . . . . The battle has been moved inside America, and we shall continue this battle, or die in the cause and meet our maker." *Id.*

67. See S.C. Res. 1333, U.N. SCOR, 55th Sess., 4251st mtg. ¶8, U.N. Doc. S/Res/1333 (2000).

68. *Britain's Bill of Particulars: "Planned and Carried Out the Atrocities"*, N.Y. TIMES, Oct. 5, 1991, at B4. The statement further notes: "Osama bin Laden and Al Qaida provide the Taliban regime with material, financial and military support. They jointly exploit the drugs trade. The Taliban allows Bin Laden to operate his terrorist training camps and activities from Afghanistan, protects him from attacks from outside, and protects the drug stockpiles. Osama bin Laden could not operate his terrorist activities without the alliance and support of the Taliban regime. The Taliban's strength would be seriously weakened without Osama bin Laden's military and financial support." *Id.*

69. "The apparent Qaeda presence in a Taliban defense ministry building suggested that Osama bin Laden's organization and the radical Islamic government were closely linked." David Rhode, *In 2 Abandoned Kabul Houses, Some Hints of Al Qaeda Presence*, N.Y. TIMES, Nov. 17, 2001, at A1.

United Nations from engaging in forcible actions against the territorial integrity or independence of any state and makes no reference in this regard to individuals, groups, or organizations, it is also fairly well established that a state that directly supports and sends out armed bands or groups to carry out serious acts of armed force against another state is itself responsible for an act of aggression.<sup>70</sup> It is not difficult to maintain the integrity of the U.N. Charter by applying these concepts to states that are closely affiliated with terrorist organizations, directly support their activities, and assist them in orchestrating devastating attacks against other states.<sup>71</sup> International practice now increasingly confirms state responsibility for such terrorist actions against other states.

While the extent of affiliation, tolerance, or support of terrorist organizations can be a source of debate in holding states accountable for terrorist acts, the international community appears to be increasingly willing to apply international legal prohibitions, including Article 2(4) of the U.N. Charter, to states that sponsor or support terrorists, and even to apply these prohibitions to states that merely acquiesce in their organized activities on their territory. The attitude of states in this area has been evolving towards stricter standards of state responsibility and imposition of clearer obligations. In 1970, General Assembly Resolution 2625 affirmed that:

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or

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70. The General Assembly's Definition of Aggression Resolution provides, in Article 3(g), that "Any of the following acts . . . qualify as an act of aggression: . . . the "sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to acts listed above or its substantial involvement therein." G.A. Res. 3314, *supra* note 45, at 142. The I.C.J. has found that "[t]his description, contained in Article 3, paragraph (G) . . . may be taken to reflect customary international law." *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 109 (June 27). In the case of rebels in Nicaragua (the contras) who were financed and equipped by the United States, the I.C.J. discussed this part of the Aggression Resolution but found that in spite of high levels of U.S. assistance and support, "there is no clear evidence of the United States having actually exercised such a degree of control in all fields to justify treating the contras as acting on its behalf." *Id.*

71. An argument can also be made that regardless of state support, Article 2(4) and Article 51 are not obstacles to responding to massive terrorist attacks. See Wedgwood, *supra* note 55, at 564 ("There is nothing in the U.N. Charter or state practice that restricts the identity of aggressors against whom states may respond—for private actors as well as governments may be the sources of aggressive conduct.").

terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.<sup>72</sup>

On December 9, 1985, the U.N. General Assembly unanimously approved Resolution 40/61, which not only unequivocally condemned all acts of terrorism as criminal, but also called upon states "to fulfill their obligations under international law to refrain from organizing, instigating, assisting, or participating in terrorist acts against other states, or acquiescing in activities within their territory directed towards the commission of such acts."<sup>73</sup> In March of 1992, the U.N. Security Council explicitly linked a state's involvement with terrorism to its obligations under Article 2, Paragraph 4. In Resolution 748, the Security Council imposed economic sanctions on Libya for its continuing involvement with terrorist activities and for its refusal to extradite two Libyan nationals alleged to have been involved in the 1988 bombing of Pan Am Flight 103 over Lockerbie, Scotland. The Council affirmed that:

In accordance with Article 2, paragraph 4 of the Charter of the United Nations, every State has a duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed toward the commission of such acts, when such acts involve a threat or use of force.<sup>74</sup>

In this significant assessment of state responsibility for terrorist activities, the Council clearly considered the Article 2(4) prohibition to extend to all forms of state involvement, participation, and acquiescence in terrorism. In 1994, the General Assembly passed the Declaration on Measures to Eliminate International Terrorism, reaffirming similar state responsibilities in this area.<sup>75</sup> On August 13, 1998, in addition to

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72. G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 122, U.N. Doc. A/8018 (1970). While General Assembly resolutions are not law and are non-binding, they are important expressions of the attitudes of states and may, when evidencing widespread or nearly unanimous agreement, serve as the basis for the eventual development of related customary international law.

73. G.A. Res. 40/61, U.N. GAOR, 40th Sess., Supp. No. 53, at 302, U.N. Doc. A/40/53 (1985).

74. S.C. Res. 748, U.N. SCOR, 47th Sess., 3063d mtg. at 52, U.N. Doc. S/RES/748 (1992).

75. See G.A. Res. 49/60, U.N. GAOR, 49th Sess., Supp. No. 49, at 304, U.N. Doc. A/49/743 (1994) ("States, guided by the purposes and principles of the Charter of the United Nations and other relevant rules of international law, must refrain

condemning the "indiscriminate and outrageous acts of terrorism" against the U.S. embassies in Nairobi, Kenya, and Dar-es-Salaam, Tanzania, the U.N. Security Council again stressed that "every 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 toward the commission of such acts."<sup>76</sup>

Finally, acting in the wake of the September 11 terrorist attacks, the U.N. Security Council even more clearly established state responsibility for terrorist acts and decisively imposed related obligations on the members of the United Nations under Chapter VII of the U.N. Charter. After further condemning the September 11 terrorist attacks on the United States, reaffirming the inherent right of self-defense, and reaffirming that such acts of terrorism constitute a threat to international peace and security, U.N. Security Council Resolution 1373 requires all states to undertake a wide range of measures to prevent, suppress, and criminalize the financing, planning, preparation, and execution of terrorist acts.<sup>77</sup> The Council further *decided* that all states shall, *inter alia*:

Refrain from providing any 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; . . . Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens; . . . Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens.<sup>78</sup>

While a state may have once argued that the actions of

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from organizing, instigating, assisting or participating in terrorist acts in territories of other states, or from acquiescing in or encouraging activities within their territories directed toward the commission of such acts."); *see also* Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, G.A. Res. 51/210, U.N. GAOR, 51st Sess., Supp. No. 49, at 348, U.N. Doc. A/51/631 (1996) (stating that the General Assembly "reiterates its call upon states to refrain from financing, encouraging, providing training for or otherwise supporting terrorist activities").

76. S.C. Res. 1189, U.N. SCOR, 52d Sess., 3915th mtg. at 110, U.N. Doc. S/RES/1189 (2001).

77. S.C. Res. 1373, *supra* note 20. Unlike G.A. resolutions or any other actions by U.N. bodies, *decisions* of the U.N. Security Council are binding on all members of United Nations. *See* U.N. CHARTER art. 25.

78. *Id.* ¶¶ 2(a),(c)-(d).

terrorist organizations did not impose responsibility on that state under Article 2(4) of the U.N. Charter and did not subject them to forcible measures in response under Article 51, those conditions no longer appear to pertain, at least in circumstances where an attack as devastating as the September 11 attacks are launched on the territory of another state and where the link between the terrorists and the sponsoring state is so well established and recognized by the international community.

#### IX. CONDEMNATION OF THE TALIBAN REGIME'S SUPPORT FOR TERRORISM AND ITS LINK WITH AL QAEDA

In regard to the link between Al Qaeda and the Taliban Regime, the U.N. Security Council has on numerous occasions made the Taliban's clear and established support of terrorist networks a subject of concern and condemnation. On December 8, 1998, the U.N. Security Council, in noting that it was "deeply disturbed by the continuing use of Afghan territory, especially areas controlled by the Taliban, for sheltering and training terrorists and the planning of terrorist acts," went on to demand that "the Taliban stop providing sanctuary and training for international terrorists and their organizations."<sup>79</sup>

Following the indictment by a U.S. court of Osama bin Laden and his associates for the East Africa U.S. embassy bombings and the Taliban's refusal to turn over Osama bin Laden for trial, the U.N. Security Council again unanimously condemned the continuing use of Afghan territory controlled by the Taliban for sheltering and training terrorists and for planning terrorist acts.<sup>80</sup> Determining that the Taliban's actions constituted a threat to international peace and security, the Council acted under Chapter VII of the U.N. Charter and passed Resolution 1267, which, among other things, "demanded that the Taliban turn over Usama bin Laden

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79. S.C. Res. 1214, U.S. SCOR, 52d Sess., 3952d mtg. at 82-83, U.N. Doc. S/RES/1214 (1998).

80. S.C. Res. 1267, 52d Sess., 4051st mtg. ¶¶1-2, U.N. Doc. SEC/RES/1267 (1999). The Council stated that it deplored "the fact that the Taliban continues to provide safe haven to Usama bin Laden and to allow him and others associated with him to operate a network of terrorist training camps from Taliban-controlled territory and to use Afghanistan as a base from which to sponsor international terrorist operations." *Id.*

without further delay to appropriate authorities in a country where he has been indicted . . . .”<sup>81</sup> After the Taliban rejected all its demands, the Security Council passed Resolution 1333 in which it again condemned the Taliban Regime for its support of international terrorism, deplored its continuing provision of safehaven to Osama bin Laden and his associates, and demanded that the Taliban swiftly close all terrorist training camps on its territory.<sup>82</sup> Citing the Taliban’s actions as a threat to international peace and security, the Council imposed a wide variety of economic and diplomatic sanctions on the Taliban, including the freezing of financial assets of Osama bin Laden and the Al Qaeda organization.<sup>83</sup>

The record in the U.N. Security Council thus supports the finding that no government has been as universally condemned by the international community for its support of terrorism and so closely linked with terrorist activities as the Taliban Regime of Afghanistan. With this status comes a more easily assigned and more certain international legal responsibility for the horrific attacks on the United States of September 11 and a clearer case for self-defense under Article 51.

#### X. NECESSITY AND PROPORTIONALITY

A final legal issue that has given rise to substantial debate among scholars regarding previous uses of force against terrorism is the requirement of necessity and proportionality. It is a well established rule of customary international law that even when a state is lawfully engaged in the exercise of its inherent right of self-defense, its use of force must be limited to that force necessary to defend against the attack and must be proportionate.<sup>84</sup> Striking back against an enemy without a

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81. *Id.*

82. S.C. Res. 1333, *supra* note 67, ¶¶1-3. The Council also specifically noted the indictment in the United States of Osama bin Laden and his associates for the August 7, 1998, bombings of U.S. embassies in East Africa. *Id.*

83. *Id.* ¶¶5, 8; Further measures were imposed by the U.N. Security Council with respect to the assets and economic resources of Osama bin Laden, Al Qaeda and the Taliban Regime in U.N. Security Council Resolution 1390.

84. The ICJ has noted that the rule whereby self-defense warrants “only measures which are proportional to the armed attack and necessary to respond to it” is a rule “well established in customary international law. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 176 (June 27). The U.S. Government has acknowledged that these rules apply to its use of force in self-

necessity for self-defense in a punitive act of retaliation is another matter; prevailing scholarly opinion now holds that acts of armed reprisal are not permitted under the U.N. Charter or customary international law,<sup>85</sup> although this is a much debated proposition in the context of responding to, and deterring, terrorist attacks.<sup>86</sup> In fact, the distinction between reprisal and self-defense may sometimes be difficult to discern in responding to specific acts of terror.<sup>87</sup>

It is clear, however, that legal arguments regarding necessity, proportionality, and reprisal figured prominently in criticism of the U.S. raid on Libya in 1986.<sup>88</sup> In criticizing that and other

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defense, as indicated in its report to the U.N. Security Council regarding its response to the 1993 cruise missile attack on the Iraqi Intelligence Service complex in Baghdad: "The targets struck, and the timing and method of attack used, were carefully designed to minimize risks of collateral damage to civilians and to comply with international law, including the rules of necessity and proportionality." Letter from the Permanent Representative of the United States of America, to the United Nations, *supra* note 8.

85. See IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 281 (1963) ("The provisions of the Charter relating to the peaceful settlement of disputes and non-resort to the use of force are universally regarded as prohibiting reprisals which involve the use of force."); Derek Bowett, *Reprisals Involving Recourse to Armed Force*, AM. J. INT'L L. 1 (1972) ("Few propositions about international law have enjoyed more support than the proposition that, under the Charter of the United Nations, the use of force by way of reprisals is illegal."); see also *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States*, G.A. Res. 2625, *supra* note 72, at 122 ("States have a duty to refrain from acts of reprisal involving the use of force.").

86. O'Brien, *supra* note 18, at 469 (examining numerous uses of armed force by states and arguing that it is "unrealistic" to deny "the element of deterrence to self-defense"). With respect to the requirement for proportionality and the issue of deterrence, see Beck & Arend, *supra* note 58, at 208 (1994) ("If proportionality consists of a reasonable relation of means to ends, it would not be disproportionate if in some cases the retaliatory force exceeded the original attack to serve its deterrent aim.") (quoting Oscar Schachter, *The Extra-Territorial Use of Force against Terrorist Bases*, 11 HOUS. J. INT'L L. 309, 315 (1989)).

87. Guy Roberts, *Military Responses to Terrorism*, 81 PROC. AM. SOC'Y INT'L L. 318, 318 (1987) (concluding that some armed reprisals cannot be properly distinguished from legitimate acts of self-defense); see also Bowett, *supra* note 85, at 3 (noting difficulties in finding the "dividing line" between protection and retribution).

88. Objections were raised with respect to the necessity and proportionality of the U.S. raid during U.N. Security Council deliberations. For example, although Denmark voted against a proposed U.N. Security Council resolution condemning the United States for the raid, the Denmark representative to the Security Council nonetheless questioned the proportionality of the U.S. attack and "deeply deplored" it. See Surchin, *supra* note 61, at 485 (citing U.N. SCOR, 41st Sess., 2682d mtg. at 32, U.N. Doc. S/PV.2682 (1986)); Wallace F. Warriner, *The Unilateral Use of Coercion Under International Law: A Legal Analysis of the United States Raid on Libya on April 14, 1986*, 37 NAVAL L. REV. 49, 89 (1998) ("Mr. Bhagat, the delegate from India and also representing the 101-member Movement of Nonaligned Countries" stressed that "[n]othing can justify the use of massive force or an armed attack against a sovereign State, in contravention of the purposes and principles of the

uses of force, some commentators have argued that the doctrine of necessity in self-defense requires "immediacy", i.e., an imminent threat requiring an immediate or close-in-time response.<sup>89</sup> In this regard, some writers are fond of citing Secretary of State Daniel Webster and his statement to Lord Ashburton, a special British representative to Washington, in the *Caroline* dispute that a state must demonstrate a "necessity for self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation" and must do "nothing unreasonable or excessive, since the act, justified by the necessity of self-defense must be kept clearly within it."<sup>90</sup>

Webster's comments in the *Caroline* dispute were, however, related to the standards applicable to a state launching a preemptive strike or engaging in a form of anticipatory self-defense<sup>91</sup> and cannot be relied on to establish a rule prohibiting

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United Nations Charter.") (citing U.N. SCOR, 41st Sess., 2683d mtg. at 12, U.N. Doc. S/PV.2683 (1986)). Although the U.S. Government had argued that the Berlin disco bombing was part of a continuing campaign of terror, some writers criticized the scale of the American response to limited number of deaths and injuries in the Berlin disco bombing. See Rowles, *supra* note 54, at 313 ("If 10,000 such attacks were actually being launched, or a continuing campaign of such large-scale attacks was in progress, the United States might have had a colorable argument for bombing the terrorists' bases in Libya.").

89. See Boyle, *supra* note 18, at 294 (1987) ("[T]his provision of the Charter [Article 51] made it quite clear that self-defense could only be exercised in the event of an actual or perhaps at least imminent 'armed attack' against the state itself. By definition, this would not include military retaliation and reprisal since they occur after the fact."); Mark Baker, *Terrorism and the Inherent Right of Self-defense (A Call to Amend the United Nations Charter)*, 10 HOUS. J. INT'L L. 25, 34 (1987) (arguing that the "temporal element of the requirement of necessity means that a response must be made close in time to the actual attack.").

90. James Bassett Moore, *Destruction of the "Caroline,"* 2 DIG. OF INT'L L. 409, 412 (1906). In related correspondence, Webster also argued that the British were required to first exhaust peaceful approaches to resolving the dispute by calling on the British to show that "admonition or remonstrance to the persons on board the *Caroline* was impracticable or would have been unavailing." Letter from Mr. Webster to Mr. Fox (April 24, 1841), reprinted in 29 BRITISH AND FOREIGN STATE PAPERS 1129, 1138 (1857).

91. See BOWETT, *supra* note 27, at 188-189; Martin A. Rogoff & Edward Collins, Jr., *The Caroline Incident and the Development of International Law*, 16 BROOK. J. INT'L L. 493, 500 (1990); see also Wedgwood, *supra* note 55, at 565 (referring to the demanding *Caroline* test as the "classical statement of anticipatory self-defense."). The *Caroline* standard was applied by the Nuremberg Tribunal in rejecting the defendants arguments that Germany's invasion of Norway in 1940 was necessary to prevent the Allies from occupying Norway. Webster's formulation was thus cited by the Tribunal as the standard for a "preventative" action in foreign territory. See Robert F. Teplitz, Note, *Taking Assassination Attempts Seriously: Did the United States Violate International Law in Forcefully Responding to the Iraqi Plot to Kill George Bush?*, 28 CORNELL INT'L L.J. 569, 578-579 (citing the Office of the U.S. Chief Counsel for the Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression: Opinion and Judgement* 36 (1947)).

a state from responding with force to repulse and end on-going acts of aggression after that state has been the target of repeated attacks and faces a near certainty that more attacks will follow. In fact, an unnecessarily strict or overly broad reading of the necessity requirement could prohibit almost all "after the fact" acts of self-defense except those that are immediately necessary to repel an attack or prevent being overwhelmed. Such a strict and self-defeating version of necessity expansively based on the *Caroline* test does not appear to be consistent with the right of self-defense under customary international law and has been vigorously opposed by a number of writers, particularly in the context of fighting terrorism.<sup>92</sup> Similarly, an overly broad or strict reading of proportionality, which would require a state's armed response in self-defense to be in exact proportion to the attack suffered, is not consistent with customary international law, particularly in relation to attacks received during an on-going conflict.<sup>93</sup>

The use of force by the United States in response to the

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92. See Alberto Coll, *The Legal and Moral Adequacy of Military Responses to Terrorism*, 81 PROC. AM. SOC'Y INT'L L. 297, 302 (1987) (rejecting the Caroline necessity standard for modern terrorist threats); Sofaer, *supra* note 55, at 97 (arguing that the Caroline test "exaggerates the test of necessity in a situation where that issue was dicta" and when "war was still a permissible option for states that had actually been attacked"); O'Brien, *supra* note 18, at 471 (arguing that with the advent of terrorism, particularly in the context of Israel's war with the PLO, the "interpretation of necessity is very different from that in a singular incident along the U.S.-Canadian border in 1837").

93. Some writers, particularly in criticizing the U.S. raid on Libya in 1986, argued that the right of self-defense "is limited by the requirement that the force used must be proportionate to the threat and cannot exceed measures *strictly necessary to repel a threat*." Gregory F. Intoccia, *American Bombing of Libya: An International Legal Analysis*, 19 CASE W. RES. J. INT'L L. 177, 205-206 (1987) (emphasis added). The ICJ applied a strict standard of necessity in the *Nicaragua* case, concluding that U.S. actions against Nicaragua in defense of El Salvador were not based on necessity since those actions were taken several months after the major armed offensive by the rebels in El Salvador had been repulsed. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 109 (June 27). In criticizing unrealistically strict views of the requirements of necessity and proportionality, State Department Legal Advisor Abraham D. Sofaer argued that respect for such requirements is undermined when states "are expected to accept too high a degree of risk of substantial injury before being allowed to defend themselves or to accept a continuation of unlawful aggression because of a tit-for-tat on military response. The law should not be construed to prevent military planners from implementing measures they reasonably consider necessary to prevent unlawful attacks." Abraham D. Sofaer, *supra* note 55, at 97-98. In this regard, Judge Sofaer noted the comments of Judge Schwebel in his dissent in the *Nicaragua* case to the effect that "an action is proportional when it is necessary to end and to repulse an attack, not just when it corresponds exactly to acts of aggression." *Id.* at 97 (citation omitted).

September 11 terrorist attacks seems, however, to involve facts which make the exercise of the inherent right of self-defense under the U.N. Charter less vulnerable to the criticism that U.S. actions are not necessary and proportionate or that they constitute prohibited acts of retaliation, revenge, or reprisal. As noted above, these horrific terrorist acts, which were immediately condemned by the international community, were not minor terrorist incidents; in fact, the magnitude of the September 11 terrorist attacks on the territory of the United States far exceeds the damage of any previous terrorist attack in world history. The deaths of thousands of persons from eighty-six different countries, untold additional personal injuries, and the enormous property and economic damage associated with the September 11 terrorist attacks have prompted many commentators to compare the attacks not with previous incidents of terrorism but with acts of aggression such as the Japanese attack on Pearl Harbor in 1941.<sup>94</sup>

Nor were the September 11 terrorist attacks isolated acts. Rather, they were part of an on-going terrorist campaign over many years that has been directed by the Al Qaeda terrorist network against the United States,<sup>95</sup> and it is a campaign which

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94. David E. Rosenbaum, *A Day of Terror: The Warnings; Years of Unheeded Alarms*, N.Y. TIMES, Sept. 12, 2001, at A25 (quoting former Senator Warren Rudman, former Co-Chairman of the U.S. Commission on National Security, who called the attacks "another Pearl Harbor"); see also Michael R. Gordon, *After the Attacks: An Assessment; U.S. Force v. Terrorists: From Reactive to Active*, N.Y. TIMES, Sept. 14, 2001 at A16. While the final number of victims for all three of the September 11 terrorist attacks was revised to 3,245 persons killed, that figure would still be higher than the 2,400 Americans killed at Pearl Harbor. See Eric Lipton, *A Nation Challenged: The Toll; Toll From Attack at Trade Center is Down Sharply*, N.Y. TIMES, Nov. 21, 2001, at A1. According to Attorney General John Ashcroft, citizens of 86 nations were killed in the September 11 terrorist attacks. Linda Wertheimer, *All Things Considered* (National Public Radio broadcast, Dec. 14, 2001). In addition to the terrible loss of life, estimates of economic damage related to the September 11 attacks has been calculated at over 100 billion dollars—with costs still mounting—and a loss of more than 100,000 jobs, with some economists "predicting a final figure of 500,000." David Williams, *US Counts Economic Cost of Terror-Driven Devastation*, AGENCE FRANCE PRESSE, Oct. 10, 2001, LEXIS, Nexis Library, Agence France Presse File; see also Chris Baker, *Putting a Price Tag on Terror*, WASH. TIMES, Nov. 18, 2001, at A1; other studies estimate that "[t]he Sept. 11 terrorist attacks will cost the nation more than 1.8 million jobs" by the end of 2002. *Attacks May Cost U.S. 1.8 Million Jobs*, N.Y. TIMES, Jan. 13, 2002, at 14.

95. In a statement before the British Parliament, Prime Minister Blair noted that Osama bin Laden has been responsible for a number of "terrorist outrages" over the past decade, including the 1993 attack on U.S. military personnel serving in Somalia, the 1998 bombings of the U.S. embassies in Kenya and Tanzania, unsuccessful attempted bombings in Jordan and Los Angeles at the turn of the

Al Qaeda and Taliban leaders have insisted must and will continue until America capitulates or is destroyed.<sup>96</sup> Even as the twisted remains of the World Trade Towers smoldered just a few blocks away from a federal courthouse in New York on October 18, 2001, one of the four men convicted of bombing U.S. Embassies in Tanzania and Kenya in 1998 responded to being sentenced to life in prison by "proudly describing himself as a 'soldier in the military wing of al Qaeda.'" <sup>97</sup> In addition, police and intelligence organizations in numerous states believe they have considerable evidence to support claims of continuing planned attacks by the Al Qaeda network, which appears to be actively engaged in continuing its "holy war" against the United States.<sup>98</sup>

In this context, the United States and its allies seem to have had little choice but to act forcefully in self-defense and defeat the Al Qaeda network and its sponsor, the Taliban Regime, particularly after having given the Taliban several

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millennium, and the attack on the USS Cole in 2000 that killed 17 crew members and injured 40 others. Prime Minister Tony Blair, Prime Minister's Statement to Parliament (Oct. 4, 2001) (transcript available at <http://www.number-10.gov.uk/news.asp?NewsId=2683>). Blair also noted that in February 1988, Osama bin Laden had signed a fatwa stating that "the killing of Americans and their civilian and military allies is a religious duty." *Id.* See also *Terrorist Hits and Misses: A Chronology of Mayhem*, TIME, Nov. 12, 2001, at 68.

96. The Taliban's leader, Mullah Mohammed Omar, is quoted as saying he had "a grand plan to destroy America, which will begin shortly." Nora Boustany, *Arab Newspapers Focus on Taliban's Fall*, WASH. POST., Nov. 16, 2001 at A38. Omar is also quoted as saying "The real matter is the extinction of America and, God willing, it will fall to the ground." *Notebook*, TIME, Nov. 26, 2001, at 19. If the world had any doubt about the likelihood of additional terrorist attacks on the United States and its allies, the leader of the Al Qaeda terrorist network eliminated those doubts when he took to the airwaves on October 7 and in a videotaped interview on al-Jazeera TV news broadcast from Qatar stated: "Here is America struck by God Almighty. . . so that its greatest buildings are destroyed. . . . I swear to God that America will not live in peace before peace reigns in Palestine, and before the army of infidels depart the land of Mohammed." *Responsibility for the Terrorist Atrocities in the United States, 11 Sept. 2001: Executive Summary*, 10 DOWNING STREET NEWSROOM, Nov. 14, 2001, at <http://www.number-10.gov.uk/default.asp?PageId=5321>. In addition, Al Qaeda interest in weapons of mass destruction has not reduced the apparent threat facing the United States. See James Risen & Judith Miller, *Chemical Weapons: Al Qaeda Sites Point to Test of Chemicals*, N.Y. TIMES, Nov. 11, 2001, at B1.

97. Michael Powell, *4 Bombers Get Life Sentences, Bin Laden Associates Planned 1998 Embassy Blasts*, WASH. POST, Oct. 19, 2001, at A1.

98. Raymond Bonnen & John Tagliabue, *Eavesdropping, U.S. Allies See New Terror Attack*, N.Y. TIMES, Oct. 21, 2001, at A1 ("More than a month after the September 11 terror attacks, the United States and its close allies are still intercepting communications among Osama bin Laden's associates and are convinced more attacks are coming, intelligence officials in several countries say.").

opportunities to avoid an armed response.<sup>99</sup> The Prime Minister of the United Kingdom, Tony Blair, perhaps best expressed this point on the day that Coalition forces began attacking targets in Afghanistan by noting: "The world understands that whilst, of course, there are dangers in acting, the dangers of inaction are far, far greater."<sup>100</sup> In the face of such serious attacks and continuing threats, international law and the United Nations Charter cannot require a passive defense in response.<sup>101</sup> In the context of a genuine armed attack, even noted writers that argue for strict limits on the use of force and a narrow interpretation of self-defense under Article 51 concede that in the case of a legitimate armed attack, self-defense, while subject to limitations of necessity and proportionality, "includes a right both to repel the armed attack and to take the war to the aggressor State in order effectively to terminate the attack and prevent a recurrence."<sup>102</sup>

## XI. CONCLUSION

While some questions and criticisms have been directed at America's previous uses of force against terrorist supporting states, the case for America's forcible response to the September 11 attacks as being fully consistent with the inherent right of self-defense under customary international law and Article 51 of the U.N. Charter is very strong. The unanimous condemnation of the attacks by the U.N. General Assembly and Security Council, the affirmation of the right of self-defense by the Security Council, the growing consensus in the

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99. To the extent that customary international law and Art. 2(3) of the U.N. Charter call for efforts to first achieve a peaceful solution to disputes before resorting to force, the United States appears to have attempted to comply with such requirements by offering the Taliban several opportunities to avoid an armed response. See discussion *supra* note 22.

100. Prime Minister Tony Blair, Prime Minister's Statement on Military Action in Afghanistan, 10 DOWNING STREET NEWSROOM, Oct. 9, 2001, at <http://www.number-10.gov.uk/news.asp?NewsId=2692>. With respect to the ultimatum delivered to the Taliban to yield up the terrorists or face the consequences, Blair stated: "It is clear that they will not do this. They were given the choice of siding with justice or siding with terror and they chose terror." *Id.*

101. Even when facing a more ambiguous threat in an earlier era, U.S. Secretary of State George Schultz noted that: "A nation attacked by terrorists is permitted to use force to prevent or preempt future attacks . . . . The U.N. Charter is not a suicide pact. The law is a weapon on our side, and it is up to us to use it to its maximum extent." George Schultz, *Low Intensity Warfare: The Challenge of Ambiguity*, 86 DEPT. ST. BULL. 15, 17 (March 1986).

102. LOUIS HENKIN ET AL., *RIGHT V. MIGHT* 45 (1991).

international community to hold states accountable for terrorist actions, and the repeated condemnation by the Security Council of the Taliban Regime's support of terrorists in particular, clearly help establish an appropriate framework under international law for the exercise of self-defense by the United States.

In this framework, an examination of the character, nature, location, and terrible scope of the September 11 terrorist attacks on the United States, their clear connection with the Al Qaeda terrorist network, the clear connection between Al Qaeda and the Taliban Regime, and the statements of support and acts of assistance by an overwhelming number of states for the United States in its response to the September 11 terrorist attacks help demonstrate the fundamental legal soundness of America's "new war" on terror. If self-defense is to have any meaning in the modern era, international law should not be interpreted to prohibit the United States from exercising its inherent right of self-defense under Article 51 to respond with force against a state that has so directly sheltered, sponsored, and supported the terrorist organizations responsible for the horrific attacks of September 11 on the United States.