Annex to
ITSSD Concerns About the Nomination of Harold Koh As the Next Legal Adviser to the US Department of State

I. The U.S. Right of Self-Defense as Defined by Customary International Law -- The *Caroline* Doctrine:

1. *Traditional Caroline Anticipatory Self-Defense Doctrine – Counter-Restrictionist:*

Simply stated, the Caroline doctrine[1], as applied before the creation of the United Nations Charter, held that, a State's right of self-defense was limited by the conditions of 'necessity', 'proportionality' and 'immediacy'.[2] Only if all three conditions were satisfied, would a State's exercise of the right of self-defense be deemed legal. The term, 'necessity' required that the action taken be justified by the 'necessity of defense' - that is, there must be no other choice but to take the action; all other forms of recourse have been exhausted.[3] The term, 'proportionality' required that the actions taken not be 'unreasonable' or 'excessive' in relation to the initial attack. The term, 'immediacy' required that the call for action be 'instant', 'without moment for deliberation'.[4]

The facts of the Caroline case are important to an understanding of the counter-restrictionist/Caroline traditionalist viewpoint. The event took place during the Canadian rebellion of 1837, along the U.S. Canadian border. At that time, many U.S. nationals sympathized with the Canadian rebels and some actively participated in rebel activities. The U.S. government tried to prevent the U.S. nationals from assisting the rebellion but its efforts were largely unsuccessful. The Caroline was a ship used by U.S. rebel sympathizers to ferry arms and men to the Canadian rebels from the New York side of the Niagra. The sympathizers were ferrying men and arms to Navy Island located on the Canadian side of the Niagra, which they had taken over. A local British Commander, having observed the Caroline's activity, decided, on December 29, 1837, to destroy the Caroline while it was at Navy Island**,** in order to prevent the rebels from potentially using it to ferry men and arms for attacks in the future. At nightfall of December 29, 1837, the British troops attacked the Caroline, even after it had crossed into U.S. territory, killing two U.S. nationals, and set it ablaze and over the Niagra Falls. Although the U.S. Secretary of State at that time protested the affair to the British, said protest was ignored. In 1840, after a British subject was arrested in New York and charged in connection with the affair, the U.S. protest against the destruction of the Caroline was renewed by Secretary of State Daniel Webster.[5]

Until the Charter era, the Caroline incident was viewed in its narrow context and was applied restrictively to similar facts and circumstances. In other words, it was applied "to extra-

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territorial uses of force by a State in peacetime against another State (a neutral party) that was unable or unwilling to prevent its territory from being used as a base of operations for hostile activities against the State taking action". [6] While many commentators, since the creation of the Charter, have extracted this famous sentence[7] from its context and applied it to all State uses of force in self-defense, there remain a number of commentators who continue to apply the Caroline doctrine to extra-territorial uses of force (interventions) only.[8] The Caroline case, furthermore, stands for the proposition that self-defense is permissible as a reaction to attacks by non-governmental entities. This position is based on the fact that the Caroline case involved support by U.S. nationals for a Canadian rebellion. To the extent that Art. 51 preserves an inherent right to self-defense, that right prior to the adoption of the U.N. Charter included the right to respond to attacks from wherever they may come.[9]

This classic interpretation of the Caroline doctrine is understandable in view of the historical context in which it arose. At the time of Webster's letters, "the terms 'self-preservation' and 'necessity' were at least equally commonly used as 'self-defense' in discussing 'acts of force short of [all-out] war', taken by a State to protect itself against an attack or a perceived attack from another State…In fact during the nineteenth century, the right of self-defense was one of the rights that were incidental to the absolute right of self-preservation".[10] Moreover, "the term 'necessity' was used occasionally as a synonym for 'self-preservation and self-defense. In discussing the U.S. attack on an outlaw fort in the Spanish Territory of Pensacola, for example, John Quincy Adams wrote that 'necessity justifies an invasion of foreign territory so as to subdue an expected assailant'. President Tyler used similar language in describing the British justification for their actions in the Caroline incident".[11] The Caroline standards were also applied by the Nuremburg Tribunal in rejecting the defendant's arguments that Germany's its invasion of Norway in 1940 was necessary to prevent the Allies from occupying Norway. Webster's formulation was cited by the Tribunal as the standard for a 'preventive' action in foreign territory.[12]

At least one commentator, who has researched the subject matter thoroughly, believes that the Caroline doctrine should be applied only to "[cross-border] interventions in 'self-defense', AND to 'anticipatory self-defense' situations in which a State is seeking to justify the use of force outside its own territory.[13] He reasons that, "international law should not be interpreted as forbidding absolutely all interventions in self-defense or all instances of anticipatory self-defense" (emphasis added), as some post-Charter commentators would prefer. Given "the continued inability of the Security Council itself to take effective [military] action to eliminate 'threats to the peace, breaches of the peace or acts of aggression, it is preferable to interpret Article 51 as including the rights of intervention in self-defense and of anticipatory self-defense, as narrowly defined in the Caroline doctrine, than to interpret it as eliminating these rights."[14]. Other commentators have asserted that the Caroline standards should apply only in cases of anticipatory self-defense, given that the term 'anticipatory self-defense', by definition, is a "resort to force in order to prevent an expected aggression". [15] Despite their differences, each of these commentators believes that the classic Caroline doctrine survived intact following the creation of the U.N. Charter and now resides in Article 51.[16]

There is one commentator, however, that continues to argue that the Caroline standards applicable to uses of force in anticipation of an attack are different than those applicable to uses of force in self-defense. In the former case, the conditions of 'necessity' and 'proportionality' are supplemented by the additional requirement of 'imminency'.[17] The difference between the standards of 'immediacy' and 'imminency' is mostly temporal: 'Immediacy' is defined as present; at once' without delay; not deferred by any interval of time. It denotes that action is or must be taken either instantly or without any appreciable loss of time. 'Imminency' is defined as near at hand; mediate rather than immediate; close rather than touching; impending; on the point of happening; threatening; perilous.[18] The interesting thing to note about this distinction is that even though the 'imminency' requirement would seem to be more relaxed than the 'immediacy' requirement, it is not. Since a State contemplating a preemptive use of force has more time available to prepare for its attack, the law would impose more of a burden to show 'necessity' of action than in the case where force is used in self-defense after an attack has already occurred.

a. Previous Invocations of the Caroline Doctrine:

The doctrine of anticipatory self-defense has been invoked several times since the *Caroline* case, as indicated by several legal commentators. One commentator has noted that, "during the Nuremberg Trials, Germany's naval commander argued that Germany had occupied Norway, a neutral country, as a necessary act of self-defense to forestall Allied landings there. While the Tribunal judges did recognize a right of anticipatory self-defense, the judgment stated, 'preventive action in foreign territory is justified only in case of 'an instant and overwhelming necessity for self-defense, leaving no choice of means, and no moment of deliberation'. The Tribunal found that this was not true for the German invasions of Denmark and Norway."[19]

Another commentator has noted that this doctrine has been used on several occasions by the State of Israel to justify preemptive actions. As early as 1956, Israel sought to justify its military action across the United Nations armistice line against the feyadeen on the basis of anticipatory self-defense. But, both the U.S. and the U.N. rejected this argument.[20] In 1967, Israel launched a massive air attack against the airfields of the United Arab Republic (now Egypt), in response to the UAR's closure of the Straits of Tiran to Israeli shipping and the UAR's massing of troops along the southern Israeli border. It claimed the preemptive attack was an act of anticipatory self-defense, arguing that the situation presented a 'serious and imminent' threat to the security of Israel. The U.N. failed to condemn the action, as an illegal use of force, perhaps because it agreed that such actions could be viewed, through the eyes of the Israelis, as an imminent threat.[21]

The Israelis again relied on the doctrine of anticipatory self-defense to justify their 1981 air attack against the Iraqi nuclear facility at Osarik. Iraq was only three months from completing construction of a nuclear reactor when the attack occurred. Iraq claimed publicly that the facility was for research purposes only, but other factors indicated to the Israelis that Iraq had other alternative uses in mind for the uranium – for manufacturing nuclear weapons to attack Israel. Israeli intelligence discovered the following facts which led to this conclusion: 1) "Iraq's uranium purchases indicated a weapons project rather than peaceful uses for the uranium; 2)

"IAEA controls on nuclear proliferation were weak; and 3) Iraq officially stated an intention to acquire nuclear weapons to be used against Israel.[22] The Security Council condemned the action, finding that "the problem with the Israeli attack stemmed from the lack of an 'imminent' threat".[23]

As explained by this commentator, "It was not clear whether Iraq would use the reactor to produce nuclear weapons. There was even more doubt about the threat those nuclear weapons would pose to Israel. Even if Iraq intended to use the reactor to produce weapons there was not an imminent threat of the use of those weapons against Israel. In Israel's opinion, Iraq would, in the very near future, obtain the means to create a weapon, which could pose a potential threat to it".[24]

U.S. actions were characterized in terms of anticipatory self-defense on two previous occasions. In 1962, the U.S. imposition of a naval blockade to prevent further Soviet shipments of nuclear missiles to Cuba, though officially declared a 'regional action under Article 52 of the Charter (and endorsed by the Organization of American States), was actually an act of anticipatory self-defense. Although the blockade was considered an unlawful use of force under Article 2(4) of the Charter, the Security Council did not pass a resolution supporting or condemning it. Subsequent Council meeting notes reveal that the doctrine of anticipatory self-defense had been discussed, and that there was no agreement as to whether the nuclear missiles had a 'defensive' or an 'offensive' purpose.[25]

Lastly, the U.S. declared its reliance upon the doctrine of anticipatory self-defense in connection with its 1986 bombing of Libya, following the U.S. intelligence discovery that Libyan operatives had been responsible for the bombing of a Berlin discotheque. Although the U.S. intention was to establish that it 'practiced' anticipatory self-defense, legal commentators believe that its action was otherwise in response to a previous attack, and had failed to meet the requirements of Article 51.[26] It was, in fact, during the Reagan administration that the theory underlying the use of preemptive attacks against terrorists was formulated and officially pronounced.[27]

2. 'State of Necessity'/Caroline Doctrine – Counter-Restrictionist*:*

In addition to standing for the proposition that a State may act in 'self-defense' in anticipation of an 'imminent attack, the Caroline doctrine also continues to be interpreted within some legal circles as articulating another customary law defense, namely actions undertaken because of the emergency of 'a State of Necessity'.[28] The doctrine of the State of Necessity has been discussed by the International Law Commission, in its Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts. It places the doctrine under the rubric "Circumstances Precluding Wrongfulness", which excuses certain State actions from 'unlawful' characterization. In fact, the Commission points out that, "the Caroline incident of 1837, though frequently referred to as an instance of 'self-defense', really involved the plea of 'necessity' at a time when the law concerning the use of force had a quite different basis than it now has".[29]

However, the Commission notes that there are extreme limitations to the lawful use of this doctrine, in view of the creation of the United Nations Charter. The use of the term 'necessity', for example, denotes that there must be no other way for a State to safeguard an essential interest threatened by a grave and imminent peril.[30] The plea of necessity is not dependent on the prior conduct of the injured State, and consists in a grave danger either to essential interests of a State or of the international community as a whole. It arises where there is an irreconcilable conflict between an essential interest, on the one hand, and an obligation of the State invoking necessity on the other.[31] It has been invoked to preserve the very existence of the State and its people in time of public emergency, or ensuring the safety of a civilian population.[32]

The Commission notes that, on balance, State practice and judicial decisions support the view that 'necessity' may constitute a circumstance precluding wrongfulness under certain very limited conditions. First, the interests of the State and its people or of the whole international community must be threatened by a grave and 'imminent' (proximate) peril, objectively established.[33] And, the course of action taken must be the 'only way' available to safeguard that interest; otherwise lawful means must not be available, and cost and convenience is no factor establishing availability. In other words, there must not exist any alternative unilateral State action or any alternative cooperative State actions (e.g., through use of international organizations) that could remove the peril.[34] Second, the conduct in question must not seriously impair an essential interest of the other State or States concerned, or of the international community as a whole. This has been interpreted to mean that the interest relied on must 'outweigh' all other considerations, based on a 'reasonable' assessment of the competing interests.[35]

Two further conditions have been imposed on a State's right to invoke this exceptional doctrine. First, necessity may not be relied upon as a defense if the responsible State has contributed to the situation of necessity by committing any act or by failing to act where it is under an obligation to do so. Second, the plea of necessity is not intended to cover conduct that is, in principle, regulated by primary obligations, such as those imposed by the U.N. Charter on the 'use of force' in international relations.[36] Since the prohibition of use of force contained within Article 2(4) is a peremptory norm, the use of force sought to be justified pursuant to a plea of necessity would have to fall below the threshold of an 'unlawful threat or use of force', in order to be legally permissible.[37] Similarly, the plea of necessity is not intended to cover the question of 'military' necessity, which is expressly excluded by certain humanitarian conventions applicable in armed conflict.[38] Some of the types of conduct proscribed by these conventions, are themselves now, considered peremptory norms.[39] In all but the most extreme circumstances, therefore, would appear that the defense of 'necessity' would not be legally available as a ground for acting to preempt an imminent military or terrorist attack that may involve the use of WMDs with potentially violent consequences.[40] This conclusion is consistent with actual State practice and the prevailing view of the international legal community.

3. Modern view of Caroline Doctrine – Post Charter View:

Caroline-post-Charter-restrictionists are content to apply the three customary law conditions imposed by the Caroline case, in addition to the prerequisite contained within Article 51, namely that 'an armed attack' must first occur before use of force in self-defense is legally justified. The post-Charter view, in effect, does not allow the use of force in 'anticipatory self-defense'. Rather, according to this view, the customary law right of self-defense imposes an even greater burden on the State seeking to preempt an impending attack from another State or a non-State actor. This is reflected by the widely accepted view that the conditions articulated by the Caroline doctrine apply to all uses of force by a State in self-defense under customary international law, including uses of force within a State's boundaries.[41]

As indicated above, post-Charter restrictionists agree that a State's inherent right of self-defense under customary international law 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. And they also agree that states are permitted to 'organize' themselves in advance in bona fide collective self-defense arrangements (e.g., NATO) for possible response if one of the members should become the victim of an armed attack.[42] However, restrictionists tend to interpret the condition of 'necessity' to mean that, "the resort to force in response to 'an armed attack'…is allowed only when an alternative means of redress is lacking".[43] Perhaps, the reason that the Caroline doctrine has been interpreted so broadly is because there has indeed been a 'substantial shift' in the norms concerning the conditions under which it is acceptable to use force in international relations. Alternatively, the very meaning of the term 'self-defense' may have changed significantly since the mid-19th century.[44]

II. The U.S. Right of Self-Defense as Defined By the United Nations Charter:

1. *The Operative Terms of Resolution 1441Cannot Deny to the U.S. its Inherent Right to Use Force in Self-Defense:*

Security Council Resolution 1441 lacks any express language that can be construed to impair the United States' inherent right to use force in self-defense, unilaterally or collectively, whether or not the Council decides to authorize the use of force to compel Iraq to disarm.[45] A Member State's inherent right to use force in self-defense is separate and apart from the authority of the Security Council under the 'security umbrella' of Chapter VII to authorize the use of force in order to maintain international peace and security, and this right cannot be withheld from it.[46] In fact, a State's inherent right to self-defense may even be supplemented by and coexist with the Chapter VII measures taken under Council authority.[47] The entitlement of the United States to invoke its right of self-defense, however, is conditioned upon its prior satisfaction of certain legal standards imposed by the Charter of the United Nations and customary international law.

The U.S.' right to use force in its international relations with other States is governed, during times of peace by Article 2(4) of the U.N. Charter. That article imposes a general prohibition on the use of force. It states that "All 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 manner inconsistent with the Purposes of the United Nations."[48] Legal scholars are in agreement that this provision was intended to outlaw war and other acts of armed 'aggression' by one State against another, and to forbid lesser forms of intervention by force by one State in the territory of another.[49] The prohibition of the use of force contained in Article 2(4) has been held to constitute a conspicuous example of a rule in international law having the character of jus cogens. In other words, it has come to be recognized as a universal peremptory norm that cannot be derogated from.[50]

There are two lawful exceptions to this general prohibition, namely, the use of force pursuant to a 'collective action' under the auspices of the U.N. Security Council to enforce the peace[51], and the use of force of individual Member States in individual or collective self-defense.[52] This limited exception of self-defense is contained in Article 51 of the Charter, which 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 by 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 (emphasis added)."[53]

According to the International Law Commission, which serves an influential though non-binding role in the interpretation of international law, "Article 51 of the United Nations Charter preserves a State's "inherent right" of self-defense in the face of an 'armed attack' and forms part of the definition of the obligation to refrain from the threat or use of force, set forth in Art. 2(4) of the UN Charter."[54] A State exercising its inherent right of self-defense, pursuant to Article 51 of the UN Charter, is not even potentially, in breach of Article 2(4).[55]

3. *Two Different Schools of International Legal Thought Have Emerged Concerning the Inherent Right of Self-Defense:*

Two schools of international legal thought have arisen in connection with the use of force regime. One school of thought comprised of 'restrictionists' takes a restrictive, textual approach towards interpreting the U.N. Charter and the right of self-defense. It is grounded on a literal reading of the Charter text and an understanding of the original intent of the Charter's drafters.[56] The second school of thought comprised of counter-restrictionists' (or 'permissive-expansionists) adopts a contextual approach to the Charter and the right of self-defense. Besides the Charter language, it takes into account pre-Charter customary law and state practice, and relies on an understanding of the overall purpose of the United Nations Charter and the system of international law of which it is a part.[57] In addition, the counter-restrictionists treat the Charter as living, breathing and evolving document, and construe its provisions in order to give them practical import and effect.[58] The difference between these two competing perspectives is

essentially grounded in the difference between legal positivism (what the law ought to do) and legal realism (what the law actually does). While the restrictionist view has dominated since the Charter's creation, the non-restrictionist view has gained currency since the end of the Cold War and the rise of international terrorism. Somewhere in between these two extremes lies a workable doctrine of self-defense.

4. *Restrictionist View vs. Counter-Restrictionist View:*

There is a lack of consensus within the international legal community as to what the phrase 'inherent right of self-defense', contained within Article 51,means. The counter-restrictionists have argued that, the 'inherent right' referred to is the traditional right of self-defense predating the United Nations Charter. That right was not limited to defense against 'armed attack'.[59] In other words, it is the right of self-defense as found in customary international law, and that rule did not require the existence of 'an armed attack' before a State could invoke its right of self-defense. These commentators assert, furthermore, that "it is not clear that Article 51 was intended to eliminate the customary law right of self-defense" especially when "the imminence of an attack is so clear and the danger so great that defensive action is essential for self-preservation".[60] "The only limitation on self-defense, according to this more permissive interpretation of Article 51 was that implied in the famous Caroline dictum: that the right of self-defense was available only when 'the necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation (emphasis added)'".[61]

The restrictionists, however, construe Article 51 as substantially narrowing the pre-Charter customary law notion of self-defense.[62] They tend to interpret the qualifying phrase 'if an armed attack occurs' together with the Article 2(4) prohibition against the use of force and the Purposes set forth within Article 1(1) of the Charter. According to this view, the Charter clearly was designed to substitute collective, U.N. sanctioned force for the unilateral use of force by States in most instances and to reduce the use of force in international relations generally. What did seem to survive the creation of the Charter, although not expressly referred to in the text of Article 51, were the customary law limitations of 'necessity' and 'proportionality'.[63] And, according to the restrictionists, the 'inherent right' of self-defense that survived the Charter, also includes a right both to 'repel' the armed attack and to take war to the Aggressor State in order effectively to terminate the attack and prevent a recurrence."[64] It is said that this view has been premised on a post-Charter rules-based system that has as its foundation the prohibition of the use of force.[65]

Resort to the rules of customary international law is especially important to the United States, given the U.S. reservation to its 1946 acceptance of the International Court's jurisdiction. That reservation excluded multilateral treaties from the scope of the Court's jurisdiction. Thus, if the U.S. becomes a party in any case brought before the International Court of Justice, the Court would be required to determine the 'use of force' claims or defenses, with respect to the United States, under customary international law. As a result, the Caroline doctrine, which also is part of Charter law, would apply.[66]

5. *Whether an Armed Attack Has Occurred -- Restrictionist Post-Charter View:*

As set forth within the text of Article 51, '*an armed attack'* by an aggressor State must occur *before* a victim State may respond in self-defense. Restrictionists interpret the right of self-defense as being constrained by a temporal and evidentiary limitation that requires the commission of an actual attack before any response can be implemented, and proof that such attack occurred. According to this view, a nation can respond by force only to an on-going attack which constitutes 'an emergency'. And, "it cannot forcibly 'retaliate' against another in response to an unlawful attack that the latter committed against the former in the past. To do so, would be to risk having its military response characterized as an unlawful reprisal.[67] According to restrictionists:

> "The Charter's restriction of such uses of force to pure self-defensive measures serves several values equally critical to a peaceful world community and a just international order. First it ensures that force is used only as an emergency measure, a necessary last resort. The Charter value of peaceful dispute resolution rejects the use of military might to enforce a nation's claims unless, of course, the nation is itself subject to an 'ongoing armed attack' [emphasis added] and must immediately respond with force".[68]

a. Evidence of An Armed Attack:

In order for a State to lawfully use force in response to an attack, the restrictionists argue that the threat or use of force must rise to the level of an 'armed attack'. The International Court of Justice, in the case of Nicaragua has ruled, as a matter of Charter and customary international law[69], that an 'armed attack' occurs not only when regular armed forces cross an international border, but also when a State sends armed bands, groups, irregulars, or mercenaries to carry out acts of armed force against another State, and the gravity of such acts, because of their scale and effect, amount to an actual armed attack conducted by regular forces.[70] An 'armed attack', however, will not be deemed to have occurred where a State merely provides weapons or logistical or other support, and/or supplies funds to such individuals.[71] This rule has been held to apply as a prerequisite to the invocation of both an individual and a collective right of self-defense.[72] In the case of collective self-defense, there is an additional requirement. The State seeking to join in defense of another State must receive a request for assistance from the State which regards itself as a victim, and said victim State must have declared itself to have been attacked.[73]

In light of the Nicaragua_case, one must carefully consider the scale of actions that might constitute 'an armed attack'. "Below the threshold of 'an armed attack' are actions such as the provision of arms to the nationals of a state who are seeking to overthrow their government. At the high end of the scale (above the threshold) are actions such as armies crossing borders, as well as a state sending armed irregulars who "carry out acts of armed force against another State of such sufficient gravity as to amount to an actual armed attack by regular forces".[74]

The International Court of Justice, furthermore, has found that 'an armed attack' can occur beyond a State's physical borders, but still within its sovereign and territorial borders. Such an event was deemed to have occurred during the morning hours of November 4, 1979, in Tehran when the United States Embassy compound, in the course of a demonstration in front of the embassy, was attacked and overrun by several hundred armed Iranian militants unaffiliated with the Iranian government or its forces.[75] As described by the Court, the facts that contributed to a finding that 'an armed attack' had occurred include the following: "The militants gained access by force to the compound and to the ground floor of the embassy building. Over two hours after the beginning of the attack, and after the militants had attempted to set fire to the building, and to cut through the upstairs steel doors with a torch, they gained entry to the upper floor; one hour later they gained control of the main vault. The militants also seized the other buildings, including several residences on the compound. In the course of the attack all the diplomatic and consular personnel and other persons present in the premises were seized as hostages and detained…"[76]

b. Evidence that Identifies the Perpetrators of the Attack:

With respect to the evidentiary requirement noted above, the International Court of Justice, in the *Nicaragua case*, ruled that the claim of a right to use force in self-defense must be supported by 'credible evidence' of an armed attack and of the attacker's identity.[77] This has been interpreted to require evidence of "an actual armed attack, which is clear, unambiguous, subject to proof, and not easily open to misinterpretation or fabrication".[78]

> "The UN Charter requirement that self-defense be used solely to counter an ongoing armed attack reflects an evidentiary (emphasis added) presumption that a nation may use force only when the facts it relies on are clear and unambiguous…If nations are permitted to launch unilateral attacks based on secret information gained largely by inference, processed by and known only to a few individuals and not subject to international review, then Article 2(4) of the UN Charter is rendered virtually meaningless".[79]

In the case of terrorist attacks, restrictionists have read into the Court's holding the following preconditions to a military response of self-defense: 1) a nation must carefully evaluate the evidence to ensure a high degree of certainty that it has identified those responsible for an attack and that more attacks are imminent; 2) the facts relied upon must be made public; AND 3) the facts must be subject to international scrutiny and investigation.[80] "International law must require that a nation meet a clear and stringent evidentiary standard designed to assure the world community that an ongoing terrorist attack is in fact occurring before the attacked nation responds with force."[81] Restrictionists believe these standards are necessary to prevent erroneous unilateral judgments from causing significant harm to innocent persons.

At least one restrictionist commentator has argued that, because international acts of terrorism qualify as 'criminal' acts, evidentiary standards analogous to those utilized in domestic criminal law proceedings, which contain inherent safeguards, should apply.

> "A determination of international law standards must weigh, as we do domestically (using the criminal law standard of '*beyond a reasonable doubt'*), the risk of harm both to the international community and to individuals from erroneous, unilateral judgments. The protection of innocent civilians and the prevention of indiscriminate uses of force require that far greater caution be exercised in deciding whether to conduct missile strikes against another country than in determining whether to lock up a criminal…Even if a *'beyond a reasonable doubt'* standard is deemed unacceptably stringent, a government should at least be required to have 'reasonable certainty' and 'direct evidence of wrongdoing' before it attacks another country with missiles…In domestic law, that lesser, but still heavy, burden of proof has often been referred to as 'clear, unequivocal and convincing evidence', or 'clear, cogent and convincing' evidence, or simply '*clear and convincing' evidence*."[82]

In addition, restrictionists have interpreted Article 51 to require that the alleged victim of an armed attack 'report' the alleged attack to the Security Council, which shall then consider the matter and take action to restore international peace and security. The Court in the Nicaragua case indicated that such report must set forth the measures that the State believes itself bound to take when it exercises the right of individual or collective self-defense.[83] But the Court, having had to make its decision based on customary international law as it pertained to the United States, found first, that the reporting obligation enshrined in Article 51 of the Charter does not exist in customary international law. Consequently it did not treat the absence of a report on the part of the U.S. as the breach of an undertaking forming part of the customary international law applicable to that dispute.[84]

c. <u>Evidence that Attributes the Identified Perpetrator's Attacks to a State:</u>

In addition to identifying the perpetrator(s) of 'an armed attack', restrictionists argue that the victim-State must also identify the State to which such actor's conduct is 'attributable'. This requirement is based on the bedrock notion that States, which are the primary actors in international law, are responsible for their wrongful actions. A State, for example, owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction and control.[85] In the context of international law, States are under a general obligation, erges omnes, not to use their territory or to allow their territory to be used, in a way that can harm the interests of another State.[86] The general obligation not to cause harm has been confirmed in several rulings by the International Court of Justice, including for example, in the *Corfu Channel* case.[87]

It is also a well-established rule of international customary law that, the conduct of any 'organ' of a State must be regarded as an act of that State, even where that State's domestic law denies the organ such status.[88] An organ includes, for purposes of international law, all the individual or collective entities that make up the organization of the State and act on its behalf.[89] Responsibility will be attributed to the State, even if the acts of the body or person in question are unauthorized or ultra vires acts, so long as, the acts were performed by officials under cover of their official capacity.[90] While in the case of regular armed forces acting under the direct authority of a State this criterion is easily met (e.g., when Iraqi armed forces invaded Kuwait), it may be more difficult to sustain when covert intelligence operatives are involved. For example, a state official that commits an act of terrorism in his official (intelligence) capacity is presumed to have acted pursuant to the authority of the State, thereby making the State responsible for his actions. [91]

A third factual relationship that may serve as the basis for establishing attribution between the actual perpetrators of 'an armed attack' and a State, was addressed by the International Court of Justice in the *Nicaragua* case. In that case, the Court the government of Nicaragua argued that the U.S. had allegedly recruited, trained, supplied and financed armed bands of individuals (Nicaraguan contras) who they then sent to fight the Sandinista army that the Nicaraguan government supported. While these armed bands of militants, paramilitaries and mercenaries were entirely independent of the U.S. government, they proceeded to operate under the latter's general direction and control. Nicaragua endeavored to directly link responsibility of the attacks to the U.S., but was unable to do so. The Court in the *Nicaragua* case held that, in order for the activities of a third party to be attributable to a State, the State (e.g., the U.S.) must have had 'effective control' over the operation(s) in the course of which the alleged violations were committed. [92] According to the Court, 'effective control' meant "[more than State] participation, even if [it is] preponderant or decisive, in the financing, organizing, training, supplying and equipping of armed bands, the selection of their military or paramilitary targets, and the planning of the whole of [their] operations."[93] The 'degree' (or intensity) of control, rather than the number of activities controlled, is most important. In other words, there must be 'substantial' rather than general involvement.[94]

The 'effective control' rule established by the Court in the *Nicaragua* case is viewed, by restrictionists, as the prevailing legal standard of association that governs any attempt to attribute (link) 'armed attacks' of terrorist organizations to a State that may have been complicit in their undertaking. This is, however, a difficult standard to satisfy when truly independent non-State actors, such as terrorists, encamp in a State that lacks knowledge or control over such actors, their whereabouts and/or their activities. Terrorists usually lack a State of their own and tend to operate within the more remote reaches of an existing States' territory. Given this evidentiary standard, a State's mere harboring of terrorists, or its passive encouragement, acquiescence in, or inability to prevent terrorist attacks would not, by itself, be deemed sufficient to attribute the terrorists' acts to the State.[95] This standard is likely to become relevant in the case of Iraq, which has reportedly been granting refuge to a number of individuals connected with international terrorist groups, including the Palestine Liberation Organization, Hamas and Al Qaeda.

The International Court of Justice has also found another instance where a State may be deemed legally responsible for the attacks of independent actors. The Court ruled, in the Diplomatic and Consular Staff case (noted above) that, the activities of armed bands or militants within a State's sovereign territory can be attributed to the host State, even where that State does not have 'effective control' over such persons or activities. Conduct can be considered as an act of a State "if and to the extent that the State 'acknowledges' and 'adopts' the conduct in question as its own". [96] As a general matter, however, conduct will not be attributable to a State where a State merely acknowledges the factual existence of conduct or expresses its verbal approval of it. States often take positions, in international controversies, which amount to 'approval' or 'endorsement' of behavior in some general sense but do not involve any assumption of responsibility.[97]

6. *Whether an Armed Attack Has Occurred – Counter -Restrictionist View:*

a. Violent and Sporadic Terrorist Attacks Over a Period of Time Constitute an 'On-going Armed Attack':

The counter-restrictionists, on the other hand, have endeavored to define the phrase 'an armed attack' as broadly as possible, in order to take into account the various types of isolated, irregular and relatively smaller scale attacks that continue to be committed by international terrorists. Implicit within this, is also an attempt to expand the rules to include a longer list of culpable actors who can be held directly responsible for such actions. Their efforts have been partially vindicated by the recent issuance of Security Council Resolution 1368 in response to the terrorist attacks that occurred on September 11, 2001.

Within this resolution, the Council not only acknowledged that non-State actors can perpetrate 'armed attacks'[98], but also established State responsibility for terrorist attacks and decisively imposed related obligations on the members of the U.N. under Chapter VII of the Charter.[99] The resolution states, in part:

> "The Security Council calls on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist acts and stresses that those responsible for aiding, supporting or harboring the perpetrators, organizers and sponsors of these acts will be held accountable".[100]

By condemning and characterizing such attacks as 'a threat to international peace' requiring further Council action,[101] counter-restrictionists believe the Security Council also reaffirmed the 'inherent' right of self-defense and clearly considered the Article 2(4) prohibition to extend to all forms of State involvement, participation, and acquiescence in terrorism."[102] This would seem to lower the threshold for attribution of State responsibility previously established by the Court in the Nicaragua case, from namely 'effective control', to mere 'aid, support or harboring' of terrorists.

The counter-restrictionists argue that Resolution 1368 was only the most recent of a number of resolutions passed by the Security Council and the General Assembly that would seem to reflect the international community's "increased willingness to apply international legal prohibitions, including Article 2(4) of the 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".[103] The Security Council first explicitly linked a State's involvement with terrorism to its obligations under Article 2(4), during March 1992. 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."[104]

The 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' (emphasis added) in organized activities within its territory directed toward the commission of such acts"[105]. And, between 1985 and 1996, the General Assembly issued four separate General Assembly resolutions setting forth the international obligations of States to "refrain from organizing, instigating, assisting…financing, encouraging, providing training for or otherwise supporting….or participating in terrorist acts…[and] activities in territories of other States, or from acquiescing in or encouraging activities from within their territories directed toward the commission of such acts".[106] These United Nations pronouncements would seem to suggest evidence of, at least, a 'nascent opinio juris' that terrorist attacks can violate Article 2(4) and can give rise to lawful self-defense pursuant to Article 51.

As discussed above, the restrictionist view asserts that clear and unambiguous evidence of 'an armed attack' must be reported to the Security Council prior to or contemporaneous with implementing force in self-defense. The counter-restrictionists, however, have taken a contrary view, namely that, while the production of such evidence is essential to sustaining the right, it is not a condition precedent to its exercise.[107] "The right of a State to defend itself against attack is not subordinated in law to a prior requirement to demonstrate to the satisfaction of the Security Council that it is acting against the party guilty of the attack. The law does have an evidentiary requirement, but arises after, not before, (emphasis added) the right of self-defense is exercised".[108] Furthermore, counter-restrictionists believe that such evidentiary requirement does not limit the presentation of the evidence to the Security Council, and does not impose a further burden on the attacked State to persuade the Security Council that its potential exercise of its inherent right of self-defense is lawful.[109] In addition, if the 'appropriate measure' subsequently taken by the Security Council following the issuance of such a report consists merely of economic and legal steps, this, in and of itself, does not extinguish the attacked party's ability to exercise its inherent right of self-defense under Article 51.[110]

The counter-restrictionists are most vocal when considering the nature and gravity of the terrorist activities that must occur before an attack will be deemed to constitute 'an armed attack' within the meaning of Article 51. They argue that, if such activities are evaluated individually pursuant to the strict standard imposed by the International Court of Justice in the Nicaragua case, most such attacks would, by their nature and gravity, fail to meet that standard. As one commentator notes:

> "The incidents of September 11 were perpetrated by "small groups of persons [Al Qaeda], who did not in any sense operate as normal military or paramilitary units, and who were engaged in isolated incidents. Further they apparently were armed with nothing more than "box cutters" (ie., Exacto knives), not weapons one would normally associate with military or paramilitary units. To the extent we must seek to equate their actions "with an actual armed attack by regular forces", these persons did not engage in an armed attack in any conventional sense. In short, the argument would be that this was not an "armed attack" but, rather, a "use of force" or 'intervention' below the threshold of armed attack, which is perhaps better characterized as a conventional [indeed heinous] criminal act. There are a series of "terrorist" conventions that regard as criminal offenses**,** acts that jeopardize safety on board aircraft, hijacking of aircraft, sabotage of aircraft and attacks against state or 'infrastructure facilities using explosive devices".[111]

At least two counter-restrictionists have argued, however, that it is possible for these incidents to be characterized as both criminal acts and as 'armed attacks'. It would simply require a different analysis that focuses on three criteria: 1) the 'gravity and scale' of the attacks, considering the economic impact, physical devastation, loss of life and other intangible and psychological damage caused by the acts; 2) the 'nature of the attack, as defined by the perception of the victimized State that it had indeed suffered 'an armed attack' akin to a military attack, as evidenced by the precautionary and defensive actions it has taken since the attack; and 3) the actual response of the world community to such events – whether hostile, accommodating, or merely acquiescent.[112]

b. <u>A State's Unlawful Possession of Weapons of Mass Destruction Can Constitute the Threat of an Armed Attack:</u>

In 1996, the International Court of Justice issued an advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, responding to a broad question posed by the U.N. General Assembly: whether the threat or use of nuclear weapons in any circumstance was permitted under international law.[113] The Court, held, in a 7-7 split decision that, it could "not conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, where the very survival of a State would be at stake".[114] The Court did, however, unanimously rule that, "a threat or use of force by means of nuclear weapons that is contrary to Article 2(4) of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful".[115]

In rendering this portion of its opinion, the Court noted that, States sometimes signal that they possess certain weapons to use in self-defense against any State violating their territorial integrity or political independence[116]. It also recognized that, such a signal could, under certain circumstances, constitute an unlawful 'threat to use force' under Article 2(4). "If the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2(4)…[T]o be lawful, the declared readiness of a State to use force must be a use of force that is in conformity with the Charter".[117] The Court clearly acknowledged that, "possession of nuclear weapons may indeed justify an inference of preparedness to use them".[118]

The key to determining whether such possession is tantamount to a lawful or unlawful 'threat to use force' contrary to Article 2(4) requires an evaluation of the intentions and motivations of the State in which such weapons reside. If the intent and motivations underlying the possession is to maintain a credible and effective defensive policy of deterrence, by seeking to discourage military aggression by means of demonstrating that it will serve no purpose, the demonstration of that possession would not seem to violate the Article 2(4) prohibition, unless "the particular use of force envisaged would necessarily violate the principles of 'necessity' and proportionality'.[119] If, however, "the particular use of force envisaged would be directed against the territorial integrity or political independence of a State, or against the Purposes of the United Nations", then it would be considered an unlawful threat to use force contrary to Article 2(4).[120] Among the many questions left unanswered by this decision, the most critical would seem to be whether, and under what circumstances, an unlawful ('aggressive') threat to use nuclear weapons and/or other weapons of mass destruction would rise to the level of 'an armed attack', and thereby give rise to the threatened State's right of self-defense.

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[1] What has been referred to as the 'Caroline doctrine' appeared within Daniel Webster's April 24, 1841 letter to a British Mr. Fox, and his July 27, 1842 letter to Lord Ashburton. Concerned about maintaining the territorial sovereignty of the U.S., Webster wrote to Fox, "It is for the [British] government to show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation…It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by necessity of self-defense, must be limited by that necessity, and kept clearly within it". Webster later wrote to Ashburton, "The act [the use of force in U.S. territory] is of itself a wrong, and an offense to the sovereignty and dignity of the U.S., being a violation of their soil and territory…But the extent of this right [of self-defense] is a question to be judged of by the circumstances of each particular case; and when its alleged exercise has led to the commission of hostile acts within the territory of a power at peace [a neutral party], nothing less than a clear and absolute necessity can afford ground of justification." *See* Timonth Kearley, "Raising the Caroline", 17 Wis. Int'l L.J. 325 (Summer 1999) at p. 329, fn 15-18, citing the Diplomatic and Official Papers of Daniel Webster While Secretary of State at pp. 104, 105 and 110.

[2] *See* Sean M. Condron, "Justification for Unilateral Action in Response to the Iraqi Threat: A Critical Analysis of Operation Desert Fox", 161 Mil. L. Rev. 115 (September 1999) at fn 92, citing Yoram Dinstein, War, Aggression and Self-Defense 176 (1994) (stating that self-defense has the three requirements of necessity, proportionality and immediacy) – the traditional Caroline formulation.

[3] Kearley quotes further language from Webster's April 24, 1841 letter, which shows what Webster believed the British would have had **to prove** in order to justify their use of force in self-defense within U.S. territory: "It must be shown that admonition or remonstrance to the persons on board the 'Caroline' was impracticable, or would have been unavailing. It must be shown that daylight could not be waited for; that there could be no attempt at discrimination between the innocent and the guilty; that it would not have been enough to seize and detain the vessel; but that there was a '**necessity**,' ***present and inevitable,*** for attacking her into the current, above the cataract, setting her on fire…A 'necessity' for all this the government of the United States cannot believe to have existed." *See* Kearley, *supra* at p.346.

[4] Kearley cited the following passage in Webster's letter to support this: "It will be for it to show, also, that the local authorities of Canada, even supposing the **necessity of the moment** authorized them to enter the territories of the [U.S.] at all, did nothing **unreasonable or excessive**; since the act, justified by the **necessity of self-defense**, must be limited by that necessity, and kept clearly within it". See Condron at p.329, citing The Diplomatic and Official Papers of Daniel Webster While Secretary of State 104 (N.Y. Harper & Bros. 1848).

[5] Kearley at p.328.

[6] *Id*., at p.325.

[7] "…The use of self-defense should be confined to situations in which a government can show the 'necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation'". *Id*.

[8] *Id*., at p.338, *citing* Bing Cheng, "General Principles of International Law As Applied By International Courts and Tribunals" at p. 87 (George W. Keeton & Georg Schwarzenberger eds., 1953) (applying the rule so that a State is allowed to defend against hostile acts of private individuals in the territory of a friendly foreign State, when the latter is unable to afford the necessary protection to its rights).

[9] *See* Sean Murphy, "Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter", 43 Harv. Int'l L.J. 41 (Winter 2002) at p.50.

[10] *See* Kearley, *supra* at p.333-334.

[11] *Id.*, at p. 334, fn 50.

[12] *See* Jack Beard, "Military Action Against Terrorists Under International Law: America's New War on Terror: The Case for Self-Defense Under International Law", 25 Harv. J. L. & Pub. Pol'y 559, (Spring 2002) at fn 91, *citing* 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 Judgment 36 (1947).

[13] *See* Kearley, supra at p.345. Kearley points out that the traditional Caroline doctrine has been interpreted as setting forth the customary law definition of both self-defense in response to an attack, as well as of **'anticipatory self-defense'**. Id., at p. 338, fn 12.

[14] *Id*., at p.346

[15] *Id.*, citing W. Meng, "The Caroline", in: R. Bernhardt (ed.), Encyclopaedia of Public International Law, Vol. I (North Holland, Amsterdam, 1992). Meng sees the Caroline doctrine as applying only to anticipatory self-defense, viewing it as part of the 'inherent right' referred to by Article 51 of the Charter.

[16] *See* Beard, *supra* at fn 91, citing D.W. Bowett, Self-Defense in International Law 185, 188-189 (1958); Martin A. Rofoff & Edward Collins, Jr., "The Caroline Incident and the Development of International Law", 16 Brook. J. Int'l L.493, 500 (1990).

[17] Schacter, cited in Condron at fn 92.

[18] *See* Sean M. Condron, "Justification for Unilateral Action in Response to the Iraqi Threat: A Critical Analysis of Operation Desert Fox", 161 Mil. L. Rev. 115, 152 (Sept. 1999).

[19] *See* Tom J. Farer, Editorial Comment: "Beyond the Charter Frame: Unilateralism or Condominium", 96 A.J.I.L. 359 (April 2002) at p.360; The commentator also notes the Bush Doctrine of preemption advocates a broader use of force than does the doctrine of anticipatory self-defense articulated in the Caroline case. It is in fact reminiscent of the notion of strategic preemption that animated German policy in the early years of the twentieth century. Its key idea is the political justification of assaulting another State so as to block any unfavorable shift, however long-term,

in the balance of power. Farer at pp. 359-360, citing George K. Walker, "Anticipatory Self-Defense in the Charter Era: What the Treaties Have Said", 31 Cornell Int'l L.J. 321, 358 (1998); Glennon at p.24.

[20] *See* Gregory M. Travalino, "Terrorism, International Law and the Use of Military Force", 18 Wis. Int'l L.J. 145 (Winter 2000), at p.164, citing Richard Erickson, Legitimate Use of Force Against State Sponsored Terrorism 100-103 (1989).

[21] *See* Condron, *supra* at pp. 136-137.

[22] *Id*., at p.138, fn 146, *citing* A. Mark Weisburd, Use of Force: The Practice of States Since World War II, 215 (1997)

[23] Israel attempted to rally international condemnation and action against the construction of the nuclear reactor in Iraq, but failed in this endeavor. In light of this failure, Israel attacked the facility on June 7, 1981, completely destroying it. The Security Council extensively debated the Israeli attack on the facility. It ultimately adopted a resolution condemning the attack, but the reasons that States supported this resolution were starkly different. These States found that the problem with the Israeli attack stemmed from the lack of an imminent threat. The int'l community simply found this argument too attenuated to support an attack based on anticipatory self-defense. The representatives of the Sierra Leone, Great Britain, Uganda, and Niger all argued under a counter-restrictionist approach using the Caroline doctrine of an instant and overwhelming force to justify an anticipatory attack. *See* Condron, *supra* citing Arend & Beck at pp.78-79. The British delegate to the Security Council argued extensively under the context of the Caroline case finding that there was no instant and overwhelming threat that would authorize a preemptive strike against Iraq. The Sierra Leone delegate reached a similar conclusion quoting directly form the Caroline case. Although the vast majority of States condemned the Israeli action, many of these States argued that, if the action met the requirements of the Caroline case, there would have been legal justification under int'l law for the attack. The delegates from Syria, Gyanan, Pakistan, Spain, and Yugoslavia took the restrictionist position in expressing an opinion about the Israeli attack. *See* Condron, *supra* at p.138, fn 150, *citing* Anthony Clark Arend & Robert J. Beck, International Law & the Use of Force 5 (1993)) Although the Security Council passed a resolution condemning the Israeli attack, **no sanctions were included in the resolution.** *Id*., citing Weisburd, *supra* at p.288. The General Assembly adopted a resolution finding the attack was act of aggression and seeking an arms embargo as punishment for the attack. The resolution passed by a vote of 109 in favor, 2 against (Israel and the United States) and 34 abstaining (mostly European and Latin American states). *Id*., citing Weisburd *supra* at pp. 288-89.

[24] *Id*.

[25] If the missiles were on the island for an 'offensive' purpose then it was possible the US would have been justified in acting preemptively to strike that offensive capability. The Ghanaian delegate argued that there was insufficient proof to conclude that the weapons were for offensive purposes and opposed the U.S. blockade of Cuba because it was an illegal use of force. *See* Condron, *supra* citing U.N. SCOR, 17th Sess., 1023rd mtg. at 19, U.N. Doc. S/PV.1023 (1962).

[26] *See* Michael J. Glennon, "Preempting Terrorism; The Case for Anticipatory Self-Defense", The Weekly Standard, Vol.7, No. 19, P. 24, at p.25 (1/28/02).

[27] The U.S. reaction to the September 11th attacks, and to the future threats posed by international terrorism generally, is further substantiated by U.S. State practice dating back to 1984. Reference to official unclassified extracts of prior still-classified documents reveal these policies continue the anti-terrorism policies initiated by the Reagan administration. In recognizing that "the U.N. Charter is not a suicide pact"[27], former Secretary of State George Schultz was, in part, instrumental in President Reagan's issuance of National Security Decision Directive 138. The purpose of that directive was to establish the official U.S. policy of identifying terrorism as a threat to U.S. national security and of resorting to military force against terrorists to reduce that risk. The extract reads, in part, as follows: "…the practice of terrorism by any person or group in any cause [is]a threat to our national security and [the U.S. Government] will resist the use of terrorism by all legal means available…States that practice terrorism or actively support it, will not be allowed to do so without consequence. All available channels of communication will be used to persuade those now practicing or supporting terrorism to desist…State-sponsored terrorist activity or directed threats of such action are considered to be hostile acts and the U.S. will hold sponsors accountable. Whenever we have evidence that a state is mounting or intends to conduct an act of terrorism

against us, we have a responsibility to take measure to protect our citizens, property and interests." Extract of NSDD 138 (1984). This still classified document established the use of military force against terrorists and that the administration considered terrorism a threat to the national security. See: Jeffrey D. Simon, The Terrorist Trap: America's Experience With Terrorism, 179-81 (1st ed. 1994), cited in Sara N. Scheiderman, Note: "Standards of Proof in Forcible Responses to Terrorism", 50 Syracuse L. Rev. 249 (2000) at fn.2. This directive was later shaped into a proposal that was submitted to Congress during the spring of 1984. See: Letter to Congress of he United States, from The White House, Office of the Press Secretary, dated April 26, 1984.

[28] See *International Law Commission Commentaries, Chapter V – Circumstances Precluding Wrongfulness; Article 25, State of Necessity, at pp 194-206.*

[29] Id., *at par. 5, p.196.; For a discussion about relying on the Doctrine of the State of Necessity in lieu of the Doctrine of Anticipatory Self-Defense,* See *John-Alex Romano, "Combating Terrorism and Weapons of Mass Destruction: Reviving the Doctrine of a State of Necessity", 87 Geo. L.J. 1023 (April 1999) at p.1046.*

[30] *See* International Law Commission Commentaries, *supra* Article 25 at p.194.

[31] *Id*., at p.195.

[32] *Id*., at p.202.

[33] *Id*.

[34] *Id*., at p.203.

[35] *Id*., at pp.203-204.

[36] *Id*., at p.205.

[37] *See* John-Alex Romano, *supra*.

[38] *See* International Law Commission Commentaries, *supra Id*. The plea of 'military necessity' was previously found to be wanting when last utilized by Germany in 1914 to justify its occupation of Luxembourg and Belgium. Germany had sought to justify on the ground of the necessity of forestalling an attack on its territory by France through Luxembourg and Belgium. *Id*., at p.195.

[39] Those peremptory norms include the prohibition against genocide, slavery and crimes against humanity and torture. *Id*., at p.208.

[40] *See* Romano, *supra* at p.1054-1055.

[41] *See* Kearley, *supra* at p.330. However, it has been argued that this revised version of the Caroline doctrine would seem to prevent a State from lawfully *using force in its own territory* in defense of that territory (e.g., in the case of terrorist attacks), unless the attacks were an immediate threat to national survival Consequently, one could conceivably argue that the need for counter-force would be neither 'instant' nor 'overwhelming' if the attacks in question did not threaten the nation's existence. *Id*., at p.326.

[42] *See* Janis and Noyes, Mark W. Janis and John E. Noyes, International Law, Cases and Commentary, (2nd ed. West Publishing 2001), citing "The Use of Force: Law and U.S. Policy" at *Right v. Might: International Law and the Use of Force 37* (1989) reproduced in Janis and Noyes, at p. 518.

[43] *Id*., at fn 7, citing Martin A. Rogoff & Edward Collins, "The Caroline Incident and the Development of International Law, 16 Brook. J. Int'l L. 493, 498 (1990). However, others have argued that this strict a definition of 'necessity' is not workable, since it would, in effect, require a victim-State to negotiate with the attacker after an attack had already occurred, thereby nullifying that State's right to self-defense. *See* Kearley, *supra* at p.326, fn9, citing Kevin C. Kenny, "Self-Defense", in 2 United Nations: Law, Policies and Practice, 1162, p.24 at 1168 (recognizing that "an armed attack creates a strong presumption of a necessity for counterattack. Insistence upon peaceful efforts before permitting counterforce would effectively nullify the right to self-defense by allowing a clever aggressor to consolidate illegal gains through dilatory tactics".) *Id*.

[44] See Kearley, supra at p.331. Regardless, it has been asserted that, "for those who believe the Charter limits significantly the unilateral use of force in self-defense under international law, it would seem logical to apply the highly restrictive conditions of the Caroline doctrine to all uses of force in self-defense…this comports well with a broadly restrictive view of Article 51's meaning". Id., at p.344.

[45] "It is beyond doubt that the right of individual or collective self-defense against 'armed attack' continues to apply if the Security Council does not act, or if the Security Council becomes generally incapable of acting." *See* Louis Henkin, "The Use of Force: Law and U.S. Policy" at *Right v. Might: International Law and the Use of Force 37* (1989) reproduced in Janis and Noyes, at p. 518.

[46] The Security Council "was never intended to be a coercive enforcer of all international law; it was only intended to respond to threats to international peace and security". White and Cryer at p.248. However, as opposed to individual States or regional organizations, the Security Council can authorize military action in response to threats to the peace which fall short of an actual or imminent armed attack. *See* Marc Weller, "The Legality of the Threat or Use of Force Against Iraq", The Journal of Humanitarian Assistance (June 2000) at p. 3, at: (http://www.jha.ac/articles/a031.htm).

[47] "[A]fter the Iraq invasion of Kuwait, the Security Council, as [in the case of the September 11 attack] affirmed the 'inherent' right to use force in individual or collective self-defense [in the preamble to Res. 661]. When almost four months later, it authorized UN members "to use all necessary means" to repel the Iraqi forces [in Res. 678(2)], that resolution reaffirmed the Council's earlier affirmation of the victim's right to act in self-defense…This serves to give Article 51 the sensible interpretation that a victim of an armed attack retains its autonomous right of self-defense at least until further collective measures authorized by the Council have had the effect of restoring international peace and security." *See* Thomas Franck, Editorial Comments: "Terrorism and the Right of Self-Defense", 95 A.J.I.L. 839 (October 2001) at p.841.

[48] *The Charter's principal Purpose is forth in Article 1(1): "To maintain international peace and security, and to that end : a) to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression and other breaches of the peace; and b) to bring about peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."*

[49] *See* Henkin, in Janis and Noyes, *supra* at p.514.

[50] Nicaragua *case citing International Law Commission view, at (par. 190) With respect to this provision the Charter law and the Customary law are one in the same – the Charter embodies customary int'l law, at par. 187. The ICJ, in the* Nicaragua *case concluded that it had to determine Nicaragua's 'use of force' claims and the United States' 'use of force' defenses under customary international law rather than under the provisions of the U.N. Charter. It deemed necessary given a U.S. reservation to its 1946 acceptance of the Court's jurisdiction, which excluded multilateral treaties from the scope of the Court's jurisdiction. Because of this reservation, the ICJ decided that it could not rely directly on Art. 2(4) of the Charter or on the Charter of the Organization of American States during the merits phase of the case.* See Nicaragua *at pars. 180-183. The term 'aggression' has been defined by the U.N. General Assembly in Article 3(g) of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX).*

[51] The Security Council's recent issuance of Resolution 1441 is an example of the process that is pursued in order to ensure the peace.

[52] *Two other Charter exceptions to the prohibition to use include: 1) action taken against 'enemy' states of WWII, as set forth in Article 107(3); and joint action by the Permanent Members of the Security Council on behalf of the United Nations, pending the availability of troops under Article 43, as set forth in Article 106. See Ziring, Riggs, & Plano at p. 148.*

[53] Article 51 of the U.N. Charter.

[54] *See* International Law Commission, "Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts", 53rd Sess., (Nov. 2001) at Chapter V, Article 21,at par. 1, p.177. The significance of this characterization is that, "acts precluding wrongfulness…provide a justification or excuse for non-performance of [a State's international obligations] while the circumstance in question subsists…They do not annul or terminate the obligation[s]...The existence in a given case of a circumstance precluding wrongfulness…provides a shield against an otherwise well-founded claim for breach of an international obligation." *Id*. *See also* Chapter V, "Circumstances Precluding Wrongfulness", par.1-2 at p.169.

[55] *Id*., at par. 1, p.177.

[56] *Louis Henkin is representative of the restrictionist school of international legal thought. He asserts that "Governments generally have insisted on the interpretations most restrictive of the use of force: the Charter outlaws war for any reason; it prohibits the use of armed force by one state on the territory of another or against the forces, vessels, or other public property of another state located anywhere, for any purpose, in any circumstances. Virtually every use of force in the years since the Charter was signed has been clearly condemned by virtually all states. Virtually every putative justification of a use of force has been rejected. Over the years since the Charter's adoption, even states that have perpetrated acts of force, when seeking to justify their acts, have not commonly urged a relaxed interpretation of the prohibition. Rather, they have asserted facts and circumstances that might have rendered their actions not unlawful".* See *Janis and Noyes*, supra *at p.515.*

[57] *Marc Reisman is representative of the counter-restrictionist (permissive-expansionist) school of international legal thought. He asserts that, "Law includes a system of authorized coercion in which force is used to maintain and enhance public order objectives and in which unauthorized coercions are prohibited. Law acknowledges the utility and the inescapability of the use of coercion in social processes, but seeks to organize, monopolize and economize it...The int'l legal system diverges from these general legal features only in terms of degree organization and centralization of the use of coercion…Its sweeping prohibition of the threat or use of force in international politics was not an autonomous ethical affirmation of nonviolence…[Rather], Article 2(4) was embedded in and made initially plausible by a complex security scheme, established and spelled out in the United Nations Charter. But the security system of the United Nations was premised on a consensus between the permanent members of the Security Council. Lamentably, that consensus dissolved early in the history of the organization….If the scheme had operated, it would have obviated the need for the unilateral use of force…Even then…the Charter acknowledged the inherent limits of its structures in the prevailing international politics by reserving to states the right of self-defense…The international political system has largely accommodated itself to the indispensability of coercion in a legal system , on the one hand, and the deterioration of the Charter system on the other. It has developed a nuanced code for appraising the lawfulness of individual unilateral uses of force."* See *Marc Reisman, "Criteria For the Lawful Use of Force in International Law", 10 Yale Journal of International Law 279 (1985), reproduced in Janis and Noyes at p. 520.*

[58] Reisman asserts that "the basic policy of contemporary international law has been to maintain the political independence of territorial communities so that they can continue to be able to express their ongoing desire for political organization in a form appropriate to them. Article 2(4), like so much in the Charter and in contemporary international politics, supports and must be interpreted in terms of this key postulate. Each application of Article 2(4) must enhance opportunities for ongoing self-determination." *See* Reisman, in Janis and Noyes, *supra* at p. 522.

[59] *According to Louis Henkin, pursuant to this view, "If an armed attack occurs" does not mean "only if an armed attack occurs".* See *Henkin, in Janis and Royes*, supra *at 518.*

[60] See *Oscar Schachter, "The Rights of States to Use Armed Force, 82 Mich. L. Rev. 1620, 1634 (1984),* cited *in John-Alex Romano, "Combating Terrorism and Weapons of Mass Destruction: Reviving the Doctrine of State Necessity",* supra *at p. 1036.*

[61] *Id*; *See also* Kearley, *supra* at p. 344 and fn 12.

[62] They argue that "…the limitation on the previously accepted customary international law right of States to use force unilaterally was put into effect by the U.N. Charter". *See* Kearley, *supra* at p. 344.

[63] As explained by the International Court of Justice, in the *Nicaragua* case, "…the United Nations Charter…by no means covers the whole area of the regulation of the use of force in international relations. On one essential point, this treaty itself refers to pre-existing customary international law; this reference to customary law is contained in the actual text of Article 51, which mentions the 'inherent right' of individual or collective self-defense, which 'nothing in the present Charter shall impair' and which applies in the event of an 'armed attack'. The Court therefore finds that Article 51 of the Charter is only meaningful on the basis that there is a 'natural' or 'inherent' right of self-defense, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed an influenced by the Charter. Moreover, the Charter, having itself recognized the existence of this right, does not go on to regulate directly all aspects of its content. For example, it does not contain any specific rule whereby self-defense would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well-established in customary international law. Moreover, a

definition of the 'armed attack' which, if found to exist, authorizes the exercise of the 'inherent right' of self-defense, is not provided in the Charter, and is not part of treaty law. It cannot therefore be held that Article 51 is a provision which 'subsumes and supervenes' customary international law". *Id*., at par. 176. The Court proceeded to find that the United States met neither the necessity nor the proportionality tests. *Id*., at par. 237.

[64] *See* Henkin in Janis and Royes, *supra* at p.518.

[65] *Id*.

[66] See *Kearley*, supra *at p.327.*

[67] *See* Jules Lobel, Colloquy: "The Use of Force to Respond to Terrorist Attacks" The Bombing of Sudan and Afghanistan", 24 Yale Journal of International Law 537, Summer 1999 at p. 540.

[68] *Id*., at 542.

[69] In the Nicaragua case, the Court was required to interpret the rules concerning the use of force, as they pertained to the United States, according to international customary law, for the reason explained in note 7, supra. The Court in the Nicaragua case determined that the right to collective self-defense set forth in Article 51 is the right of collective self-defense in customary int'l law as well. (par 193). It reasoned that the wording of General Assembly (Friendly Acts) Declarations adopted by States demonstrates their recognition of the principle of the Art. 2(4) prohibition as definitely a matter of customary int'l law. The Ct also concluded that this resolution also demonstrated that the States represented in the Gen'l Assembly regard the exception to the prohibition of force constituted by the right of individual or collective self-defense as already a matter of customary law – The Court cited par. 103 of the Declaration -- 'nothing in the foregoing paragraphs shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful'. Id.

[70] The Court held that, "it sees no reason to deny that, in customary international law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces". (par. 195). The ICJ's pronouncement on this provision has been understood to reflect customary international law. See Beard, supra at fn70. The Court's definition of 'an armed attack' was based on the definition of the term "aggression", contained in Article 3(g) of the "Definition of Aggression Resolution" annexed to General Assembly Resolution 3314 (XXIX). G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31 at 142-43, U.N. Doc. A/9631 (1974).

[71] The ICJ also held that the mere supply of funds to the contras, while undoubtedly an illegal act of 'intervention' in the internal affairs of Nicaragua, did not, in itself, amount to a 'use of force'. (par 228) Upon considering all of the facts, the Court held that Nicaragua's assistance to the Salvadorian rebels did not rise to the level of an armed attack because, at most, it assumed the form of the supply of arms. Accordingly, U.S. intervention was not justified on the ground of collective self defense. (par. 238)

[72] While an armed attack would give rise to an entitlement to collective self-defense, a use of force of a lesser degree of gravity (provision of weapons or logistical or other support) cannot produce any entitlement to take collective counter-measures involving the use of force. Nicaragua at (par. 249).

[73] Nicaragua case at par. 199. See Henkin in Janis and Noyes, supra at p.518. The Court's ruling had been greatly influenced by the principle enunciated years earlier by renowned legal commentator Ian Brownlie. In 1963 he wrote: "Since the phrase 'armed attack' strongly suggests a trespass it s very doubtful if it applies to the case of aid to revolutionary groups and forms of annoyance which do not involve offensive operations by forces of a State. Sporadic operations by armed bands would also seem to fall outside the concept of 'armed attack'. Brownlie, cited in Michael Glennon, "Military Action Against Terrorists Under International Law: The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the U.N. Charter", 25 Harv. J.L. & Pub. Pol'y 539 (Spring 2002) at p. 542.

[74] See Sean Murphy, supra at p.45

[75] "The Diplomatic and Consular Staff Case", United States v. Iran, 1980 ICJ 3, 1980 WL 368. According to the Court's account of the facts, "In the course of a demonstration in front of the embassy the embassy compound was overrun by a strong armed group of several hundred people.

[76] *Id*., at par. 57.

[77] Military and Paramilitary Activities in and Against Nicaragua, (Nicar. Vs. US), Merits,1986 ICJ REP. 14, 119-21, 127, paras 230-234, 248-249.
[78] *See* Lobel, *supra* at p.543, citing Louis Henkin, How Nations Behave, at p. 142 (2nd ed. 1979).
[79] *Id*., at p.547.
[80] *Id*.
[81] *Id*.
[82] *Id*., at p.551. This commentator has concluded that, since the Clinton Administration's August 20, 1998 firing of Tomahawk cruise missiles at sites in Afghanistan and Sudan failed to meet these standards, such acts were properly characterized as illegal acts of reprisal. The commentator reasoned that, while the missiles were launched in response to what, the U.S. *believed*, was indisputable evidence of Osama bin Laden's link to the prior bombings of the American embassies in Nairobi Kenya and Dar es Salam, Tanzania, that had occurred two weeks earlier, the Clinton Administration, *at the time the missiles were launched*, "did not have any *direct evidence* of bin Laden's connection to the embassy bombings…Nor did it have *direct evidence* that bin Laden was responsible for a wave of very recent attacks on Americans and was planning specific future attacks…This type of showing would seem necessary to illustrate an ongoing armed attack and thus raise a claim of self-defense and not just reprisal". *Id*., at p.549. According to this commentator, *at the time of the missile attacks*, the Clinton Administration did not conclusively establish any 'facts'; rather it merely proffered the following allegations that amounted to, at most, a *'reasonable suspicion' of culpability*: 1) that bin Laden's network was responsible for the embassy bombings and other prior bombings; 2) that bin Laden had publicly issued a fatwa calling for more attacks on American civilian and military targets; 3) that it had evidence that bin Laden was indeed planning further attacks (that he was engaged in a systematic terror campaign against the United States); and 4) that the Sudan factory was linked to or controlled by, and was an instrument of, bin Laden's network and that it was producing nerve gas precursors. *Id*., at p.543-544. (quoting a senior congressman at a CIA briefing, as saying that *there was evidence of "a lot of suspicious activity, but nothing conclusive*") The rule to be derived from this outcome is that, 'evidence of a lot of suspicious' activity' but nothing conclusive, will fail to satisfy this burden of proof. *Id*., at p.546. Under this type of evidentiary regime, not even the more substantial evidence proffered to the Security Council by the Reagan Administration to justify its 1986 air strike against Libya as an act of self-defense, would be considered sufficient under international law. The Reagan Administration submitted the following evidence: 1) Cable intercepts between Tripoli and the Libyan embassy in Berlin that allegedly ordered the bombing in West Berlin that killed a U.S. army sergeant and injured fifty American military personnel; 2) A series of alleged terrorist incidents occurring within a week of the West Berlin bombing, planned or committed by Libyan agents who were arrested or expelled by police in Istanbul and officials in Paris; and 3) Evidence that the Libyan embassy in Vienna was in the process of plotting a terrorist operation against an unknown target on April 17, 1986, and that Libya was planning widespread attacks against Americans in the following weeks. Ibid at p.549, *citing* Marian Nash Leigh, "Contemporary Practice of the United States Relating to International Laws", A.J.I.L. 612, 633-35 (1986).[82] And notwithstanding said evidence, the world community still condemned the U.S. raid. The Security Council voted nine to five to condemn the U.S. action, with the U.S., Britain and France vetoing the resolution. The General Assembly favored the condemnation by a vote of seventy-nine to twenty-eight. *See* Lobel, *supra* at p.549.
[83] *Id*., at par. 235.
[84] The *Nicaragua* case at par. 235.
[85] *The Trail Smelter Case, United States v. Canada*, 1941, U.N. Rep. Int'l Arb. Awards, 1905, 1938, (1949).
[86] *Barcelona Traction, Light and Power Company, Ltd.*, I.C.J. Reports 1970, p.3, at p. 32, par. 33.
[87] *Corfu Channel*, Merits, I.C.J. Reports 1949, p.4 at pp. 22-23; *See also* International Law Commission Commentaries, Part I, Chapter I, Article I, "Responsibility of a State for its International Wrongful Acts", *supra* at pp. 63-67. In *Corfu Channel*, the Court held, that every State has an obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States. The Court ruled, however, that knowledge of an unlawful use of State territory is not ipso facto imputable to a State merely because of a State's general exercise of control over that territory. In the *Corfu Channel* case, indirect evidence, "based on a series of facts linked together and leading logically to one conclusion" showed that, the State of Albania kept constant watch over its territorial waters,

and consequently, that it must have been aware of the presence of mines in its harbor. Since Albania knew, or should have known, of the mine laying in its harbor and of the danger to approaching British destroyers, the Court held that, Albania's failure to warn them of such danger made them responsible for the damage suffered by the British destroyers as a result of such omission to act.

[88] *See* "Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights", I.C.J. Reports 1999, p. 62, at p.87, para. 62; *See* "The International Law Commission Commentaries", Part I, Article 4, *supra* at pp.84,86; 90-91.

[89] *Id.*

[90] See International Law Commission Commentaries", Part I, Chapter II, Article 7, supra at pp. 99-103. The Commission distinguishes between situations in which officials acted in their capacity as such, albeit unlawfully or contrary to instructions, and those where the conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals, not generally attributable to the State. Id., at p.102.

[91] However, establishing conclusively such a direct connection at the time an armed response is contemplated, is not as clear-cut as it may appear, especially where an aggressor State's covert operatives are involved. Two cases, in fact, suggest just the opposite. Although the remaining defendant in the case of the 1988 bombing of Pan Am Flight 103 over Lockerbie, Scotland, was found guilty of the bombing, and was believed to have acted in his capacity as an officer within the Libyan Intelligence Service, Libya has officially denied its involvement and has not yet accepted legal responsibility for his acts. In fact, Libya's Khadafi did not turn over the suspects until 1999 (eleven years after the incident), as part of a U.N. deal to temporarily suspend economic sanctions. Similarly, the Kuwaiti arrests of seventeen persons alleged to have been involved in the failed April 1993 assassination attempt on the life of former President George Bush, has yet to give rise to Saddam Hussein's admission of legal responsibility for such a plot. And, even though Saddam Hussein has continued to deny any involvement in that attempt, the U.S. officially continues to assert that there exists enough 'credible' evidence to prove that Hussein was indeed responsible. The fact that such evidence could not satisfy the 'beyond a reasonable doubt' burden of proof required under U.S. criminal law did not have much bearing on the international community's view toward this case; in fact, it did not seem to matter. Notwithstanding this official position, following a Scottish Appeals Court's February 2002 dismissal of the defendant's appeal, Libya, on August 8, 2002, officially announced to British Foreign Office Minister, Michael O'Brien, its "initial readiness" to pay compensations to the victims of Pan Am Flight 103, and to shoulder 'responsibility' for the event. This willingness to admit responsibility, however, is believed to be motivated by the desire to have the U.N. finally lift economic sanctions imposed upon Libya during January and March 1992, pursuant to Security Council Resolutions 731 and 748. See "Libya Considers Lockerbie Responsibility: First of a Kind U.K. Meeting", ArabicNews.com, 8/8/02, at: (http://www.arabicnews.com/ansub/Daily/Day/020808/2002080805.html); "Libya Ready to Pay for Lockerbie", CNN.com, 8/8/02, at: (http://www.cnn.com/2002/WORLD/meast/08/08/libya.uk/index.html); See also "Lockerbie Appeal Begins", BBC News, 1/23/02, at: (http://news.bbc.co.uk/1hiworld/1776846.stm); "UN Monitor Decries Lockerbie Judgment", BBC News, 3/14/02, at: (http://news.bbc.co.uk/1/hi/world/1872996.stm). The Clinton Administration relied on such information to justify its firing of twenty-three Tomahawk cruise missiles at Baghdad on June 26, 1993. Kuwaiti intelligence information, an F.B.I. report and subsequent C.I.A. interviews, notwithstanding, an article was subsequently written in the November 1993 issue of New Yorker Magazine alleging, contrary to government allegations, that no such 'clear' evidence based on a 'beyond a reasonable doubt' evidentiary standard ever existed. See Seymour Hersh, "A Case Not Closed", New York Times, 11/1/93, at: (http://www.newyorker.com/archive/content/?020930fr_archiveo2). In fact, the veracity of this position continues to be accepted within the congressional intelligence community as well. See: CRS Report for Congress, "Terrorism: Near Eastern Groups and State Sponsors, 2002, updated February 13, 2002, Order Code RL31119, at p.CRS-35; These situations contrast with the evidence the Reagan Administration was able to gather attributing the 1986 Berlin discotheque bombing first to Libyan nationals and then to the Libyan government. Because the evidence was not disclosed to the international community at the time of the U.S. response (presumably for national security reasons), the U.S. action was strongly condemned by the international community. In fact, a Security Council resolution condemning the action was tabled but later vetoed by the U.S., the U.K. and France. However, when decoded transcripts were later disclosed by the U.S. in 1997, they resulted, on November 13, 2001 (fifteen years after the

event), in the convictions of four people, including one Libyan diplomat and one Libyan embassy worker, thereby establishing that Libya ordered the bombing. See Beard, supra at p.561, fn4.

[92] See International Law Commission, Commentaries, Part I, Chapter II, Article 8, supra at p.103.

[93] The Court noted that according to Nicaragua, the contras are no more than bands of mercenaries which have been recruited, organized, paid and commanded by the Gov't of the U.S. (114). The Court took the view that "U.S. participation, even if preponderant or decisive, in the financing organizing , training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operations, is still insufficient in itself, on the basis of the evidence, for the purpose of 'attributing' to the U.S. the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua". (for State Responsibility purposes of establishing liability) Nicaragua at par. 115.

[94] The 'degree' of control of the contras by the U.S. Government was relevant to the claim of Nicaragua attributing responsibility to the U.S. for activities of the contras. (par.113). All of the forms of U.S. participation mentioned above, and even the 'general' control by the U.S. over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the U.S. 'directed' or 'enforced' the perpetration of the acts.

[95] The range in degree of association can be vast: from terrorist acts performed by state officials, to direct sponsorship of terrorist groups, to state supply of financial and logistical support to groups, to state acquiescence to or toleration of, the presence of terrorist bases on its soil, to tacit or merely rhetorical support, and finally to the presence of terrorists within a state's territory without its consent. See Sara N. Scheiderman, Note: "Standards of Proof in Forcible Responses to Terrorism", 50 Syracuse L. Rev. 249 (2000) at p. 261, quoting Antonio Cassesse, "The International Community's 'Legal' Response to Terrorism", 38 International & Comparative Law Quarterly, 589, 598-599 (1989), and John F. Murphy, supra State Support of International Terrorism: Legal, Political and Economic Dimensions, 32-33 (1989).

[96] See: International Law Commission, "Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts", 53rd Sess., (Nov. 2001) at Chapter II, Art. 11, par. 3 at p.119.

[97] Id., at par. 6 at p.121. As explained by the International Law Commission, "the language of 'adoption' carries with it the idea that the conduct is acknowledged by the State as, in effect, its own. The term 'acknowledges and adopts' makes it clear that what is required is something more than a general acknowledgement of a factual situation, but rather that the State identifies the conduct in question and makes it its own". The phrase "acknowledges and adopts the conduct in question as its own" is intended to distinguish cases of acknowledgement and adoption from cases of mere support or endorsement. The attacks that occurred in this case were committed by independent persons residing within the 'host-adopting' State and took place only within the 'host-adopting State's borders. It is arguable, however that, this same principle could apply where: 1) the attacks committed by independent terrorists residing within a 'host-adopting' State take place within the territory of another State; and 2) the 'host-adopting' State officially embraces the general grievances and objectives (the ends sought) of the terrorist group as representing an extension of the State's foreign policy goals. At the very least, it could be presented as further evidence that that State knew or should have known about such dangerous conduct, within the meaning of the Corfu Channel case. Ibid at par. 6. The Diplomatic and Consular Staff case provides an example of subsequent adoption by a State of particular conduct. There the Court drew a clear distinction between the legal situation immediately following the seizure of the U.S. embassy and its personnel by the militants, and that created by a decree of the Iranian State, which expressly approved and maintained the situation. United States Diplomatic and Consular Staff in Teheran, I.C.J. Reports 1980, p.3. "The policy thus announced by the Ayatollah Khomeini, of maintaining the occupation of the Embassy and the detention of its inmates as hostages for the purpose of exerting pressure on the U.S. Government was complied with by other Iranian authorities and endorsed by them repeatedly in statements made in various contexts. The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State." Id., at p.35, par. 74, cited by the International Law Commission at pp. 120-122. It should be noted, furthermore that, in that case, it made no difference whether the effect of the "approval" of the conduct of the militants was merely prospective, or whether it made the Islamic Republic of Iran responsible for the whole process of seizure of the embassy and detention of its personnel ab initio. The Islamic Republic of Iran had already been

held responsible in relation to the earlier period on a different legal basis, namely, its failure to take sufficient action to prevent the seizure or to bring it to an immediate end. Id., at pp. 31-33, pars. 63-68.

[98] This seems to reaffirm that there is nothing in Article 51 of the U.N. Charter that requires the exercise of self-defense to turn on whether an armed attack was committed directly by another State. Indeed the language used in Article 2(4) which speaks of a use of force by one "Member" against "any State", is not repeated in Article 51. Rather, Artice 51 is silent on who or what might commit an armed attack justifying self-defense. See Sean Murphy, "Terrorism and the Concept of 'Armed Attack' in Article 51 of the U.N. Charter", supra at p.50.

[99] Resolution 1368, par. 4.

[100] Id.

[101] Resolution 1368, par. 5. (See: Res. 1368; 1373; 1377).

[102] Resolution 1368, Preamble; See also Beard, supra at p.580, 581; Thomas Franck, Editorial Comments: "Terrorism and the Right of Self-Defense", supra at pp. 839-840. According to Franck, Resolution 1368's classification of such actions as "a threat to international peace and security", "signifies a decision to take 'measures…in accordance with Articles 41 and 42, to maintain or restore international peace and security'. Such measures under Article 39 of Chapter VII were in fact taken sixteen days later when it adopted Res. 1373, and still later adopted Res. 1377 both of which addressed international terrorism". Franck thinks "it is inconceivable that actions the Security Council deems itself competent to take against a non-State actor under Articles 41 and 42 in accordance with Article 39, should be impermissible when taken against the same actor under Article 51 in exercise of a state's 'inherent right' of self-defense. If the Council can act against Al Qaeda, so can an attacked State". Id., at p.840.

[103] See Beard, supra at p.580.

[104] *S.C. Res. 748, U.N. SCOR 47th Sess., 3063rd mtg. at 52, U.N. Doc. A/40/53 (1985).*

[105] See *Beard*, supra *at p.581, citing S.C. Res. 1189, U.N. SCOR, 52nd Sess., 3915th mtg. at 110, U.N. Doc. S/RES/1189 (8/13/98). This resolution condemned the terrorist bombings against the U.S. embassies in Nairobi, Kenya, and Dar-es-Salaam, Tanzania.*

[106] *Id*., at pp. 581-82, citing G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28 at 122, U.N. Doc. A/8018 (1970); G.A. Res. 40/61, U.N. GAOR, 40th Sess., Supp. No. 53, at 302, U.N. Doc. A/40/53 (1985); G.A. Res. 49/60, U.N. GAOR, 49th Sess., Supp. No. 49, at 304, U.N. Doc. A49/743 (1994) otherwise known as the "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).

[107] *See* Thomas M. Franck, *supra* at p.840.

[108] Id., at p. 842. According to Franck, "as a matter of strategic practice, any attacked State is very likely to make an intense effort to demonstrate the culpability of its adversary, limited only by inhibitions regarding the operational effect of sharing intelligence methods. As a matter of law, however, there is no requirement whatever that a State receive the blessing of the Security Council before responding to an armed attack". Id., at p.843.

[109] As had occurred in the days and weeks following the September 11th attacks, the U.S. initially contacted NATO's North Atlantic Council, and asked to consider invoking Article 5 of the NATO Charter. It then, for national security reasons, proceeded to present to the Council intelligence it had accumulated between September 12, and October 1, 2001. On that latter date, NATO Secretary General Lord Robertson reported that the U.S. had presented to the NATO Council "compelling" and "conclusive" evidence that the attacks were the work of Al Qaeda, protected by the Taliban, and that invocation of [the collective defense provision] (Article 5) of the NATO Charter was therefore confirmed". See Thomas Franck, supra at p.842.

[110] "It is reductio ad absurdum of the Charter to construe it to require an attacked State automatically to cease taking whatever armed measures are lawfully available to it whenever the Security Council passes a resolution invoking economic and legal steps in support of those [armed] measures". *Id*., at p. 842.

[111] *See* Sean Murphy, *supra* at p. 45-46, fn 25-28.

[112] Id., at pp. 47-48. In the context of the events that took place on September 11, 2001, such an analysis would proceed as follows: "First, the scale of the incidents was certainly akin to that of a military attack. The destruction wrought was as dramatic as the Japanese attack on Pearl Harbor on December 7, 1941--the complete destruction of the twin towers in the heart of the U.S. financial center and severe damage to the nerve center of the U.S. military.

Further, the death toll from the incidents was worse than Pearl Harbor. The repercussions from the incidents were severe, ranging from intense fear across the U.S. to the temporary halt to all civilian air traffic, to the closure of the NY Stock Exchange for six days. Even after it reopened, the U.S. stock market experienced the largest point drop in its history. Second, the U.S. immediately perceived the incidents as akin to that of a military attack. The president declared a national emergency and called to active duty the reserves of the U.S. armed forces. On September 18, 2001, the Congress adopted a joint resolution authorizing the president to use 'all necessary and appropriate force against those nations organizations or persons he determines planned, authorized, committed, or aided the terrorist acts that occurred on September 11'. The U.S. also reported to the U.N. Security Council that it was the victim of armed attacks by Al Qaeda which were made possible by the Taliban and that the U.S. was responding in self-defense…Third, [t[he U.S. interpretation of the incidents as an armed attack was largely accepted by other nations. While the two Security Council resolutions did not authorize the use of force by the U.S., they both affirmed, in the context of the incidents, the inherent right of individual and collective self-defense and the need to "combat by all means" the "threats to int'l peace and security caused by the terrorist acts". Also, the North Atlantic Council agreed to consider and later invoked Article 5 of the Washington Treaty, after having reviewed evidence proffered by the U.S., which it considered as proving that an armed attack had occurred against the U.S…Also the Organization of American States deemed the incidents as 'armed attacks' and as invoking the Rio Treaty of reciprocal assistance. And, the international community largely supported the U.S. strikes in Afghanistan against the Taliban and Al Qaeda. Id.

[113] Legality of the Threat or Use of Nuclear Weapons, I.C. J. Reports 1996, at par.1, citing GA Res. 49/75 (12/15/94).

[114] *Id*., at par. 105(2)(E). And, the Court unanimously ruled that, "there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control. *Id*. at par. 105(2)(F).

[115] *Id*., at par. 105(2)(C). It also unanimously ruled that, "a threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, and in particular, the principles and rules of humanitarian law". *Id* at par. 105(2)(D).

[116] It noted that the purpose of such a signal is to lessen or eliminate the risk of unlawful attack.

[117] "The notions of "threat" and "use" of force under Article 2(4) of the Charter stand together in the sense that if the use of force itself in a given case is illegal…the threat to use such force will likewise be illegal…Thus it would be illegal for a State to threaten force to secure territory from another State, or to cause it to follow or not follow certain political or economic paths." *Id*. at par. 47.

[118] *Id*. at par. 48

[119] *Id*.

[120] *Id*.