Colloquy

The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan

Jules Lobel†

I. INTRODUCTION

On August 20, 1998, the United States fired Tomahawk missiles at sites in Afghanistan and Sudan. The missile strikes destroyed the El Shifa pharmaceutical plant located in Sudan’s capital, Khartoum. The United States also targeted training facilities in Afghanistan believed to be under the control of Osama bin Laden, the man depicted by the Clinton Administration as the “terrorist mastermind” behind the August 7, 1998 bombings of the American embassies in Nairobi, Kenya, and Dar es Salam, Tanzania.

The United States promptly notified the Security Council that the military strikes were legally justified as measures taken in self-defense, under Article 51 of the United Nations Charter.1 President Clinton stated that the United States had “convincing evidence” that bin Laden was behind the embassy bombings and had planned to attack other American targets in the immediate future.2 Administration officials claimed that the Sudan factory “was producing chemical warfare-related weapons” and was linked to bin Laden’s terrorist network.3

The Security Council did not meet publicly to evaluate the U.S. military action, as it did in 1986 and 1993 when the United States launched air strikes in response to the alleged terrorist acts and plots of Libya and Iraq.4 Thus far,

† Professor of Law, the University of Pittsburgh. I wish to thank my research assistants Neelie Shreiber and John Monocello for their valuable research assistance and the staff at the Document Technology Center at the University of Pittsburgh for their technical support.

the United States has successfully blocked Sudan’s efforts to initiate a Security Council fact-finding investigation of the U.S. claim that the El Shifa plant had produced a precursor of lethal VX gas.5

International reaction to the U.S. action was mixed and muted. Most U.S. allies, including Britain, Germany, Australia, New Zealand, and Israel, supported the attacks.6 France and Italy issued tepid statements of support.7 Russian President Boris Yeltsin condemned the attacks, as did Pakistan and several Arab countries.8 China, although equivocal at first, later openly criticized the U.S. action.9 The Non-Aligned Movement condemned the U.S. attack as “unilateral and unwarranted.”10 Finally, in September, U.N. Secretary-General Kofi Annan criticized “individual actions” against terrorism, implying his disapproval of the August 20 missile strikes.11

The missile strikes on targets in Sudan and Afghanistan renew the important legal question regarding a nation’s right to use force in response to a terrorist attack pursuant to Article 51, an issue that has been extensively debated in legal journals since the 1980s. Yet the August 20 missile strikes raise the equally important, but far less analyzed, questions of how, and under what evidentiary standard, nations and scholars are to assess the factual allegations upon which the use of force against terrorism is premised.

Questions involving the standards and mechanisms for assessing complicated factual inquiries are generally not accorded the same treatment given by the legal academy to the more abstract issues involved in defining relevant international law standards. Unfortunately, international incidents generally involve disputed issues of fact, and in the absence of an international judicial or other centralized fact-finding mechanism, the ad hoc manner in which nations evaluate factual claims is often decisive. At the heart of the questions surrounding the August 20 missile strikes—particularly in the case of Sudan—is the credibility of the U.S. assertions of fact. The U.S. government’s factual assertions were openly challenged by Sudan and questioned by the U.S. press, some Administration officials, and other countries. The August 20 missile strikes thus raise the following questions:

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7. See id.


10. Id.

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1. Is a country that unilaterally uses force required to submit the proof upon which it relies to some international forum?
2. What degree of factual certainty ought a nation have before it can attack another nation?
3. What are the implications for international law of permitting a nation to unilaterally use force based on its self-described factual claims where: (a) the state makes its own unilateral characterization of the facts; (b) there is no court or other centralized authority to evaluate those claims; and (c) the evidence is secret and cannot be compelled?

The changing nature of warfare in the latter half of the twentieth century highlights the international community’s need to develop rules and mechanisms to address the factual assertions upon which a nation employs armed force. The U.N. Charter-based rules were designed for a world where warfare primarily involved the large scale attack by one nation against the territory of another, as occurred in World War I and World War II. The rise of internal conflict and of private non-state actors in post-World War II conflict\(^\text{12}\) raises questions not only about the legal definitions of armed attack and self-defense, but also the factual premises such warfare involves. Claims that a nation has unlawfully and covertly intervened on behalf of one side in a civil war, or has secretly aided a terrorist organization in launching its attacks, raise complex factual issues that are often not present where one nation openly attacks another. Modern warfare thus calls for increased attention to the fact-finding and evaluating standards and mechanisms employed by the international community and nation-states. This Comment will address these questions. I argue that international law cannot allow a nation to attack another based on a self-serving, unilateral characterization of facts not subject to multilateral investigation. Any contrary rule renders the U.N. Charter’s proscription of the non-defensive unilateral use of force a nullity.

Part II examines the traditional and revisionist interpretations of the Charter’s rules on the use of force and the application of these rules to the problem of using force in response to terrorist attacks. Part III analyzes the factual claims the United States made in legally justifying the August 20 missile attacks, focusing particularly on the attack on Sudan. I conclude that the most troubling aspect of those attacks was not the legal rules the Clinton Administration asserted, but the manner in which it treated the factual premises underlying its legal justification. Part IV argues that it is necessary for nations to employ a higher evidentiary standard than that used by the United States to attack Sudan before a state responds to a purported terrorist attack with force. It also challenges the United States’s assertion that multilateral fact-finding and review are unessential to render a forceful

response to a terrorist attack lawful. My general claim is that any relaxation or redefinition of the U.N. Charter's legal rules to address the problem of terrorism must be accompanied by greater international scrutiny of the factual basis of forceful responses to terrorism. Part V questions the alleged military and political efficacy of armed responses to terrorism. Part VI concludes that the international community's failure to seriously protest the August 20 missile attacks does not reflect the emergence of any new legal principle or expansion of self-defense permitted by Article 51, but rather an acquiescence to the power of the world's sole remaining superpower.

II. THE LEGAL STANDARDS

The United Nations Charter prohibits the use of force except when authorized by the Security Council or when undertaken by individual nations in self-defense and in response to "an armed attack." Moreover, as a general matter, the United Nations has sought to limit the Article 51 self-defense exception to prevent its misuse. First, Article 51 permits only those actions taken in self-defense; reprisals and retaliations are proscribed under the U.N. Charter. In other words, a nation can respond to an ongoing attack, including one waged by a terrorist organization, by using force. However, that nation may not forcibly retaliate against another in response to an unlawful act that the latter committed against the former in the past. The reasoning behind this rule is simple: a nation subject to an ongoing attack cannot be expected to wait for the international community's aid before fighting back. Obviously, when a nation is under attack, immediate action is necessary. On the other hand, a nation whose citizens are no longer being attacked must seek U.N. intervention; to allow military reprisals would be to encourage the renewed use of force. This would result in a spiraling escalation of violence. Thus, the U.S. government, most state actors, the U.N. Security Council, and the International Court of Justice have officially taken the position that armed reprisals are outlawed.

A second limitation on the self-defense exception is that not all uses of force qualify as "armed" attacks. As the International Court of Justice

13. See U.N. CHARTER art. 2, para. 4 & art. 51.
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concluded in Nicaragua v. United States, only a substantial military attack, and not isolated armed incidents, rises to the level of an "armed attack." 17

Third, not all aid provided by a state to terrorists will render that state complicit in an armed attack carried out by those terrorists. The court in the Nicaragua case determined that although the provision of arms or other forms of aid by one government to guerrillas could be considered an unlawful use of force, it would not necessarily constitute an "armed attack" upon the other. 18

This would suggest that a government could not launch counterattacks against terrorist bases in another state unless the terrorists were agents of the state or were controlled by its government. The court, in dicta, suggested that the attacked state—though not its allies—could take proportionate and necessary countermeasures. 19

Finally, governments cannot lawfully use force to respond to terrorist threats that do not rise to the level of an armed attack, at least unless those threats are widespread and imminent. 20 The Charter thus seems to preclude any open-ended use of anticipatory self-defense; the unanimous Security Council condemnation of the 1981 Israeli attack on the Iraqi nuclear reactor at Osrig reinforces this proscription. 21

Despite this traditional, restrictive scheme designed to narrowly limit a nation's right to use force in self-defense, various scholars have argued for a more expansive view of a nation's military options in fighting terrorism. 22 The driving force behind that argument is the perceived political and military desirability of employing force against terrorists. Former Legal Advisor to the State Department Abraham Sofaer has argued that "[s]elf-defense allows a proportionate response to every use of force, not just 'armed attacks.' " 23

Sofaer also claims that any aid given by a state to terrorists—for instance, allowing terrorist groups to use its territory—renders that state complicit and subject to attack. 24 Finally, Sofaer argues that "[d]efensive measures may be taken to pre-empt attacks, as in Sudan, where necessary for deterrence." 25

Thus, a nation suspecting that a terrorist group is planning future, unspecified attacks against it would be justified in using military force against that group and any country knowingly harboring it.

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18. See id. at 93–94.
19. See id. at 117. The court did not articulate whether those countermeasures could include the use of force.
Although Sofaer’s viewpoint is not the publicly articulated policy of many nation-states, some have argued that, as a practical matter, governmental elites tolerate forceful reprisals despite the formal strictures of the U.N. Charter. Professor Michael Reisman uses the U.S. missile raid on Baghdad in 1993 to illustrate this point. Reisman notes that while the United States sought to characterize the raid (in response to the alleged assassination attempt on President Bush) "as an act of self-defense, the raid fits at least as comfortably, if not more so, under the classic rubric of reprisal."\(^\text{26}\) He claims that this practice of characterizing military actions as lawful exercises of self-defense, whenfactually they are reprisals, illustrates an emerging code that implicitly accepts the use of forceful countermeasures.\(^\text{27}\) His broader claim, adopted by some like-minded scholars, is that whatever the justification employed, nations such as the United States are in practice maintaining the option to use force unilaterally in a wider set of circumstances than those suggested by the narrow strictures of Article 51.

Those who argue for the broad right of states to use force unilaterally against terrorists point to the world community’s normative value of deterring, eradicating, or at least reducing terrorism. Nevertheless, 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 and must immediately respond with force. The alternative would be an anarchic escalation of violence in which any nation could unilaterally employ military force to punish a wrongdoer. For example, such a regime would allow Holland to attack France for blowing up the Rainbow Warrior in 1985 and killing Dutch citizens. Cuba could attack the United States in response to its attempts to assassinate Fidel Castro. Libya could retaliate for the U.S. attempt on Muammar al-Qaddafi’s life in 1986.

Second, the Article 51 requirement of an ongoing armed attack serves as a restraint against uses of force based on pretext, misunderstanding, and erroneous factual determinations. In other words, that requirement serves as an evidentiary standard proscribing the use of force in situations where both the threat to national security and the source of that threat is less than clear, limiting the authorized use of force to a class of situations in which there is a relatively easily verifiable factual predicate for the use of retaliatory force. As Professor Henkin has noted, the United Nations “recognize[s] the exception of self-defense in emergency, but limit[s] [it] to actual armed attack, which is clear, unambiguous, subject to proof, and not easily open to misinterpretation or fabrication.”\(^\text{28}\)

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\(^{27}\) See REISMAN & BAKER, supra note 16, at 102.

\(^{28}\) LOUIS HENKIN, HOW NATIONS BEHAVE 142 (2d ed. 1979) (emphasis added).
When one nation attacks another, the factual predicate for self-defense is clear and observable. That is usually not the case where a nation claims the right to use force in response to alleged terrorist attacks and imminent threats thereof. It is untenable for international law to permit one nation to attack another merely because it alone claims that a group operating in the other country is launching terrorist attacks against it. Such a rule would obliterate the prohibition against the use of force, as unsubstantiated claims by a single state would become the new legal predicate for the use of force. Those who urge a looser interpretation of Article 51 have yet to prescribe a viable method of ensuring that self-serving characterizations of facts are subject to some clear legal standard and international oversight. The August 20 missile attacks on Afghanistan and Sudan highlight this problem.

III. THE FACTUAL PREDICATES OF THE AUGUST 20 ATTACKS

The Clinton Administration sought to justify the August 20 missile strikes as self-defense in response to an armed attack under Article 51. If one accepts the Administration’s factual claims—that bin Laden’s network was responsible for the embassy bombings and other prior bombings, that bin Laden had publicly issued a fatwa calling for more attacks on American civilian and military targets, and that the Administration had evidence that he was indeed planning further attacks—one could conclude that bin Laden was engaged in an ongoing armed attack against the United States. The Administration’s assertions of fact, if true, could thus give rise to a right of self-defense. Such a right would permit the United States to take necessary and proportionate countermeasures, including the use of force to prevent such future attacks.

The Sudan attack is legally more difficult to justify, even assuming the Administration’s facts to be true. The United States has not claimed that bin Laden used chemical weapons, or that he was going to use them imminently,
or that the El Shifa factory was producing chemical weapons. Moreover, the United States has historically rejected a broad right of anticipatory self-defense: "In contrast to an attack on a terrorist base in self-defense, the United States opposes peacetime attacks on a state's facilities on the mere possibility that they may someday be used against the attacking country." The Clinton Administration cannot rely on the theory of anticipatory self-defense to justify the missile attack on the factory.

The Administration thus attempted to set forth a justification of self-defense that was not based on anticipatory self-defense. It claimed that the factory was linked to or controlled by bin Laden's network, that it was producing nerve gas precursors, and that bin Laden was engaged in a systematic terror campaign against the United States. If these propositions could be proven, the United States could conceivably justify the attack as one targeting an instrumentality of bin Laden's terror network that, in turn, was engaged in an armed attack against the United States. The main problem with the Clinton Administration's argument is not its theory of self-defense per se, but rather its faulty factual premises.

The attack on the El Shifa factory was predicated upon three critical assertions of fact. First, the Administration claimed that the plant did not produce any medicines and was a heavily guarded chemical weapons facility. After the attack, officials quickly backed away from that claim, acknowledging that at the time of the missile strikes they were unaware that the factory did in fact produce pharmaceuticals and that it was unguarded. Indeed, it subsequently became clear that the El Shifa plant was the major pharmaceutical producer in Sudan and was visited routinely by foreign dignitaries, school children, visiting Americans, and representatives of the World Health Organization.

Second, Secretary of Defense William Cohen claimed that bin Laden had a clear financial interest in the El Shifa plant. As it turned out, the Administration did not know that Salah Idris, a Sudanese businessman with no obvious ties to bin Laden, had purchased the plant several months before the

attack. While the Administration has subsequently attempted to tie Idris to bin Laden, any connection remains highly speculative.

The Administration proffered a third factual argument, supposedly the "smoking gun," to make its case: A soil sample collected from the ground outside the factory was found to contain the chemical EMPTA. Officials have stated that EMPTA's only known use was as a precursor ingredient in the nerve gas VX. That evidence, however, has been called into question.

While the U.S. claimed that EMPTA is an immediate chemical weapons precursor with no recognized chemical use, several subsequent reports dispute that claim. First, the Organization for the Prohibition of Chemical Weapons (OPCW), the international group overseeing the treaty prohibiting chemical weapons, lists EMPTA as having possible commercial uses; other independent experts similarly concluded that EMPTA could have lawful applications. Moreover, some experts suggested that EMPTA's chemical structure resembled that of an agricultural insecticide known as FONDOS, and that a laboratory test could confuse the two.

Questions have also arisen about the soil sample itself. Intelligence reports on Sudan are notoriously suspect. In fact, the United States admits it withdrew over one hundred intelligence reports on Sudan because there were reasons to believe they were fabricated. The soil sample could have been similarly fabricated. A senior OPCW inspector familiar with EMPTA explained that due to the chemical's highly reactive nature, it is unlikely that unaltered EMPTA could be found in a ground sample. The inspector argued, "The only way this material could be in the ground is if somebody had emptied a flask ... and then taken a sample." Moreover, a team of scientists was hired by a prominent Washington law firm with ties to the Democratic Party to determine whether EMPTA was present on the factory grounds. The scientists conducted an extensive analysis and concluded that "to the practical limits of scientific detection, there was no Empta or Empa" in the plant's breakdown product.


38. See Atlas & Moseley, supra note 34. U.S. officials now claim that Mr. Idris is a protégé of the chairman of the National Commercial Bank of Saudi Arabia, whose sister is married to bin Laden. See Pearl, supra note 37, at A1.


42. Hersh, supra note 35, at 40.

43. James Risen & David Johnston, Experts Find No Arms Chemicals at Bombed Sudan Plant, N.Y. TIMES, Feb. 9, 1999, at A3. The team was headed by the chairman of the chemistry
As for the purported link between Salah Idris, the factory’s owner, and bin Laden, an international security company hired by Mr. Idris’s Washington lawyers found no evidence of any direct link between the two. The White House, however, was not persuaded by any of this new evidence.

Other reports also contradicted the American assertion that the El Shifa plant was a chemical weapons factory. An American engineer who designed the factory claimed that it was designed solely for producing pharmaceuticals and did not have the facilities or equipment for making nerve gas. Several Jordanian engineers and a British engineer who was the technical manager at the plant concurred, as did the German ambassador to Sudan and the Italian supplier of the factory. Even some Administration officials realized that the evidence was unconvincing, as have officials from nations closely allied to the United States.

Despite this host of questions, the United States has consistently stood by its version of the facts and rebuffed requests from Sudan and other countries for a Security Council investigation. American officials have responded to such questions by claiming that there was irrefutable evidence that the plant was producing EMPTA.

While the administration sees no reason for an independent investigation, some Americans, including former President Jimmy Carter, support such measures. Even Abraham Sofaer, former Legal Advisor to President Reagan, wrote that it is “disturbing . . . that the defense secretary announced (on the basis of erroneous intelligence) that the factory in Sudan did not make pharmaceuticals, and that the Clinton Administration has been unwilling to participate in a thorough evaluation of its factual premises concerning the plant.”

The Sudan missile strike thus highlights the fundamental dilemma of the claimed right of nations to use force unilaterally against terrorists. Who

department of Boston University. See id.

44. See id.
45. See id.
46. See Ibrahim et al., supra note 39; Pearl, supra note 37.
49. See Colum Lynch, Allied Doubts Grow About U.S. Strike on Sudanese Plant, BOSTON GLOBE, Sept. 24, 1998, at A2 (noting assertions by French and Italian foreign ministers, as well as British and German officials, that the evidence is less than convincing). Senior British officials reportedly have privately expressed “dismay and anger” over the missile strikes. See id.; see also Carter Urges Inquiry Into U.S. Raid on Sudan, N.Y. TIMES, Sept. 18, 1998, at A4 (noting the assertion of former President Carter that British, German, and other foreign leaders “were increasingly skeptical of American assertions about the [Sudan] factory”).
52. Sofaer, supra note 23.
The Use of Force determines the scope of responsibility for a terrorist attack, using what kind of evidentiary standard, and subject to what international oversight? The United States government's position on the destruction of the El Shifa factory is that it alone can characterize and review the facts without multilateral or independent review by other member nations of the United Nations. International investigation is unnecessary because the U.S. believes that "we have credible information" justifying the strikes, even if much of the world disagrees. The U.S. action is subject to the same criticism set forth by Professor Henkin in his discussion of the Baghdad raid of 1993; it is "a unilateral action by a state on its own decision, on the basis of its own findings of undisclosed facts, of its own characterization of those facts, and its own interpretation of applicable legal principle."53

The U.N. Charter requirement that self-defense be used solely to counter an ongoing armed attack reflects an evidentiary presumption that a nation may use force only when the facts it relies on are clear and unambiguous. A regime which, as a practical matter, allows the recent missile strikes against Sudan reverses this evidentiary presumption. 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 U.N. Charter is rendered virtually meaningless.

IV. INTERNATIONAL EVALUATION OF EVIDENCE

A. The Evidentiary Threshold

Given the potential for abuse of the right of national self-defense, 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. Such a principle is the clear import of the International Court of Justice's decision in Nicaragua v. United States. From this decision, it can be discerned that a military response to a terrorist attack should at a minimum require: (1) that the nation 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) that the facts relied upon be made public; and (3) that the facts are subject to international scrutiny and investigation. None of these three requirements were met in the missile attacks on Sudan and Afghanistan.

United States officials have for some years urged that the requirement of reaching reasonable factual certainty before force is employed be discarded or watered down in the context of fighting against terrorism. Secretary of State George Schultz argued in 1984 that the United States must be ready to use military force to fight terrorism and retaliate for terrorist attacks even before

all the facts are known.\textsuperscript{54} Similarly, Abraham Sofaer has claimed that in the interest of national security, the United States must use force when responding to terrorism even if our claims cannot "be proved in a real court or in the court of public opinion."\textsuperscript{55} While the Charter regime attempts to limit the unilateral use of military power to cases of clear self-defense, Schultz argued that "we do not have the luxury of waiting until all the ambiguities have disappeared."\textsuperscript{56}

The Clinton Administration, following in the footsteps of the Reagan White House, has evinced a consistent disregard for evidentiary showings, preferring to "act now and talk later." In 1993, when the Kuwaiti government allegedly uncovered an Iraqi plot to assassinate President Bush, President Clinton announced that the United States would postpone any response until the facts were established in the criminal trials in Kuwait City.\textsuperscript{57} Nonetheless, before those trials ended, U.S. warships fired twenty-three Tomahawk cruise missiles at Iraqi intelligence headquarters in Baghdad.\textsuperscript{58}

The Sudan and Afghanistan attacks reflect a similar willingness to use military might before the facts have been established. Attorney General Janet Reno was reportedly disturbed that the Administration had not accumulated clear evidence of a link between bin Laden and the projected targets.\textsuperscript{59} Furthermore, the attacks on bin Laden's camps in Afghanistan were undertaken while the FBI investigation was still in its preliminary stage.\textsuperscript{60} Indeed, Reno apparently urged the White House to delay the raids so that the FBI could gather more evidence linking bin Laden to the embassy bombings. Seymour Hersh has reported that Justice Department officials say they understood that Reno warned the White House that it was not clear, based on the information then available, that the United States had enough evidence against bin Laden to meet the standards of international law.\textsuperscript{61} The attack on Afghanistan and Sudan reflects an even more watered-down factual standard than that employed by the Reagan Administration. As a Justice Department official explained, the Attorney General believed that the evidence tying bin Laden to the embassy bombing did not meet the Tripoli standard—a reference to the 1986 air strike against Libya.\textsuperscript{62}

\textsuperscript{55} Sofaer, supra note 22, at 105.
\textsuperscript{56} George Schultz, Low Intensity Warfare, the Challenge of Ambiguity, 25 I.L.M. 204, 205 (1986).
\textsuperscript{57} See Reisman, supra note 26, at 120–21; U.S. Delays Any Revenge Against Iraq, Chl. Trib., June 8, 1993, at 9.
\textsuperscript{58} U.S. officials did conduct what they described as an extensive investigation into the alleged plot. See Official Recounts Probe of Iraqi Plot, Minneapolis Star Trib., June 29, 1993, at 1A.
\textsuperscript{59} See Hersh, supra note 35, at 36.
\textsuperscript{60} See FBI Director Says Investigation Into Bombings Is Preliminary, Baltimore Sun, Aug. 22, 1998, at 98 (noting FBI Director Freeh's declaration that he had come to "no final conclusions" about who was responsible for the embassy bombing).
\textsuperscript{61} See Hersh, supra note 35, at 36.
\textsuperscript{62} See id. at 38.
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Thirteen years ago, after it had ordered the raid on Tripoli, the Reagan Administration proffered the following evidence to the U.N. Security Council in attempting to justify the attack as a measure taken in self-defense:

1. Cable intercepts of messages 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.\(^6\)

Notwithstanding this alleged evidence, world reaction generally condemned the U.S. raid. The Security Council voted nine to five to condemn the U.S. action, with the United States, Britain, and France vetoing the resolution; the General Assembly favored condemnation by a vote of seventy-nine to twenty-eight.\(^6\)

Despite this aftermath of condemnation in 1986, the evidence presented in support of the August 20 raids is even less compelling than that proffered by the Reagan Administration before launching the widely condemned Libya bombing. At the time of the decision to strike Afghanistan and the Sudan, the Clinton Administration did not have any direct evidence of bin Laden’s connection to the embassy bombings comparable to the alleged intercepts of Libyan diplomatic cables in 1986. 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 comparable to that proffered by Ambassador Walters with respect to Libya in 1986. 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.\(^5\) Thus, the Libya experience indicates that Reno’s apparent objections to the August 20 missile strikes were well-founded.


\(^5\) The U.S. government pointed to two prior attacks in which bin Laden was apparently implicated. Both occurred more than two years prior to the embassy bombings, as opposed to the Libya situation, where the United States cited a series of attacks or thwarted attacks that took place within weeks of the Berlin bombing. Nor did the Clinton White House allege that bin Laden’s pattern of attacks was corroborated by the police or intelligence agencies of other countries, as was alleged in 1986.
Given the haste with which these attacks were launched, Reno’s reported hesitancy is even less surprising. The FBI investigation of bin Laden’s connection to the embassy bombings was at a preliminary stage with no firm conclusions as of August 20.66 This clearly indicates that, at the time that the missiles were launched, the United States did not have definitive proof that bin Laden was behind the embassy bombings.67

After the raids had taken place, National Security Advisor Sandy Berger claimed that the American intelligence community had “very specific information about very specific threats with respect to very specific targets” that bin Laden was planning to attack; his conclusions, however, were disputed by American intelligence operatives.68 Furthermore, although a number of senators were reportedly impressed by the Administration’s evidence, one senior congressman said of the CIA briefing that there was evidence of “a lot of suspicious activity, but nothing conclusive.”69 That the decision to attack was made by a very small group of advisors—which included neither the Joint Chiefs of Staff nor the FBI Director—heightens the suspicion that the evidence was not sufficiently discussed even within the American government. As James Woolsey, President Clinton’s former CIA Director, stated, “This should not be the kind of decision made only with three or four people around you of a Cabinet-level who don’t know an EMPTA sample from their left foot.”70 Woolsey’s comment rings even truer today, as nearly every U.S. claim regarding the Sudan factory has turned out to be false. Meanwhile, the Administration has repeatedly smothered efforts to initiate a Security Council investigation of the Sudan missile attack, apparently claiming that the “credible” evidence supporting its position was sufficient.71

Thus, the Clinton Administration ordered missile strikes based at most on a reasonable suspicion that bin Laden ordered the embassy bombings, that he was planning imminent attacks on other U.S. targets, and that the El Shifa factory was producing or was about to produce chemical weapons for bin Laden’s operation. Can one country attack another on the basis of such inferences and suspicions? Should international law permit such “self-defensive” measures before all the facts are known?

Those who would use force against terrorists often rely on domestic law analogies to argue their position. For instance, they argue that harboring terrorists is the international equivalent of “aiding and abetting”; just as the state may punish those who aid a crime, so may a nation that offers refuge or other aid to terrorists be punished.72 However, this analogy, like others taken

67. See Hersh, supra note 35, at 39.
68. Id. at 38.
69. Id. at 39.
72. See Sofaer, supra note 22, at 103–05.
from domestic law, is flawed if one only imports the domestic legal standards into the international arena, and not its procedural and evidentiary safeguards. Under domestic law, the state must provide proof beyond a reasonable doubt before a jury can condemn the criminal to death or prison.

No country—not even the United States—should be able to attack alleged terrorists or their facilities based on evidence far weaker than that which we require for a domestic criminal conviction. Had the United States indicted bin Laden for murder and the owner of the El Shifa factory for conspiracy, the government would have had to prove beyond a reasonable doubt that they were guilty of the alleged crimes. It is self-serving hypocrisy for the United States to attack alleged terrorist facilities, violate other nations' sovereignty, and kill innocent civilians, using evidence that would not suffice to sustain a criminal prosecution.

The U.S. government and its academic supporters would likely respond as follows. First, the world is a jungle, and even the ablest intelligence agencies are not able to conduct the same kind of thorough criminal investigation employed domestically. To impose domestic legal requirements on the international order would therefore be ludicrous, despite the use of domestic legal analogies when it serves proponents of force. But recent history suggests that the coordinated effort of United States and other intelligence agencies can obtain evidence that they believe will suffice to convict terrorists in courts of law. Moreover, it is unclear why it should be easier, in terms of evidentiary showings, to conduct missile strikes against another country, destroy a pharmaceutical plant producing medicine for people who desperately need it, and condemn innocent civilians to death, than it is to put a common criminal behind bars. A determination of international law standards must weigh, as we do domestically, 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. Mistaken judgments leading to deprivations of liberty can be reversed; the political and physical consequences of Tomahawk missile strikes generally cannot. 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. None of those standards were met in the case of Sudan. The evidence proffered by

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73. See, e.g., David K. Linman, Iran Air Flight 655 and Beyond: Free Passage, Mistaken Self-Defense, and State Responsibility, 16 YALE J. INT'L L. 245, 313–14 (1991) (describing the mistaken attack on Iran Air Flight 655 as an example of "scenario fulfillment" due to speedy decision-making and difficulties in collecting evidence).
the Clinton Administration neither linked the Sudan factory to bin Laden nor established that bin Laden was behind the embassy bombings. Indeed, in bin Laden’s case, law enforcement agencies gathered evidence for several months after the August 20 raids, ultimately indicting the Saudi exile for his alleged role in the embassy bombings. Why not at least wait until law enforcement agencies determine that sufficient evidence exists to indict the alleged terrorists? The response to the “why not wait” question would undoubtedly focus on the need for a “swift” response. According to the proponents of the use of force, deterrence requires a swift response, and self-defense warrants immediate action. However, some experts have questioned the deterrence value of an immediate military response, and the risk of error and pretext do not justify any deterrence value gained. If the alleged terrorists are planning future attacks, these attacks can be uncovered and thwarted while law enforcement officials gather the evidence. Furthermore, Administration officials recognize that a forceful response to terrorism would likely provoke terrorist retaliation. Thus, the Administration appears more interested in long-term deterrence rather than immediate self-defense. The rule of law, however, requires, at a minimum, that deterrence measures are taken only after the facts are known.

B. International Investigation of Factual Dispute

The Clinton Administration also failed to disclose the evidence upon which it relied in ordering the August 20 strikes, nor will it allow any international fact-finding or public discussion with regard to that evidence. Thus, practically speaking, the U.S. government’s handling of the evidence supporting the Sudan and Afghanistan raids reflects less respect for international law than its practice after the Libya and Baghdad attacks. In each of those cases, the U.S. government presented some of its evidence to the Security Council; in the case of Libya, the United States disclosed sensitive intelligence data to the world community.

The United States’s repeated refusal to allow a Security Council investigation into the El Shifa factory missile attack illustrates the extreme hubris of the Clinton Administration: since the United States already knows


76. See, e.g., Intoccia, supra note 64, at 200–01 (arguing that self-defense serves the dual purpose of protecting the attacked state from immediate threats and deterring future acts of aggression); Excerpts from Schultz’s Address on International Terrorism, supra note 54, at 12 (same).

77. Indeed, as former CIA Director Woolsey testified, an effective military response is often “at odds with its being prompt.” Hearings on Counterterrorism Policy Before the Judiciary Committee of the Senate, 105th Cong. (1998) (testimony of James Woolsey, former Director of the CIA), available in 1998 WL 564420.

all the facts, no purpose would be served by an international fact-finding. This claim disturbs even those who strongly support the use of military force in fighting terrorists. Moreover, the implications of the U.S. position for the international legal order are deeply troubling.

In refusing to permit any international discussion of the Sudan raid, the United States has rather boldly suggested that the international legal community cannot competently evaluate the factual basis of its self-defense claim. This is the first time the United States has made such a suggestion. Even in Nicaragua v. United States, the United States recognized that the Security Council remains responsible for dealing with uses of force; it argued only that the International Court of Justice ought not to evaluate an ongoing use of force. Now, the Administration claims that even the Security Council ought not even to investigate the facts of a use of force already completed.

The United States's position appears to be that the factual premises of unilateral uses of force are internationally unreviewable. "Trust us," the government states, as if error were not possible. The effect of the U.S. position is that any nation may attack another based on undisclosed facts not subject to any international evaluation—unless we are arguing the untenable position that the United States, but not other nations, can so act. We would certainly oppose another nation's use of force based on such a principle. The U.S. position provides virtually no legal restraint on the unilateral use of force. Even if one agrees that the concept of self-defense should be interpreted to allow nations to respond to terrorism, the requirements of international order cry out for multilateral fact-finding. As former Ambassador Richard Gardner has argued:

> We need to develop international processes to find the facts... The Security Council, under Article 33 and subsequent articles, should be used to obtain the facts in disputed situations, where claims of self-defense are made on one side and rebutted by the other. Strengthening the Council's fact-finding capacity should be a major priority for Soviet, American, and other international lawyers, and all persons concerned with collective security.

Professor Wedgwood argues that it is simply unrealistic for international law to require that a nation share, in a multilateral, public forum, the information on which a targeting decision has been based. While a nation may politically decide to make such information public, there are undoubtedly cases, as Wedgwood suggests, when doing so would compromise intelligence sources or render sources less valuable in the future.

Three arguments nonetheless compel the conclusion that a nation that bombs another country in response to a terrorist attack is required to submit

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79. See Sofaer, supra note 23.
82. See Wedgwood, supra note 22, 567–68.
83. See id.
such decisions—and the information upon which they are based—to international review. First, international law narrowly, and in my view, correctly, limits such decisions to compelling cases of urgent necessity. That a nation is unwilling to subject its factual decision-making basis to international scrutiny suggests that the military necessity of such action is dubious. In other words, the requirement that a nation subject such decisions to international review serves to ensure that those decisions are not made lightly. The Reagan Administration's release of evidence to support its 1986 bombing of Libya resulted in the disclosure of sensitive intelligence information, but such disclosure was one of the costs of conducting those air strikes. International law does impose some costs on a nation that uses force against another—one of those legitimate costs involves the necessity of proving its claims to the international community.8

Second, while in some cases a requirement of multilateral review may involve some risk to intelligence sources, in many cases such review will not. For example, in the Sudan case the United States could turn over the soil sample it has for independent review (if the sample still exists); it could allow independent experts access to the lab tests and to lab technicians that evaluated that sample; and it could permit a multilateral investigation into Mr. Idris's ties and what was being produced at the factory—all without any disclosure of sensitive intelligence information. The reason why the United States does not do so is because it is simply unwilling to submit to multilateral review, not out of fear of damaging intelligence assets.

Finally, the alternative regime that Professor Wedgwood suggests is unacceptable. Wedgwood's rule would be that a state can forcibly respond to what it believes is another state's aid to terrorists based only on its political determination as to whether it ought to explain its targeting decisions to the world community. Wedgwood argues that "[t]he use of military force must be tested by responsible decision-makers against a host of prudential considerations."85 Thus, it turns out that the use of military force against terrorism is governed by political, not legal, considerations. If every nation can target another based on secret information that it need not legally share, then the fundamental premise of the U.N. Charter prohibiting the use of force is rendered meaningless. Thus, some sort of international review must be required if one wants to preserve some meaningful legal restraints on the use of force in the fight against terrorism. The issue involved in the August 20 missile attacks is therefore not merely the "merits of a particular decision,"86

84. Wedgwood's analogy of the targeting of a manufacturing plant in Khartoum with a targeting decision made during a war is inappropriate. See id. at 569-71. The decision to attack a country with whom we are ostensibly at peace is fundamentally different than a decision to attack an enemy during a war. In the first case, the risk of error is that of initiating a war, of attacking another country wrongfully; in the other, it is of making a tactical error within a war and possibly killing innocent civilians. The Charter directly deals with the first problem and not with the second because the basic interests of world order require that nations not start wars with other nations unless certain very narrow exceptions apply. See U.N. CHARTER art. 51.
85. Wedgwood, supra note 22, at 563 (emphasis added).
86. Id. at 569.
as Professor Wedgwood argues, but the important principle of whether such factually contested decisions ought to be subject to multilateral review. The United States’s expansive use of the concept of self-defense requires more international fact-finding and oversight, not less. The international legal order can restrain the unilateral use of force either by creating a clear legal standard or by providing international oversight of claims of self-defense. If neither option is available, the legal restraints on the use of force collapse.

V. MILITARY FORCE AS AN EFFECTIVE STRATEGY

The legal justifications permitting nations to use force in response to terrorist attacks are premised on the efficacy of such military strikes. The proponents of strong and swift military responses to terrorist attacks argue that force is needed as “an effective counterweight to extremism.” However, the efficacy of such military strikes is as suspect as their legality. Many experts note that these attacks do not deter terrorism, but result in an escalation of terrorist violence and a spiraling cycle of retaliation. Officials in the United States and abroad now believe that the attack on bin Laden’s camp may have backfired. A number of senior U.S. counter-terrorism officials claim that the missiles inflicted very little lasting damage but helped to make bin Laden a more popular figure in the Islamic world. Former CIA Director James Woolsey has questioned whether targeting the camps, two of which are supported by Pakistan, will ultimately damage our ability to cooperate closely with Pakistani law enforcement agencies. Others, such as General Sir Michael Rose, the former British commander of U.N. forces in Bosnia, suggest that such strikes contribute to a “culture of violence” that invites more terrorism.

The 1986 air strikes against Libya further underscore the dangers of military retaliation. While many observers claim that Libyan-sponsored terrorism declined after the U.S. Tripoli raid, the U.S. government concluded otherwise. United States officials have determined that the destruction of Pan Am Flight 103 over Lockerbie, Scotland, in 1988 was Libya’s response to the Tripoli raid, and that, in the words of a former counter-terrorism official, “we [had] just set up the next round of terrorism.” Thus, after the Lockerbie

87. Schultz, supra note 56, at 205.
90. See id.
91. See Hearings on Counterterrorism Policy Before the Judiciary Committee of the Senate, supra note 77, at 11.
tragedy, the United States government shifted its strategy and focused on law enforcement.

The de facto relaxation of Article 51 is both unnecessary and counterproductive in the fight against terrorism. Besides weakening the international legal restraints upon which the world order vitally depends, such strategies reflect the erroneous view that complex political problems can be solved by military force. This is certainly true when the military force used is largely symbolic, as was the case in both the 1993 Baghdad bombing and the 1998 attack on Afghanistan; neither raid seriously damaged the target’s military capabilities. As President Clinton’s former CIA Director Woolsey has stated, “shooting cruise missiles at buildings, is not, on the whole, the best way to deal with [terrorism].” The combination of the serious risks both to international order and innocent civilians posed by forceful responses to terrorism, and the general inefficacy of forceful responses, mandates the maintenance of strict legal rules and evidentiary standards to restrict such unilateral uses of force.

VI. INTERNATIONAL ACQUIESCENCE IN THE MISSILE STRIKES

The most curious aspect of the U.S. missile strikes of August 20, 1998 is the virtual absence of international reaction. Most nations, including U.S. NATO allies such as France, Italy, Britain, and Germany, appear to believe that the United States attacked the wrong factory in Sudan. Surely, that belief would make the attack on Sudan illegal. Nonetheless, when on August 20, 1998 the Security Council informally met and discussed Sudan’s complaint and the Arab League’s call for an investigation, only the United States and one other country spoke to the issue. To date, not one Security Council member has taken up Sudan’s call for an investigation, and the whole issue seemingly has been dropped.

That the Security Council and the international community has acquiesced in the U.S. missile attacks is not attributable to states’ view that the attacks were legal. For even if, as the French Foreign Minister noted, America’s allies are willing to condone unilateral attacks in certain circumstances, “you must not get it wrong.” That most nations believe that the United States probably did “get it wrong” in striking the El Shifa plant means that they do not believe that the action was legal.

The lack of public protest and debate over the missile strikes can only be explained by the general distaste for the Sudanese government coupled with a disinclination to directly confront the United States. Sudan, unlike Iraq, has no

Newman et al., Clinton Raises the Stakes in the War Against Terrorism, U.S. NEWS & WORLD REP., Aug. 31, 1998, at 38 (“[T]he bombing of Pan Am Flight 103 in 1988 is widely believed to have been an act of revenge for the U.S. bombing of Libya in 1986 . . . ”).

94. Hearings on Counterterrorism Policy Before the Judiciary Committee of the Senate, supra note 77, at 11.


96. Lynch, supra note 34.
vast oil reserves. The August 20 attack, unlike that on Iraq, has no strong bearing on any significant economic or political interests that other governments, such as Russia or France, have in the attacked country. The end of the Cold War and the United States's position as the world's sole and unchallenged superpower renders opposition to U.S. actions even more difficult in the absence of some strong interests motivating other states. In addition, other governments are reluctant to publicly accuse the United States of lying, even if they believe a mistake was made. Finally, any direct confrontation between the Security Council and the United States over the missile strikes is certain to fail, as the United States has made it clear that it will veto any resolution calling for an investigation into the attack. This is therefore a situation where nations privately complain about what the United States did, but officially remain silent—or at least do not protest noisily. Other states are frustrated that the United States is able to disregard views that contradict its position—a frustration that inevitably leads them to choose their battles over the United States's unilateral use of force carefully. The Sudanese missile strike cannot be a very appealing battle to wage.

Nor can other states' acquiescence in the Sudan and Afghanistan missile strikes reflect the emergence of any new legal principle or expansion of self-defense permitted by Article 51. No state, not even the United States, would argue for a legal principle that permits states to use force predicated on unilateral factual assertions based on undisclosed evidence.

Rather, the August 20 missile strikes represent the assertion of imperial might and arrogance in opposition to international law. The attack demonstrates that the United States has the power to block any effort to question or challenge its factual assertions, and to, in effect, silence other international voices.

But imperial hubris has its costs. The current Clinton Administration policy to disregard the limits set by international law in dealing with such nations as Iraq or Sudan can only have the long-run effect of undermining respect for the U.N. Charter. The decade started with the United States proudly proclaiming a new world order based on the U.N. Charter and international law. It ends with a United States determined to use its power in disregard of both international law and the views of other nations.