Responding to Terrorism: The Strikes Against bin Laden

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I. INTRODUCTION

The legal structure of warfare is a dramatic example of a changing regime, even while its fundamental principles remain constant. Conflict management asks that international actors devise and follow rules to prevent the reckless escalation and widening of conflicts—often requiring deterrence as well as defense—and to promote the termination of violence and the rebuilding of post-war confidence. Principles of humanity ask that conflicts be conducted in a way that minimizes the needless suffering of soldiers and protects noncombatant civilians. The application of these principles may not look the same in each era, with changes in technology, the character of conflicts, and the personality of the actors.

Modern terrorism has salient differences from traditional warfare. The actors are often not states, but rather ideological, political, or ethnic factions. States have a host of international commitments and aspirations that create an incentive to avoid all-out warfare and to avoid undermining the rules of war, while a single-purpose terrorist organization may operate without mitigation. A terrorist group often calculates that it will win attention for its cause and undermine a target government by the very atrocity of its tactics. A terrorist group is less vulnerable to international sanctions, as it does not possess a visible economy, land area, or identified population. With an uncertain membership and inchoate form, terrorist networks lie outside the web of civil responsibility that constrains private and public actors in international society.

Technology has changed the landscape of conflict. The international market in weapons of mass destruction has prevented any easy *cordon sanitaire* against proliferation to irresponsible actors. Arms control regimes attempt to dissuade suppliers from selling precursors and components to questionable customers,[1] but false destinations and straw man end-users are

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1. For example, the Australia Group is an informal organization of interested countries dedicated to slowing the proliferation of chemical and biological weapons by limiting the export of precursors and production equipment. The Nuclear Suppliers Group coordinates export controls on nuclear components, and the Wassenar Arrangement (of which Russia is a member) limits exports of

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easily concocted, and transshipping through shell companies remains an adaptable tactic. Dual-use technology—the close resemblance between innocent and culpable uses of chemicals, biological reagents, and supporting equipment—also complicates any attempt to police suppliers. Pesticide plants are easily converted to manufacture chemical weapons, and biological growth media is used both in medical laboratory cultures and the manufacture of biological weapons. Once deployed, weapons of terror remain hard to track and destroy. Canisters of VX nerve gas and biological agents can be smuggled across borders and into public facilities, and even the older medium of high explosives is compact and readily moved. The indiscriminate nature of these weapons and their extraordinary range of destruction multiplies the threat.

The car bombs that exploded outside the American embassies in Nairobi, Kenya, and Dar es Salam, Tanzania, on August 7, 1998—in an attack evidently engineered by the covert network of Saudi terrorist Osama bin Laden, wounding 4500 people and killing twelve Americans and 200 or more Kenyans and Tanzanians—show the difficulties of setting rules in an era of asymmetric warfare and nontraditional actors. The U.N. Charter provides a magisterial text from 1945 and a working political system meant to govern conflicts between states. However, it remains to be seen whether these textual rules and community understandings will allow an effective response to the problem of terrorism, in the service of common values.

II. STRATEGIES

The response chosen by the United States to terrorist acts has been four-fold. One strategy is to use the tools of criminal justice, attempting to hold accountable in a court of law the individuals who have disregarded the humanitarian standards of warfare by targeting diplomatic facilities and ordinary civilians. Agents from the FBI were dispatched to Nairobi and Dar es Salam immediately after the August 1998 attacks to comb the wreckage for forensic evidence. Bin Laden was indicted by a federal grand jury in the Southern District of New York on November 3, 1998.[2]

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dual-use items and conventional arms to a limited number of nations suspected of sponsoring terrorism. *See Prepared Statement of Dan Hoydysh, Unisys Corporation, Co-Chairman of the Computer Coalition for Responsible Exports Before the Senate Comm. on Banking, Housing and Urban Affairs, Subcomm. on International Trade and Finance*, Fed. News Serv., Mar. 16, 1999, *available in* LEXIS, News Library, News Group File.

2. Indictment, United States v. Usama bin Laden, S(2) 98 Cr. 1023 (LBS), (S.D.N.Y. Nov. 4, 1998), *available in* <http://www.heroes.net/pub/heroes/indictments.html> (visited Apr. 5, 1999) [hereinafter Bin Laden Indictment] (charging conspiracy, bombing of U.S. embassies, and 224 counts of murder). Bin Laden was said to be the leader or emir of a group called "al Qaeda" or "the Base," a terrorist group "dedicated to opposing non-Islamic governments with force and violence." *Id.* at 1–2. The Southern District indictment charged that the al Qaeda leadership was headquartered in Afghanistan and Peshawar, Pakistan between 1989 and 1991, and in Sudan from 1991 until 1996, returning to Afghanistan in 1996. U.S. support for the governments of Saudi Arabia, Egypt, and Israel, and the United Nations and U.S. involvement in the 1991 Gulf War and in Operation Restore Hope in Somalia in 1992 and 1993, "were viewed by al Qaeda as pretextual preparations for an American occupation of Islamic countries." *Id.* at 2–3. According to the indictment, bin Laden formed an alliance with the National Islamic Front in the Sudan and with representatives of the Hezbullah, issuing *fatwas* (orders) to other members of al Qaeda that U.S. forces in Saudi Arabia, Yemen, and Somalia should be attacked, as

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The familiar forms of criminal justice should not disguise the fact, though, that the capture or rendition of terrorist suspects may be difficult without extraordinary means. Such cases are often too hot to handle, even for responsible governments, because of the danger of retaliation. There are a surprising number of European governments that have been reluctant to detain suspects in cases of political terrorism, worrying that it will make them an attractive target for retaliatory actions by supporters. The recent case of Abdullah Ocalan offers an interesting comparison: the Kurdish leader was a hero to many, despite his use of terror tactics against civilians in a war for an independent Kurdistan. Objecting to Turkey's death penalty, Italy released Ocalan from custody in the face of a Turkish extradition request. Germany and the Netherlands declined to admit Ocalan because his mandated arrest would endanger their own citizens.[3] Ocalan was arrested in Nairobi, prompting demonstrations against Greek, Israeli, and United States embassies, whose governments were believed to have cooperated in the matter. Upon Ocalan's transfer to Turkey, the PKK announced it intended to target public sites in Istanbul and elsewhere to shut down Turkey's tourist trade.[4]

The use of a criminal justice strategy may, at times, place stress on the protected sovereignty and traditional enforcement jurisdiction of the countries through which terrorists travel. A rich corpus of antiterrorist treaties was created in the 1970s, obliging signatory countries to prosecute or extradite terrorist suspects found within their borders for crimes such as airplane hijacking,[5] airplane bombings,[6] attacks on diplomats,[7] hostage-taking,[8] and

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well as a general *fatwa* in May 1998 warning that all U.S. citizens were targets. *See id.* at 4–5, 8–9, 14. The indictment also charged that bin Laden sought to obtain chemical and nuclear weapons and their components. *See id.* at 10; *see also US Indicts Osama bin Laden on Embassy Bombing Charges*, Agence Fr.-Presse, Nov. 4, 1998, *available in* LEXIS, News Library, Wire Service Stories File. Co-defendant Al-'Owhali told investigators that he had trained for the bombing mission at several camps in Afghanistan. *See* Bin Laden Indictment, *supra*, at 12. Co-defendant Mohammed Sadeek Odeh was charged with training operatives who killed 18 Army Rangers serving in a Somalia peacekeeping deployment on October 3 and 4, 1993. *See id.* at 9–10.

3. *See* Ralph Atkins, *Bonn Will Not Seek Ocalan Extradition*, FIN. TIMES (London), Nov. 28, 1998, at 2 ("[T]he decision had been taken to protect 'law and order' in Germany because of fears the Kurdish conflict would spill on to German soil if Mr. Ocalan arrived.").

4. *See, e.g.*, *Around 1,000 Kurds Demonstrate in Netherlands*, Agence Fr.-Presse, Mar. 8, 1999, *available in* LEXIS, News Library, Wire Service Stories File; *Kurdish Protesters Injure Three Police in Montreal*, TORONTO STAR, Feb. 20, 1999; *Three Kurds Shot in Germany*, Agence Fr.-Presse, Feb. 21, 1999, *available in* LEXIS, News Library, Wire Service Stories File (reporting that three Kurds were shot dead "when around 30 Kurdish demonstrators attempted to force their way into" the Israeli consulate); *Turkish Clothes Shop in Switzerland Torched*, Agence Fr.-Presse, Feb. 21, 1999, *available in* LEXIS, News Library, Wire Service Stories File ("Protesting Swiss Kurds occupied United Nations conference halls in Geneva for 36 hours as well as the Greek diplomatic missions in Bern and Zurich and the headquarters of the UN refugee agency.").

5. *See* Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1643, 860 U.N.T.S. 105.

6. *See* Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177.

7. *See* Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167.

8. *See* International Convention against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. No. 11081, 19 I.L.M. 33.

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torture.[9] But too often, in practice, governments worried by violence or tempted by commerce do not wish to take part in chancy arrests. Thus, even the criminal justice paradigm is likely to put pressure on exclusive enforcement jurisdiction—the deeply held tenet that only the territorial sovereign can engage in arrests within its borders. There may be, at times, a difference between public and private pronouncements; quiet permission for an operation to go forward may be given, even while a protest is made in public. This difference in discourse is not helpful in the enterprise of establishing transparent norms of international behavior—but it is a fact of life. At other times, the use of ruses or stratagems to lure a suspect from protected territory to another jurisdiction or onto the high seas may offend local norms of investigative behavior,[10] but avoids more direct insult to the territorial jurisdiction of the sovereign government.

The United States has pursued a second strategy of seeking treaty agreements to establish new international norms and enforcement mechanisms. The United States has recently taken part in United Nations treaty negotiations on the protection of peacekeepers,[11] terrorist bombings,[12] nuclear terrorism,[13] and the overseas financing of terrorism.[14] These exercises have the virtue of stigmatizing certain kinds of behavior as universal crimes, beyond any justification of politics, culture, or "poor man's weaponry." But a treaty structure without enforcement will hardly deserve the moniker of "law."

A third approach is to disrupt terrorist structures through civil sanctions; this has included freezing the financial assets of terrorist organizations. For example, on August 20, 1998, an executive order froze U.S. assets of bin Laden and forbade any financial transactions between U.S. companies and his

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9. *See* International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85.

10. *Cf.* United States v. Yunis, 681 F. Supp. 896, 906-07 (D.D.C. 1988) (upholding jurisdiction over a Lebanese resident-citizen accused of hijacking, where the defendant was lured to international waters, arrested, and taken to the United States by the "efforts and stratagem" of FBI agents).

11. *See* Convention on the Safety of United Nations and Associated Personnel, Dec. 9, 1994–Dec. 31, 1995, 34 I.L.M. 482.

12. *See* International Convention for the Suppression of Terrorist Bombings, Jan. 12, 1998–Dec. 31, 1999, 37 I.L.M. 249.

13. *See* G.A. Res. 51/210, U.N. GAOR, 51st Sess., Supp. No. 49, Vol. 1, at 346, U.N. Doc. A/51/49 (1997). As recommended by the Sixth Committee, the General Assembly convened an ad hoc committee to frame an international convention for the suppression of acts of nuclear terrorism. *See id.* The Russian Federation submitted a draft of such an instrument, *see Convention on the Suppression of Acts of Nuclear Terrorism: Draft Submitted by the Russian Federation*, U.N. GAOR Ad Hoc Committee Established by the General Assembly Resolution 51/210, 1st Sess., U.N. Doc. A/AC.252/L.3 (1997), which is being revised. *See Draft International Convention for the Suppression of Acts of Nuclear Terrorism: Revised Text Proposed by the Friends of the Chairman*, U.N. Doc. A/C.53/L.4, annex I, at 14–15 (1998); *Ad Hoc Committee to Prepare Anti-Terrorism Instruments Concludes Third Session at Headquarters, 15–26 March*, U.N. Press Release L/2918 (Mar. 26, 1999).

14. *See Draft International Convention for the Suppression of Terrorist Financing*, Ad Hoc Committee Established by the General Assembly, 3d Sess., U.N. Doc. A/AC.252/L.7 (1999). The draft convention was to be considered at the March 15–26, 1999 meeting of the ad hoc committee. *See Provisional Agenda*, U.N. Doc. A/AC.252/L.6 (1999) (giving provisional agenda for the Mar. 15, 1999 meeting).

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entities.[15] This approach also includes imposing unilateral sanctions against countries that have supported terrorist structures.[16]

There is a fourth strategy: the prudent use of military force to prevent terrorist attacks and to degrade terrorist infrastructures. The use of military force must be tested by responsible decision-makers against a host of prudential considerations: whether it will make a martyr of the leader of the target organization, or deeply offend good relations with affected countries, or waste military assets that are not limitless. But there are other prudential tests, including whether the use of force will save the lives of innocent victims and prevent future attacks; whether it is the only realistic way to achieve deterrence by signaling that the responsible country will strike back hard; or whether a leader who has come to power by brutal means is likely to scoff at words and remonstrations that are not backed by force.

In the case of the embassy bombings, the United States has used all four strategies: indicting bin Laden, continuing work on multilateral antiterrorist conventions, imposing civil sanctions on bin Laden, and engaging in a dramatic use of military force. On August 20, 1998, two weeks after the bombing attacks in Nairobi and Dar es Salam, the United States launched Tomahawk Land Attack Missiles (TLAMs) at targets associated with the bin Laden network in Afghanistan and the Sudan. The Afghan targets were training camps used for logistical support and coordination, identified as the locus for a top-level meeting of bin Laden's leadership. The Sudan target was an industrial plant in Khartoum—the El Shifa pharmaceutical plant—believed to be a manufacturing or transhipping facility for chemical weapons and their precursors.[17]

III. THE CLASSICAL JUSTIFICATION OF ANTITERRORISM

The controversy that has surrounded the evidentiary basis for the choice of the target in Sudan, which will be addressed below, should not divert attention from several premises of the two operations.

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15. *See* Exec. Order No. 13,099, 63 Fed. Reg. 45,167 (1998); *see also* Continuation of Emergency Regarding Terrorists Who Threaten to Disrupt the Middle East Peace Process, 64 Fed. Reg. 3393 (1999) (continuing sanctions); *Embassy Bombing Suspects Charged in U.S.*, FACTS ON FILE WORLD NEWS DIG., Sept. 3, 1998, at 608 E1 [hereinafter *Embassy Bombing Suspects*].

16. In 1993 Sudan was added to the list of countries that provide support for international terrorism, *see* 50 U.S.C.A. § 2405(j) (West Supp. 1998), prompting limits on U.S. exports to Sudan. *See* Determination Sudan, 58 Fed. Reg. 52,523 (1993). In 1996, the U.N. Security Council voted multilateral sanctions against Sudan for its failure to surrender suspects in the attempted assassination of President Mubarek of Egypt. *See* S.C. Res. 1054, U.N. SCOR, 3660th mtg., U.N. Doc. S/RES/1054 (1996). On November 3, 1997, President Clinton further extended sanctions against Sudan by blocking Sudanese government assets in the United States and prohibiting most transactions with Sudan and Sudan-based companies. *See* Exec. Order No. 13,067, 3 C.F.R. 230 (1997).

17. *See* Address to the Nation on Military Action Against Terrorist Sites in Afghanistan and Sudan, 34 WEEKLY COMP. PRES. DOC. 1643 (Aug. 20, 1998) [hereinafter Address to the Nation]; U.S. Strike on Facilities in Afghanistan and Sudan, DEP'T ST. FACT SHEET, Aug. 21, 1998, *available in* <http://www.state.gov/www/regions/africa/fs_binladin_facilities.html>. The military action was called "Operation Infinite Reach." *See* Federation of American Scientists Military Analysis Network, *United States Military Operations* (visited May 24, 1999) <http://www.fas.org/man/dod-101/ops/index.html>.

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A. *Armed Attack*

The massively destructive bombings of the embassies in Kenya and Tanzania, with a horrific loss of life, were clearly "armed attacks" that allowed forcible measures of self-defense, even under the most stringent reading of U.N. Charter requirements. Article 51 recognizes the inherent right of self-defense in the face of an armed attack, and declares that a victimized nation is entitled to engage in unilateral or collective self-defense until and unless the Security Council has addressed the issue.[18] There is nothing in the U.N. Charter or state practice that restricts the identity of aggressors against whom states may respond–for private actors as well as governments may be the sources of aggressive conduct. Indeed, the constitutional provision for punishing offenses against the law of nations[19] was framed with piracy in mind—the private misuse of naval capacity, thought to be so destructive to international commerce in the eighteenth century that any state could undertake a pirate's capture and punishment. To be sure, in ordinary circumstances there is a presumption that each territorial sovereign will control criminal conduct in its own territory or territorial waters, preventing misuse of its borders by private actors who might mount armed attacks against other states. But terrorism often intimidates even the host government, and there are as well governments that have no interest in its control. The United States had the right to take forcible measures against bin Laden as the author of the bombing attacks. Indeed, the massacre of civilians and the destruction of facilities in Kenya and Tanzania must qualify as an armed attack if the words are to retain any meaning. The fact that Kenyans and Tanzanians were also victims of the attacks does not preclude the United States from acting to protect its own nationals and property.

B. *Imminent Danger*

After the bombings in Kenya and Tanzania, the danger was not over. American intelligence reportedly had multiple sources confirming that bin Laden was planning additional imminent attacks against American nationals and American diplomatic property. The evacuations of U.S. embassies in Tirana, Albania, and Islamabad, Pakistan, are consistent with this claim.[20] The

18. Article 51 of the U.N. Charter states:

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

U.N. CHARTER art. 51.

19. *See* U.S. CONST. art. I, § 8.

20. *See* John Authers & Mark Suzman, *Washington Plans for the Worst*, FIN. TIMES (London), Aug. 22, 1998, at 3 (noting that the U.S. has "withdrawn non-essential employees and families from embassies in Albania, Pakistan and Eritrea, while U.S. government offices in Uganda, Egypt, Malaysia

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British have also publicly confirmed that their intelligence sources corroborate the American claim that bin Laden was planning further attacks.[21] Hence, even within a strict and classical paradigm of self-defense, the use of military force was warranted to preempt terrorist action by bin Laden's network. The military response cannot be characterized as forcible retaliation for a one-time attack; it was preemption and deterrence of renewed assaults. The difficult theology that surrounds the limits of anticipatory self-defense thus has no necessary application here, for the explosions in Kenya and Tanzania show that bin Laden's plans were underway, not simply potential. Even by the demanding test of the *Caroline*, the classical statement of anticipatory self-defense,[22] the danger of renewed assault justified immediate action.

C. *Safe Haven*

If a host country permits the use of its territory as a staging area for terrorist attacks when it could shut those operations down, and refuses requests to take action, the host government cannot expect to insulate its territory against measures of self-defense.[23] The politically chaotic situation in Afghanistan may make it hard to pinpoint bin Laden's lines of influence, but there is no indication that the Taliban or any other Afghan faction had attempted to suppress bin Laden's use of Afghan territory as a center for training, supply, conference, and staging operations, despite repeated U.S. requests to do so.[24] Likewise, Sudan has been a well-known way station for

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and Yemen have also been affected.").

21. *See* Robert Shrimsley, *We'll Hit Back, Terrorists Told*, DAILY TELEGRAPH (London), Aug. 24, 1998, at 1 (reporting U.K. Defence Secretary George Robertson as saying that "Britain had independent evidence to back claims that the terrorist blamed for the US embassy bombings was planning others"). The U.K. Defence Secretary told BBC Radio that the United Kingdom has "'independent evidence'" that bin Laden was "'seeking to acquire chemical and biological weapons in order to prosecute the kind of campaign that we know they were involved in.'" Sian Clare & Lucie Morris, United Kingdom: *UK Defense Secretary Claims Evidence Against Bin-Laden*, London Press Ass'n, Aug. 23, 1998, *available in* FBIS-TAC-98-235, *in* <http://wnc.fedworld.gov> (quoting the U.K. Defence Secretary). The Secretary also remarked upon "'evidence that we had independently acquired that bin Laden . . . had plans for more such atrocities.'" *Id.*

Another report indicated that the Sudanese opposition group, National Democratic Alliance, had told a British official "that the hardline government was engaged in co-operation with Iraq in the manufacture of chemical weapons." Siobhan Byrne, *Glenys Kinnock Raised Alarm on Sudan*, THE SCOTSMAN (Edinburgh), Aug. 27, 1998, at 4. The article went on to note that "Emad al-Ani, one of the leaders of Iraq's chemical weapons programme, has close links with senior managers of the Khartoum factory and attended its opening ceremony two years ago." *Id.*

22. *See* Letter from U.S. Secretary of State Daniel Webster to Lord Ashburton (Aug. 6, 1842), *in* 1 THE PAPERS OF DANIEL WEBSTER: DIPLOMATIC PAPERS 669 (1983) (stating that the threat must be "instant, overwhelming, leaving no choice of means, and no moment for deliberation"). Webster declined to protest Canada's destruction of an American vessel, the *Caroline*, about to embark across the Niagara carrying Fenian insurgents. The *Caroline* test was framed in a world with much tamer hazards, but its language is adaptable to weapons of mass destruction, where the overwhelming and instant nature of the threat often inheres in the weapons systems themselves.

23. *See* Address to the Nation, *supra* note 17, at 1644 ("Afghanistan and Sudan have been warned for years to stop harboring and supporting these terrorist groups.").

24. One report from a pro-Saudi newspaper in Paris notes that bin Laden allegedly managed an $8 billion fund for the Taliban movement. *See Afghanistan: Report on Bin-Ladin's Activities, Wealth*, AL-WATAN AL-'ARABI (Paris), Sept. 4, 1998, at 23, *translation available in* FBIS-NES-98-248, *in*

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paramilitary and terrorist operations, including those of Carlos the Jackal and Abu Nidal. Sudan sheltered participants in the 1995 assassination attempt against President Hosni Mubarak of Egypt that led to U.N. Security Council sanctions.[25] Sudan cooperated openly with bin Laden until 1996. The former defense minister of Sudan's Islamic Front government, Ghazi Salah-al-Din, has maintained close personal relations with bin Laden,[26] and bin Laden has made major economic investments in the country, including bank deposits of $500 million that help to float the Sudanese currency. Bin Laden has also sustained close ties with the Military Industrial Corporation of Sudan, a state-owned company that has managed Sudan's activities to produce chemical weapons.[27]

The denial of any sheltered sanctuary is consistent with the decision of the International Court of Justice (ICJ) in the *Nicaragua* case.[28] Many will dispute whether the limitations placed by the ICJ on responses to low-level cross-border operations are a faithful rendition of the customary law of self-defense.[29] In any event, the bin Laden facts are dramatically different from the presumed circumstances of the Central American war. Afghanistan is not hosting insurgents carrying out low-level border violations, but rather terrorist attacks of the most brutal kind. American acts of self-defense were taken by a country directly victimized by bin Laden's attacks, rather than a volunteer in collective action. And unlike the *Nicaragua* case, there was no targeting of independent assets of the host countries. The only objectives in Afghanistan were the training camps that served directly as instrumentalities of bin Laden's crimes. In Sudan, the objective was the El Shifa pharmaceutical factory, believed to be involved in the production or transfer of gas chemical weapons and their precursors. These were direct instrumentalities of armed attack. It would be an interesting question whether military force can be used against an economic asset of a terrorist organization that financially supports the group's operation but is not directly involved in the production of war matériel.[30] Here, the question can be deferred, since the targets in Sudan and

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<http://wnc.fedworld.gov>.

25. *See* S.C. Res. 1054, U.N. SCOR, 3660th mtg., U.N. Doc S/RES/1054 (1996).

26. *See* Al Venter, *Terrorism: America's Nemesis: Usama bin Laden*, JANE'S INTELLIGENCE REV.-POINTER, Oct. 1, 1998, at 8.

27. *See* Samuel R. Berger, *Why the U.S. Bombed*, WASH. TIMES, Oct. 16, 1998, at A21.

28. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 1 (June 27).

29. The *Nicaragua* decision approved "proportionate countermeasures" taken by a state against neighboring territories from which insurgents mount operations, but disallowed the full range of "self-defense," holding that assistance to rebels in the form of the provision of weapons, logistics, or other support does not amount to an "armed attack." *See id.* at 126–27. *But see id.* at 343–44 (dissenting opinion of Judge Schwebel) (defining aggression as any "substantial involvement" in insurgents' acts of armed force).

30. In state-to-state warfare, economic and industrial sites that contribute to the war effort (rather than sustaining a civilian population) have been considered legitimate targets. In controlling terrorism, economic sanctions may be adequate to disrupt terrorists' financial capability, and the importance of any single economic asset may be limited. The matter could be open to wider debate in instances where civil countermeasures have been ineffective and key economic assets clearly sustain a terror network's operating capacity. The importance of respecting territorial sovereignty would set a high bar for claims of necessity based on pure economic assets.

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Afghanistan were, allegedly, direct instruments in bin Laden's paramilitary operations.

D. *Multilateral Review*

The suggestion that military targeting decisions should, ex ante or ex post, always be subject to the review of a multilateral body[31] is simply unrealistic. Under the U.N. Charter, a country exercising the right of self-defense must notify the Security Council of its action, and the United States did so. If it is possible to share the information on which a targeting decision is based, a politically adept state will be forthcoming to reinforce the confidence of its allies and avoid dissent. The United States, in taking action in the Cuban missile crisis in 1962, went to the Security Council with photographs from U-2 surveillance airplanes. But there will also be those generally rare occasions when such information cannot be shared, at least in the short or medium term, without seriously and even fatally prejudicing protective countermeasures. The United States announced, for example, that the timing of the strikes on the Afghan camps was set to coincide with a high-level meeting of bin Laden's lieutenants. To "prove" that claim in public, with the sort of evidence expected in a court of law, would be obviously incompatible with maintaining the same intelligence source, whether it was technical or human or both.

Recent history provides a dramatic example from a different arena. In 1996, the United States used satellite surveillance photographs to protest India's apparent preparations for a nuclear test, displaying those high resolution images in meetings with Indian officials.[32] By 1998, India had learned to mask its site preparations for a nuclear test and, lying to American officials, carried out a sixty kiloton explosion without forewarning. Simply put, India used the briefing on intelligence to evade U.S. surveillance capabilities.

The political advantage of explaining targeting decisions to the world community and providing the supporting data, and the desirability of allowing all states to see for themselves that community norms have been observed, has to be weighed against the circumstances of necessity.[33] Some terrorist organizations, such as bin Laden's, regard themselves as committed combatants in an ongoing war. Indeed, bin Laden issued a *fatwa* in 1998 calling for the killing of Americans without discrimination. In the midst of a conventional war, a country defending its territory and nationals will rarely be able to disclose its intelligence sources in a public forum. "I do not relish

31. *See* Jules Lobel, *The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan*, 24 YALE J. INT'L L. 537, 553–55 (1999).

32. *See U.S. Threatens Sanctions Against India Over Nuclear Testing*, Agence Fr.-Presse, Jan. 17, 1996, *available in* LEXIS, News Library, Wire Service Stories File (reporting that a warning to senior Indian officials by U.S. Ambassador Frank Wisner "reportedly followed U.S. intelligence observations that suggested India might be preparing to conduct a nuclear test").

33. *See* PHILIP B. HEYMANN, TERRORISM AND AMERICA: A COMMONSENSE STRATEGY FOR A DEMOCRATIC SOCIETY 71–72 (1998).

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laying bare to the enemy all our internal resources," Churchill said.[34] A country may even have to avoid disclosing intelligence by telltale operational decisions. (The Enigma dilemmas of the Second World War come to mind.) It may not be realistic to expect a different standard in an ongoing fight against unremitting terrorist organizations.

E. *Third Party Airspace*

Perhaps the most difficult legal issue of the air strikes concerns the intrusion into the airspace of a third party. Tomahawk missiles launched from U.S. Navy warships in the Indian Ocean overflew Pakistan before reaching their targets in Afghanistan. Measured against the norm of conflict containment, this was the most questionable part of the operation, since India and Pakistan had recently completed nuclear tests and remained alarmed by their neighbors' missile capabilities. In a state of heightened tensions, an unidentified missile, even with a trajectory indicating it would overfly Pakistani territory, could create a danger of Pakistani misinterpretation and reaction. The primitive state of command and control of Subcontinent nuclear forces heightens the concern, since advice to the Pakistani government would have to be passed on to all operational commanders. The White House has stated publicly that it provided timely notification to Pakistan, with a full understanding of the need to prevent any destabilization of the Indian-Pakistani dyad. The unsteady state of its domestic politics would not allow Pakistan to concede prior knowledge,[35] and it filed a diplomatic protest following the raid.[36]

As legal justification for the overflight, the U.S. government has available the argument of necessity, if not consent. Ordinarily, even in wartime, the territory and airspace of a neutral country must be rigorously respected. But this rule has been subject to amendment even in conventional wars, as for example, when the Allied forces in the Second World War preemptively secured areas that were vulnerable to Nazi aggression.[37]

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34. WINSTON CHURCHILL, *The War Situation*, Oct. 8, 1940, *in* 6 HIS COMPLETE SPEECHES (Robert Rhodes James ed., 1974) 6284, 6290 [hereinafter COMPLETE SPEECHES]; *cf.* WINSTON CHURCHILL, *The War Situation*, June 10, 1941, *in* COMPLETE SPEECHES, *supra*, at 6408–09 ("[N]o full explanation can possibly be given without releasing valuable information to the enemy. . . . There is always a danger that a Minister in my position, in seeking to vindicate the course we have pursued, might inadvertently say something which may supply the enemy with some essential, with some seemingly innocent fact.").

35. *See* Betsy Pisik, *Pakistan Files Complaint Over Attack; Angry Letter to U.N. Tells of Unexploded Missile*, WASH. TIMES, Aug. 25, 1998, at A1 ("Many Pakistanis support Afghanistan's Taleban militia, which is protecting bin Laden, and would be outraged at any suggestion of government cooperation in [the] air strikes.").

36. *See Letter Dated 24 August 1998 from the Permanent Representative of Pakistan to the United Nations Addressed to the President of the Security Council*, U.N. Doc. S/1998/794 ("This action by the United States entailed a violation of the airspace of Pakistan. . . . [O]ne of the missiles landed at Shatinger in the province of Balochistan, 280 kilometers from our coastline in Pasni."); *see also* Pisik, *supra* note 35 ("In Pakistan, the Foreign Ministry took pains to disavow any prior knowledge of the attacks, categorically rejecting media reports suggesting the United States had warned the Islamabad government that the attacks were coming.").

37. *See* WINSTON CHURCHILL, *To the People of Iceland*, Aug. 16, 1941, *in* COMPLETE

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Terrorist conflicts create an evident difficulty for the traditional protections of neutrality because an organization such as bin Laden's can infiltrate members in and out of land-locked Afghanistan without the knowledge of surrounding countries. If bin Laden launched a missile attack from Afghan territory, overflying Pakistan, one would assume that his victim could reply in like measure, even if it required overflight through neighboring airspace. Land attacks engineered in similar circumstances create the same dilemma.

F. *Evidentiary Standards and Civilian Targets*

The attack on the El Shifa manufacturing plant in Khartoum, Sudan has raised the most questions, and here again, the merits of a particular decision should not cast doubt on the principles involved. Even the classical tactics of conventional land battles will raise questions regarding particular targeting decisions—a military historian may ask whether the Germans were using a particular church belfry as a sniper's post in a town in the Rhineland, making it a legitimate military target for the Allies. Any difference over a particular decision should not undermine agreement on the general principles of permissible and impermissible uses of force.

The understandable concern of critics is that the El Shifa plant in Khartoum had visible civilian functions. The factory was a manufacturing site for pharmaceuticals, including veterinary and anti-malarial medicines, and worked under contract to supply drugs to Iraq under a U.N. program.[38] These functions clearly provided grounds for caution. But the misuse of civilian sites—sheltering military assets within civilian or humanitarian facilities—is also a familiar tactic in recent conflicts. Indeed, this strategy occurs so commonly that it has been denominated as a war crime in the Rome Statute of the International Criminal Court.[39] The use of civilian manufacturing facilities to mask chemical and biological weapons production is a tactic well known from Iraq's eight year game of "hounds and hares" with U.N. inspectors. For example, the al Hakam plant in Iraq, site of Iraq's large-scale biological weapons program, was also used in the manufacture of animal feed. In

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SPEECHES, *supra* note 34, at 6472 ("[Y]ou will all realize that if we had not come others would."); WINSTON CHURCHILL, *The War Situation*, May 7, 1941, *in* COMPLETE SPEECHES, *supra* note 34, at 6387, 6397 (speaking of the "forestalling action" of landing British troops at Basra in Iraq).

38. *See* Terry Atlas & Ray Moseley, *'Smoking Gun' for Sudan Raid Now in Doubt*, CHI. TRIB., Aug. 28, 1998, at 1 ("In the bombed-out rubble, reporters saw thousands of bottles of the type used for packing medicines. Foreign diplomats in Khartoum said the plant was only lightly guarded and was understood to be making inexpensive malaria medication and other drugs."); *see also Letter from the Permanent Representative of Sudan to the United Nations Office at Geneva Addressed to the United Nations High Commissioner for Human Rights*, U.N. Doc. E/CN.4/1999/6 (Oct. 22, 1998) (expressing Sudan's claim that the "factory was exclusively designed to produce drugs, including the most vitally needed anti-malaria drugs and antibiotics, and to export human and veterinary drugs to neighboring countries. In this respect, it had recently signed a contract under the United Nations programme for the supply of essential drugs to Iraq.").

39. *See* United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome Statute of the International Criminal Court, art. 8(2)(b)(xxiii), U.N. Doc. A/CONF.183/9 (July 17, 1998) (stating that "[u]tilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations," is a "serious violation[] of laws and customs applicable in international armed conflict").

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addition, Iraq's main chemical weapons plant was contained within the "State Enterprise for Pesticide Production" at al Muthanna.[40] The government of Sudan is believed to be cooperating with Iraq in the attempted production of chemical warfare agents. This is an especially troubling enterprise in the midst of Sudan's brutal civil war between a fundamentalist government and a Christian minority in the South, as Sudan adheres neither to the 1925 Geneva Gas Protocol[41] nor the 1993 Chemical Weapons Convention.[42] Bin Laden's agents operated freely in Sudan until 1996, and their formal expulsion in no way ruled out an ability to maintain a covert infrastructure.

The United States has built its public defense of the El Shifa target selection on the famous soil sample taken by an agent inside the gates of the Khartoum plant. The probative value of the sample as corroboration of the plant's employment in chemical weapons production or transport has been disputed on several grounds. These include allegations that O-ethyl-methyl-phosphonothionate, or "EMPTA" (the chemical precursor for deadly VX nerve gas) can theoretically be used in other applications, including fungicides and anti-microbial agents. However, EMPTA has no known commercially viable use, and no evidence indicates that any experimental enterprise to develop new products was conducted at the El Shifa plant. Summoning commercially improbable alternatives may remind some observers of Baghdad's bluff to the U.N. Special Commission: Iraq purported that missing growth media was used for single-cell animal feed, rather than biological weapons production—an explanation belied by the relative commercial cost of growth media and animal feed. Sudan has offered no suggestion of any actual innocent use of EMPTA at the El Shifa plant. The circumstances of the El Shifa soil sampling—for example, whether the source had unrestricted and unobserved access to plant grounds—may also explain why only one sample was taken.[43] But there are questions that remain to be answered in the public debate, such as whether the EMPTA trace possibly could be the result of

40. Gregory Koblenz, *Countering Dual-Use Facilities: Lessons from Iraq and Sudan*, JANE'S INTELLIGENCE REV., Mar. 1, 1999, at 48.

41. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65.

42. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, *opened for signature* Jan. 13, 1993, S. Treaty Doc. No. 21, 32 I.L.M. 800.

43. The Sudanese Permanent Representative to the United Nations was urged by one member of the Security Council to open the Khartoum plant to international inspection soon after the airstrike, if the Sudanese government wished to effectively dispute U.S. claims. The alternative of a soil sampling commissioned two months after the military strike by El Shifa plant owner Salin Idris has evident limitations. The report by Kroll Associates, hired by Idris's Washington lawyers, has not been made publicly available, but reportedly "confirmed his commercial links to Sudan's Military Industrial Corporation," which the United States alleges was "responsible for chemical weapons production" in Sudan. *See* James Risen & David Johnston, *Experts Find No Arms Chemicals at Bombed Sudan Plant*, N.Y. TIMES, Feb. 9, 1999, at A3. To be sure, the United States has opposed Sudan's request for a U.N. commission to examine the plant operations. *See US Bombing of Pharmaceutical Plant Grave 'Act of Terrorism'—Sudan's Minister for External Relations*, M2 Presswire, Sept. 30, 1998, *available in* LEXIS, News Library, Wire Service Stories File.

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pesticide degradation products,[44] and how the sample was handled on its way to testing.

An informed reading of the landscape must accompany the extracurricular statements by some officials of the United Nations Organization for the Prohibition of Chemical Weapons (OPCW) that dispute the protocol of the EMPTA soil sample.[45] The OPCW, based in the Hague, is a newly-established monitoring agency for the Chemical Weapons Convention (CWC). The United States has ratified and implemented the CWC, albeit after insisting on some conditions in its implementing legislation.[46] The OPCW is governed by an assembly of state parties, and its work is highly important, providing the foundation for long-term efforts against the proliferation of chemical weapons. At the same time, the efficacy of the OPCW depends on the political support and cooperation of 121 state parties, including state declarations of inspection sites. The OPCW may wish to avoid any association with member states' use of force, even in national self-defense, and hence work to distinguish the OPCW inspection techniques from those employed in Khartoum.

So, too, the decision to closely hold the plans for the August 20 strike among a limited circle of officials must be read in light of the realities of Washington. A military target list that included the El Shifa plant and the Afghan training camps was compiled at an earlier date, with the participation of all the military service chiefs of staff. The "Op-order"—the operational decision to implement the prior plan—involved the President, the National Security Advisor, the Secretary of State, the Director of Central Intelligence, in addition to the Secretary of Defense, the Chairman of the Joint Chiefs of Staff, and the pertinent theater commander, in this case, the Commander-in-Chief for the Central Command (CINCCENT), General Anthony Zinni. Under the Goldwater-Nichols Act,[47] there are no other U.S. officials in the chain of command. The desire for secrecy is not surprising in an operation designed to intercept top-level bin Laden operatives in a serendipitous clandestine meeting. The rule of Washington is that the chance of inadvertent disclosure increases geometrically with the number of offices involved. The Director of the Federal Bureau of Investigation is not in the chain of command, and, for that matter, neither is the Attorney General (who was informed). The service chiefs were informed twenty-four hours before the operation took place and

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44. *But see* Venter, *supra* note 26, at 8 (arguing that phosphorus-carbon bond in flame retardant Fyrol 6 and pesticide Dyfonate or FONOFOS "is in the form of an ethyl group, not methyl as in the case of EMPTA ... and Iraq has used this same precursor to manufacture VX."). The carbon-carbon bond of an ethyl group would not ordinarily degrade into the carbon-hydrogen bond of a methyl group.

45. *See, e.g.*, Steven Lee Myers & Tim Weiner, *After the Attack: The Chemicals; Possible Benign Use Is Seen for Chemical at Factory in Sudan*, N.Y. TIMES, Aug. 27, 1998, at A1 (reporting that the OPCW "says that theoretically there are other uses for Empta though it does not know of any commercial products using it"); *see also* Seymour M. Hersh, *The Missiles of August*, NEW YORKER, Oct. 12, 1998, at 39, 40.

46. Chemical Weapons Implementation Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681.

47. Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, 100 Stat. 992 (1986) (codified as amended in scattered sections of 10 U.S.C.).

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were able to offer their advice on a refined target list for Khartoum; this advice was worthwhile and was acted upon, but it is at least understandable that the circle of forewarning was limited until the operation's launch.

The dilemma in completing the case for the targeting of the El Shifa plant is that the key sources remain (presumptively) classified. Western electronic intercepts, the press has reported, corroborate the role of El Shifa plant officials in the production or transshipment of chemical weapons in cooperation with Iraq. Intercepts allegedly reveal telephone contacts between "senior Shifa officials and Emad al-Ani, the reputed creator of Iraq's chemical weapons program."[48] U.S. intelligence officials reportedly believe Iraq "was spreading its knowledge of chemical weapons production" to other countries.[49] A Paris-based Arab language paper has claimed knowledge of a 1997 meeting of fundamentalist leaders in Sudan where a bin Laden representative "discussed the urgency of beginning operations at a new 'chemical and bacteriological factory' in the Khartoum suburb of Kubar."[50] The new factory project, "according to the meeting agenda, was done in cooperation with the Iraqi government."[51] Moreover, the use of EMPTA as the last step in the production of VX nerve gas has been the signature of the Iraqi chemical weapons program, according to the U.N. Special Commission on Iraq. Six hundred tons of precursor is still missing, unaccounted for by Baghdad in its thwarting of the Special Commission's inquiry.

The Kubar site was struck from the U.S. target list because of its proximity to residential and diplomatic neighborhoods in Khartoum, but its presence strengthens the claim that the El Shifa site was used for auxiliary operations.[52] The El Shifa plant was commissioned in 1993 by Sudanese

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48. *Sudanese Factory Was Working with Iraq on VX Nerve Agent, U.S. Intelligence Says; Assessment Based in Part on Intercepted Phone Calls*, BALTIMORE SUN, Aug. 26, 1998, at 18A. One news source reported a U.S. intelligence official as saying, "[w]e knew there were . . . strong ties between the plant and Iraq." John Diamond, *U.S. Cites Iraqi Tie to Sudan Plant*, AP, Aug. 26, 1998, available in LEXIS, News Library, Wire Service Stories File. The report went on to note that: "U.S. officials say they have intelligence indicating that scientists in Baghdad worked with counterparts at the plant in Khartoum, the capital of Sudan, on a formula—unique to Iraq—for making the deadly nerve agent VX. The intelligence included intercepted phone conversations between the plant and Iraqi officials." *Id.*; *see also Embassy Bombing Suspects*, *supra* note 15 ("U.S. officials briefing reporters on the soil sample August 24 also said that the U.S. had evidence of contacts between El Shifa's directors and Emad al-Ani, an official of Iraq's Samarra Drug Industries. . . . a pharmaceutical company that the U.S. believed was involved in Iraq's chemical weapons program."); Vernon Loeb & Bradley Graham, *Sudan Plant Was Probed Months Before Attack*, WASH. POST, Sept. 1, 1998, at A14.

49. *See* Diamond, *supra* note 48; *see also Embassy Bombing Suspects*, *supra* note 15 ("Unidentified diplomats in Khartoum had said that Sudan had agreed to allow Iraq to develop chemical weapons in Sudan in return for military and other aid.").

50. Jihad Salim, *Secrets of al-Manshiyah Meeting Between Hasan al-Turabi and Ayman al-Zawahiri*, AL-WATAN AL-'ARABI (Paris), Oct. 31, 1997, at 22–24, *translation available in* FBIS-NES-97-322, *in* <http://wnc.fedworld.gov> (reporting on a secret meeting attended by a representative of bin Laden designed to "[f]ind the necessary financing to develop the chemical and bacterial weapons factory that the Sudanese Government has established in the Khartoum Bahri suburb of Kubar, in cooperation with the Iraqi Government, which smuggled special materials for this factory after the end of the Gulf War").

51. *Id.*

52. *See* Diamond, *supra* note 49 (reporting that the El Shifa soil sample indicated that the "plant was being used to manufacture, store, or handle EMPTA").

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President Omar Bashir and reportedly expanded in 1995 with the expropriation of land on its perimeter, the construction of new buildings, and tighter security.[53] El Shifa officials remained in contact with Iraqis who ran Baghdad's VX nerve gas production program.[54] The El Shifa plant's dual-use in pharmaceutical manufacture was believed to provide a pretext for visits to Khartoum by Iraqi officials involved in chemical weapons production.[55] Although Iraq is debarred from purchasing most products abroad because of U.N. economic sanctions, the sanctions regime has a humanitarian exception permitting delivery of food and medicines. This humane purpose was reportedly abused by Iraqi officials to maintain Sudanese contacts for weapons manufacture.

The full set of circumstances allegedly surrounding the El Shifa plant have a surprisingly powerful cumulative effect. One is confronted by Sudan's interest in developing chemical weapons; the contacts by El Shifa plant officials with Iraqi chemical weapons experts; the EMPTA soil sample; Iraq's characteristic use of EMPTA as a VX precursor; and the stated ambition of bin Laden to contribute to a chemical weapons factory in Sudan. Links between El Shifa plant manager Sulayman and bin Laden, and financial co-ventures between the El Shifa plant owner Salim Idris and bin Laden, have also been reported.[56]

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53. *See Bashir Calls for U.N. Probe, Claims Raid Launched from Arab State*, Deutsche Presse-Agentur, Aug. 21, 1998, *available in* LEXIS, News Library, News Group File. In the 1995 expansion, the El Shifa factory "was linked through an asph[a]lt road with the military industrialization department in the Kafuri region and led straight into the Public Security complex. Sources say that this complex included a private office for Usama Bin-Laden ...." *Afghanistan: Report on bin Laden's Activities, Wealth, supra* note 24.

54. *See* Jacquelyn S. Porth, *U.S. Has Chemical Weapons-Related Soil Sample from Sudan Plant*, United States Information Agency, *available in* <http://www.usia.gov/topical/pol/terror/98082502.htm> (visited May 5, 1999) ("U.S. intelligence officials, who declined to be identified, told reporters there were contacts, as the Sudanese company was being developed, between al-Shifa officials and Iraqis working on their country's VX program. . . . A U.S. intelligence official told reporters . . . at the Pentagon that 'we know that bin Ladin has been seeking to acquire chemical weapons for use in terrorist acts.'"). Another report noted that,

> [a]s for the Al-Shifa factory, security sources affirm that this factory is just one of several stages that are used to manufacture chemical weapons. These weapons were once used in an attack on the Sudanese popular army positions in the Nuba Mountains in 1994. . . . The operation of this program is led by Iraqi scientists and technicians, led by Dr. Khalil Ibrahim Mubarakah, and by Asian and foreign experts.

Afghanistan: Report on Bin-Ladin's Activities, Wealth, supra note 24.

55. *See id.* (reporting that Iraq bought medicine from the El Shifa plant "under a United Nations-approved exception to sanctions—contracts that formed a pretext for Iraqi officials linked to that country's chemical weapons program to travel to Khartoum and help start up the plant"); Diamond, *supra* note 48.

56. A study published in *Jane's Intelligence Review* concluded that, "[b]y early October [1998] the USA had learned that the general manager of the plant, Osman Sulayman, had been deported from Saudi Arabia in around 1995 for his suspected ties to Bin Laden and that the owner, Salih Idris, had financial dealings with members of Islamic Jihad, an Egypt-based group which receives money and sponsorship from Bin Laden." Koblenz, *supra* note 40. However, Sulayman and Idris "deny any connection with Bin Laden." *Id.*; *see also* Jahid Salim, *US Plan to Eliminate Bin-Laden Detailed*, AL-WATAN AL-'ARABI (Paris), Sept. 21, 1998, *translation available in* FBIS-TOT-98-262, *in* <http://wnc.fedworld.gov> (noting "financial cooperation and joint investment projects between the owner of the Sudanese factory Salah Idris and Usamah bin-Laden" and taped accounts of "a number of Sudanese and Arab citizens who knew about this financial relationship between the two men").

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The reluctance of the United States to confirm facts openly may stem from the daunting threat that bin Laden's organization still poses. If there are indeed human intelligence sources within bin Laden's organization or within his supply network, or national technical means that have intercepted and decrypted his conversations, it is surely understandable that these have not been confirmed while the bin Laden organization still remains in active operation. The United States government's airing of intercepted communications between Tripoli and the Libyan embassy in Berlin in 1986, following the terror bombing of a Berlin discotheque, to provide public justification for military action against Tripoli, cannot be taken as the measure of feasible disclosure in all future cases. Indeed, some in the intelligence community have remarked that the 1986 disclosure was quite costly to ongoing monitoring of Libyan activities.[57] Libya continued to be involved in terror activities, including the bombing of Pan Am Flight 103 over Lockerbie, Scotland, in 1988, and effective surveillance was desirable.

Does this mean that the legitimacy of a military targeting decision can sometimes be evaluated only after the fact? The answer is unabashedly "yes." (Even the targeting of the *Lusitania* is being reexamined eighty years later, since it appears that the ship was in fact carrying war matériel.) The public critique of the Sudan decision surely provides an incentive to be careful. It also presents the strongest political, as well as ethical, argument for careful decisions about proportionality. The relative lack of controversy over the El Shifa strike within the international community is related to the stringent precautions taken to minimize any collateral damage, including conducting the raid at night to avoid harming workers in the plant and the decision to omit the Kubar plant as a second Khartoum target for fear that it would endanger nearby civilian neighborhoods.

Is it possible that an error was made? The White House and Department of Defense roiled the waters by the omission of some published facts about the plant in after-action briefings (such as its status as a U.N. contractor for the manufacture of vaccine materials).[58] One should not assume that the military planners recommending and legal counsel reviewing target selection were burdened by the same omission. The evaluation of evidence by key decision-makers in a targeting choice should encompass all the facts, in part so that they can ask targeting specialists about estimate confidence if any

57. *See* Tim Weiner & Steven Lee Myers, *After the Attacks: The Overview*, N.Y. TIMES, Aug. 29, 1998, at A1 (reporting that in April 1986, President Reagan made public "the contents of decoded Libyan diplomatic calls in explaining why he had ordered an American bombing raid" and that intelligence officers stated that "the disclosure had damaged their ability to gather information on terrorist groups").

58. *See* Tim Weiner & Steven Lee Myers, *U.S. Notes Gaps in Data About Drug Plant But Defends Attack*, N.Y. TIMES, Sept. 3, 1998, at A6 (stating that "when the U.S. launched cruise missiles against a factory in the Sudan on August 20, it was unaware that the plant made medicine, Secretary of Defense William S. Cohen said today"). A thoughtful study by Michael Barletta of the Monterey Center for Nonproliferation Studies notes the several early missteps in the public explanation of the El Shifa raid but also concludes, for example, that EMPTA could "have no role in Shifa's known legitimate medicinal production." Michael Barletta, *Chemical Weapons in the Sudan: Allegations and Evidence*, NONPROLIFERATION REV., Fall 1998, at 115, 124.

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particular facts are changed. Relevant evidence can be fully digested within the planning cell that makes a targeting recommendation,[59] but top-level decision-makers should also know the critical facts, if only to provide a well-marshaled public explanation.

Nonetheless, the predicate of the targeting decision made by the President may also rest on sources that are unshakable. It can be politically costly to the United States to withhold these in the short term, but international law does not, and should not, require that any country prejudice its ability to defend its citizens and assets against an ongoing terrorist campaign.

IV. A NEW PARADIGM?

The military strikes of August, 1998 can be justified within a classical framework of armed attack and proportionate self-defense. But the ability to respond to terrorism ultimately requires that we take account of the single-minded structure and purpose of many terrorist organizations. States may acquire weapons to maintain a regional balance of power and guard against their neighbors' ambitions. The acquisition of military capability by Westphalian states is generally protected from forcible response in the absence of preparation for an attack, because there are acceptable reasons for states to have weaponry.[60] Terrorist organizations differ from states in having no legitimate purpose for their weaponry. Any tolerance for the acquisition of conventional weapons, much less weapons of mass destruction, by terrorist networks is misplaced.

In domestic strategies against organized crime, the criminal enterprise itself is made the target of investigation and prosecution. The rationale is that an act-based jurisprudence will only succeed in disabling the low-level expendable actors, rather than the sustaining core of a criminal enterprise. So, too, an effective strategy against terrorism may require that the terrorist organization itself be deemed a legitimate target for a full panoply of responses. An episodic "tit-for-tat" or passive defense may not easily protect against the ambitions of a complicated paramilitary organization. One wishes, of course, to distinguish the organizations that are threats only on paper. The fight against terrorism should not become a Congress of Vienna that suppresses aspirations for political change. But there are terrorist organizations whose concerted design is to violently disrupt and destroy existing governments and commerce. Against these, one may have to entertain

59. Sometimes the government doesn't know what it knows. The report by the Foreign Broadcast Information Service, published by the U.S. Department of Commerce, *see Afghanistan: Report on Bin Laden's Activities, Wealth, supra* note 24, of visits by Iraqi officials to Sudan under the pretext of placing pharmaceutical orders shows that some within the U.S. government did know of El Shifa's commercial activity. Officials in the U.S. Mission to the United Nations also approved the El Shifa contract for pharmaceutical production under the U.N. sanctions regime.

60. The acquisition of weapons of mass destruction by states that have demonstrated hostile intent in the past may be a necessary qualification to this traditional rule. Legal conventions were framed with conventional weapons in mind.

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the paradigm of ongoing conflict. An idealist's desire to address root causes will not suffice against an organization that opposes all secular regimes in the region or objects to United States protection of essential economic and political interests. And simple reaction in the face of a completed attack will often not be a wise or sufficient policy.

The defense of a nation-state in international war permits the targeting of the adversary's command and control structure, military facilities, and even his supporting economic assets. This is not a license to overrule good judgment. In limited war, the rules of engagement are carefully moderated to avoid broadening the conflict or drawing in other countries. While attending to third party interests and maintaining the stability of the larger peace, one may need to place antiterrorist actions within the international legal paradigm of war, rather than unbroken peace, with a right of ongoing offensive action against an adversary's paramilitary operations and network. Disserving the interests of safety can erode a durable structure for international law.

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