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# The Use of Armed Force Against Terrorism: American Hegemony or Impotence?

Walter Gary Sharp, Sr.\*

Let our actions today send this message loud and clear: There are no expendable American targets; there will be no sanctuary for terrorists; we will defend our people, our interests and our values; we will help people of all faiths in all parts of the world who want to live free of fear and violence; we will persist and we will prevail.

President William J. Clinton<sup>1</sup>

Ironically, while the rest of the world is greatly concerned and annoyed about American military hegemony,<sup>2</sup> some Americans believe U.S. military force is impotent in its fight against international terrorism.<sup>3</sup> It seems as though America's benevolent role as the world's sole superpower should serve as a stabilizing force for international peace and security and a deterrent to terrorists. Instead, its formidable military dominance has antagonized other states and has made America the world's sole super-target of terrorists. In 1997, for example, Americans were the targets of

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1. Concluding remarks of President William J. Clinton, in his Address to the Nation on August 20, 1998 announcing that he had ordered the Armed Forces of the United States to strike at terrorist-related facilities in Afghanistan and Sudan. President's Address to the Nation on Military Action Against Terrorist Sites in Afghanistan and Sudan, 34 Weekly Comp Pres Doc 1643, 1644 (Aug 24, 1998), available online at <<http://www.access.gpo.gov/nara>> (visited Mar 4, 2000).
2. For a general discussion, see, Evan Thomas and Michael Hirsh, *The Future of Terror*, Newsweek 35 (Jan 10, 2000) ("America entering the 21<sup>st</sup> century is the strongest, most dominating nation in the world. It is also the biggest and softest target for the dangerous resentments of the left-behind."); David E. Sanger, *America Finds It's Lonely At the Top*, NY Times 1 (July 18, 1999); Samuel P. Huntington, *The Lonely Superpower*, 78 Foreign Aff 35, 42-43 (Mar-Apr 1999) ("[I]n the eyes of many countries [the United States] is becoming the rogue superpower . . . [and] the single greatest threat to their societies.").
3. Consider Thomas and Hirsh, *The Future of Terror*, Newsweek at 35 (cited in note 2); Raymond Close, *Hard Target: We Can't Defeat Terrorism With Bombs and Bombast*, Wash Post C1 (Aug 30, 1998); Ralph Peters, *We Don't have the Stomach for This Kind of Fight*, Wash Post C1 (Aug 30, 1998); Gregory Vistica and Evan Thomas, *Hard of Hearing*, Newsweek 78 (Dec 13, 1999) ("Washington has had difficulty finding its most-wanted terrorist, Osama bin Laden, because Islamic extremists use European-made encrypted mobile phones."); Russell Watson and John Barry, *Our Target Was Terror*, Newsweek 24 (Aug 31, 1998).

over one-third of all international terrorist attacks.<sup>4</sup>

The United States defines terrorism as “premeditated, politically motivated violence perpetrated against noncombatant targets by sub-national groups or clandestine agents,” usually intended to influence an audience, and international terrorism as “terrorism involving citizens or the territory of more than one country.”<sup>5</sup> Defined as such, international terrorism is a criminal act committed by non-state actors—and the appropriate response of a victim state to defend against such terrorism is law enforcement. All non-state actors, however, operate within the sovereign territory of at least one state, and when a territorial state is unwilling or unable to cooperate in the suppression of international terrorism, or when it is covertly supporting international terrorism, then the law enforcement option fails. Furthermore, some states openly engage in, or support acts of violence that fall within the U.S. definition of international terrorism,<sup>6</sup> and when a state attacks another state by resorting to or supporting international terrorism, an appropriate response of the victim state may be the use of armed force.

Accordingly, international legal authority for a state to respond to acts of international terrorism is actor-dependent. If it is known that a non-state actor has committed an act of terrorism against the United States, then American law enforcement has the right to apprehend and prosecute the terrorist. However, when the location of a terrorist or a terrorist base camp is known and the territorial state refuses to cooperate with American law enforcement, the law enforcement response is completely ineffective in defending Americans and American interests abroad. In contrast, if it is known that a state actor has committed or supported an act of international terrorism, then American national security organizations have the lead in responding to the use of armed force by another state. Depending upon the severity of the terrorist attack and other circumstances, such a response may range from a diplomatic protest to seeking Security Council condemnation to the use of armed force in self-defense. In practice, however, the identity of the actor and a determination of state-sponsorship can be very difficult to establish. This Article briefly outlines the legal regimes which principally govern U.S. responses to international terrorism when it is established that the terrorist is either a non-state or state actor, and it explores international legal authorities’ use of armed force against non-state actors when law enforcement options fail to protect Americans and American interests abroad.

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4. See US Department of State, *Patterns of Global Terrorism: 1997*, Publ No 10535 (Apr 1998), available online at <<http://www.state.gov/www/global/terrorism/1997Report>> (visited Mar 4, 2000).
  5. 22 USC § 2656f(d)(1)-(2) (1994). See also *Patterns of Global Terrorism: 1997* (cited in note 4).
  6. For example, in the same year (1984) that Colonel Qadhafi made frequent public statements announcing Libya’s right to export terrorism, it was estimated that Libya spent an estimated one hundred million dollars annually operating over a dozen camps where about 1,000 terrorists were trained in guerrilla warfare, explosives, and arms for use in sabotage. See Gregory Francis Intocchia, *American Bombing of Libya: An International Legal Analysis*, 19 Case W Res J Intl L 177, 180-82 (1987).

No state, including the United States, should take a heavy-handed approach toward the use of armed force under any circumstances. All states, however, must be able to exercise their inherent right under international law to defend themselves against all actors—non-state and state alike. Effective deterrence demands that terrorists do not have safe havens and that terrorists must fear that they ultimately will pay a price for their criminal mayhem. This Article does not advocate armed force as an option of first resort; however, when force may be necessary, it details the international legal authority of states to use armed force against states for acts of terrorism and against non-state actors when the more appropriate law enforcement option is ineffective against terrorist threats to the national security of our great Nation.

## I. THE LAW ENFORCEMENT RESPONSE TO NON-STATE-SPONSORED TERRORISM

Non-state-sponsored terrorism<sup>7</sup> committed against the citizens, property, or territory of a state is rarely a criminal violation of international law per se, but it is usually a violation of the domestic criminal law of the victim state or of the state where the act of terrorism occurs. States must therefore rely upon one another to effectively combat international terrorism. Although the international community began a concerted effort to control international terrorism in the late 1920s, it has never been able to agree on a definition of international terrorism.<sup>8</sup> Consequently, the international community has taken a piecemeal approach and addressed the problem of international terrorism by identifying particular criminal acts inherently terrorist in nature to be prevented and punished by domestic law.<sup>9</sup> The result has been the adoption of a number of global treaties, regional conventions, and bilateral agreements which are relevant to the suppression of international terrorism, and corresponding domestic laws which implement those arrangements.<sup>10</sup>

The basic function of all of these arrangements is to establish a framework for international cooperation among states to prevent and suppress international terrorism by requiring state parties to cooperate in the prevention and investigation of terrorist acts, to criminalize terrorist acts, to assist other states in the prosecution of terrorists, and to either prosecute or extradite terrorists found in their territory.<sup>11</sup> The

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7. The US Secretary of State has designated 30 groups as foreign terrorist organizations. See *Patterns of Global Terrorism: 1997* (cited in note 4). This report provides a complete listing and detailed description of each of these terrorist organizations.

8. See John Norton Moore, et al, eds, *National Security Law Documents 446-47* (Carolina Academic 1990).

9. *Id.* at 447, 455.

10. *Id.* at 455. At pages 455-62, this text provides a detailed discussion of these global, regional, and bilateral arrangements as well as proposed conventions. For a collection of documents relevant to the suppression of international terrorism, see John Norton Moore, et al, eds, *National Security Law Documents 293-322* (cited in note 8).

11. See Moore, *National Security Law* at 456-59 (cited in note 8).

goal is to ensure that the accused terrorist is apprehended and prosecuted, but even when all states cooperate in good faith, it is very difficult to obtain the necessary evidence to convict an international terrorist, and the effectiveness of these arrangements as deterrents is questionable.<sup>12</sup>

The U.S. Congress has taken an increasingly active role in criminalizing international terrorism<sup>13</sup> based upon four internationally recognized principles of extraterritorial jurisdiction.<sup>14</sup> Indeed, the jurisdiction that the United States claims over international terrorism is the most far-reaching of any of its extraterritorial statutes.<sup>15</sup> Regardless of where the act occurs, for example, terrorists who kidnap, assault, or murder an American citizen are subject to U.S. criminal prosecution.<sup>16</sup> Similarly, terrorists who assist in the making of any biological agent, toxin, or delivery system for such agents or toxins anywhere in the world are subject to U.S. criminal prosecution if the intended victim is an American citizen.<sup>17</sup> The United States also criminalizes terrorist acts that damage aircraft or injure airline passengers of any nationality, regardless of where the incident occurs.<sup>18</sup>

Nevertheless, despite the practical difficulties of multi-jurisdictional efforts to investigate, identify, capture, and prosecute international terrorists,<sup>19</sup> when states cooperate in good faith the only appropriate and legal response to non-state-sponsored international terrorism is domestic law enforcement. Such a law enforcement response permits a state to rely upon its military or intelligence capabilities to discharge its law enforcement responsibilities, but it must do so consistent with the international law obligations that define the character of a law enforcement response.

## II. THE USE OF ARMED FORCE AGAINST STATE-SPONSORED TERRORISM

State-sponsored terrorism<sup>20</sup> committed against the citizens, property, or territory of another state is a violation of the international law of conflict management which invokes the victim state's inherent right of self-defense. This international law of conflict management is codified in Articles 2(4), 39, and 51 of the Charter of the United Nations ("Charter"), which governs the use of force between states.<sup>21</sup> Article 2(4) of the Charter prohibits the threat or use of force by any state against the

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12. *Id.* at 456-57.

13. See Howard M. Shapiro, *Terrorism in a Democratic Society*, 1 J Natl Sec L 95, 96 (1997).

14. See James S. Reynolds, *Expansion of Territorial Jurisdiction: A Response to the Rise in Terrorism*, 1 J Natl Sec L 105, 106 (1997).

15. *Id.* at 107.

16. See Shapiro, 1 J Natl Sec L at 96 (cited in note 13).

17. *Id.* at 97.

18. *Id.* at 96.

19. Reynolds, 1 J Natl Security L at 108 (cited in note 14).

20. The US Secretary of State has designated seven countries as state sponsors of terrorism: Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria. *Patterns of Global Terrorism: 1997* (cited in note 4).

21. See Bruno Simma, ed, *The Charter of the United Nations: A Commentary* 111 (Oxford 1994).

territorial integrity or political independence of another state, except as authorized by the U.N. Security Council ("Security Council") under its Article 39 authority or in self-defense as authorized by international law and recognized by Article 51 of the Charter.<sup>22</sup> A state can sponsor an act of terrorism by directing the action of its regular armed forces, armed bands, irregulars, mercenaries, or private groups.<sup>23</sup>

No international convention interprets or defines the thresholds of Articles 2(4), 39, and 51. Thus, a heuristic analysis of interdependent, subjective, and politically volatile interpretations of state practice is required to determine what acts of state-sponsored terrorism constitute an unlawful use of force under international law or what acts of state-sponsored terrorism invoke a state's right of self-defense.<sup>24</sup> Inherently, this analysis usually results in conclusions of law that fail to maintain any international consensus or provide any concrete precedent. For example, in response to the murder of seven Americans in two Libyan-sponsored bombings in Rome and Vienna in December of 1985 and the terrorist bombing of a West German discotheque in April of 1986, the United States justified the lawfulness of its April 1986 air strikes against terrorist training camps and military targets in Libya as an exercise of its right of self-defense as recognized by Article 51 of the Charter.<sup>25</sup> The air strikes were widely denounced, however, by the international community primarily

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22. These articles must be read together to determine the scope and content of the Charter's prohibition on the use of force, the responsibility of the Security Council to enforce this prohibition, and the right of all states to use force in self-defense. Articles 2(4), 39, and 51 provide:

*Article 2*

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles: . . . .

(4) All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations. . . .

*Article 39*

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security. . . .

*Article 51*

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

UN Charter Arts 2(4), 39, 51.

23. Simma, *The Charter of the United Nations* at 674 (cited in note 21).
24. For a general discussion, see Walter Gary Sharp, Sr, *CyberSpace and the Use of Force* (Aegis Research 1999) (This text provides a detailed heuristic analysis of how the international law of conflict management is defined by state practice.).
25. See Intocchia, 19 Case W Res J Intl L at 179, 182-85, 191-92, 200-13 (cited in note 6).

because of the concern that it would perpetuate the cycle of violence.<sup>26</sup> A Security Council resolution condemning the U.S. action was vetoed by Great Britain, France, and the United States, but the U.N. General Assembly adopted a resolution condemning the air strikes by a vote of 79 to 28, with 33 abstentions.<sup>27</sup>

In addition to relying upon their inherent right of self-defense, states may seek Security Council authority to use armed force to combat international terrorism. Every act of international terrorism proscribed by Article 2(4) is, per se, a threat to international peace and security within the meaning of Article 39.<sup>28</sup> Accordingly, the Security Council has the coercive authority to authorize states to impose coercive sanctions or to use armed force in response to any act of terrorism that violates Article 2(4).<sup>29</sup> Most importantly, the authority of the Security Council to use force extends beyond violations of Article 2(4). Indeed, the Article 39 threshold extends considerably below the Article 2(4) threshold,<sup>30</sup> giving the Security Council the power to authorize states to use armed force under circumstances where states do not independently have the right to use armed force in self-defense. For example, threats to international peace and security within the meaning of Article 39 even include the failure of a state to surrender terrorists in accordance with an order of the Security Council.<sup>31</sup>

Regardless of which international legal authority a state relies upon to use armed force to defend itself against terrorism, customary international law requires that all uses of force be necessary for either individual or collective self-defense and proportional, and it prohibits the use of force for retaliatory or punitive actions.<sup>32</sup> For example, the requirement of necessity for a state to use armed force in self-defense could clearly be met when a pattern of state-sponsored terrorism is established.<sup>33</sup> In contrast, if a single act of state-sponsored terrorism occurs, and it is evident from the circumstances that it is indeed an isolated act, then the principle of necessity would not justify the use of force in the absence of a continuing threat.<sup>34</sup> For example, in justifying the lawfulness of its April 1986 air strikes against military targets in Libya as an exercise of its right of self-defense, the United States emphasized Libya's policy on exporting terrorism and "compelling evidence of Libyan involvement in other planned attacks."<sup>35</sup>

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26. Id at 186-89.

27. Id at 189.

28. See Simma, *The Charter of the United Nations* at 119 (cited in note 21).

29. Decisions taken by the Security Council under Article 39 are binding on all Member States. Id at 407-18; see also UN Charter Art 25.

30. Simma, *The Charter of the United Nations* at 119 (cited in note 21).

31. Id at 113, 611-12.

32. See John Norton Moore, *Crisis in the Gulf: Enforcing the Rule of Law* 156-157 (Oceana 1992); Simma, *The Charter of the United Nations* at 677 (cited in note 21).

33. See Intocchia, 19 Case W Res J L at 200-12 (cited in note 6).

34. See id at 200-12.

35. Id at 191.

Similarly, international law requires that a state's use of force be proportional in intensity and magnitude to what is reasonably necessary to promptly secure the permissible objectives of self-defense.<sup>36</sup> The principle of proportionality does not unreasonably limit the use of force that can be used between combatants. Nor does it limit the use of force to destroy a military objective to the strength or firepower of that objective. Proportionality is a limitation on the use of force against a military objective only to the extent that such a use of force may cause unnecessary collateral destruction of civilian property or unnecessary human suffering of civilians.<sup>37</sup> The principle of proportionality is a balancing of the need to attack a military objective with the collateral damage and human suffering that will be caused to civilian property and civilians by the attack.<sup>38</sup> Proportionality categorically imposes *no* limitations on the use of force between combatants in the absence of any potential effect on civilians or civilian property.<sup>39</sup>

States have a number of response options when they are the victim of a terrorist attack by another state. Victim states may publicly denounce the terrorist act; sever diplomatic relations with the terrorist state and expel its diplomats; terminate trade or impose economic sanctions; or, seek civil redress in the International Court of Justice. They may also seek the public denouncement by the United Nations or other regional organizations; request the Security Council to impose mandatory sanctions on the terrorist state; or, request the Security Council to authorize the use of force against the terrorist state. However, even without Security Council authority, a state which has been the victim of a state-sponsored terrorist attack has the inherent right under international law to use necessary and proportional armed force to defend itself.

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36. See Moore, *Crisis in the Gulf* at 158 (cited in note 32).

37. While civilian property and civilians may not be the *object* of an attack as such, states may use force against civilian property and activities that support or sustain an enemy state's war-fighting capability during armed conflict. States may use force during armed conflict, for example, against economic targets such as enemy lines of communication, rail yards, bridges, rolling stock, barges, industrial installations producing war-fighting products, and power generation plants. See US Dept of the Navy, NWP 1-14M, *The Commander's Handbook on the Law of Naval Operations* paras 8.1.1-8.1.2 (1995) (hereinafter *Commander's Handbook*). In today's modern society, much of a state's civilian infrastructure is used for military purposes, and is thus subject to lawful attack during armed. See US Department of Defense, *Conduct of the Persian Gulf War: Final Report to Congress Pursuant to Title V of the Persian Gulf Conflict Supplemental Authorization and Personnel Benefits Act of 1991*, Pub L No 102-25, Appendix O at 613 (Apr 1992) (hereinafter *Conduct of the Persian Gulf War: Final Report*).

38. It is not unlawful to cause *incidental* injury to civilians, or collateral damage to civilian property, during an attack on a legitimate military objective. The balancing of proportionality does require, however, that such incidental injury or collateral damage not be excessive in light of the advantage anticipated by the attack. See *Commander's Handbook* para 8.1.2.1 (cited in note 37).

39. Indeed, one of the four strategic concepts of the national military strategy of the United States is to use decisive force to overwhelm an adversary. See Chairman of the Joint Chiefs of Staff, *National Military Strategy of the United States of America* 3 (1997). Even more notably, in December 1990, U.S. Secretary of Defense Dick Cheney threatened Saddam Hussein that the U.S. response to an Iraqi use of weapons of mass destruction would be "absolutely overwhelming and . . . devastating." *Conduct of the Persian Gulf War: Final Report*, Appendix Q at 641 (cited in note 37).



### III. THE USE OF MILITARY FORCE AGAINST NON-STATE ACTORS—DEFINING STATE-SPONSORSHIP

While the international legal regime requires a law enforcement response toward non-state actors, it operates under the core precondition that states will act in good faith and will not covertly sponsor or harbor non-state actors who engage in international terrorism. When a state fails to act in good faith and cooperate with a state that has been the victim of international terrorism, the issue arises as to when its lack of cooperation constitutes state sponsorship. On one extreme, it is clear that a state has sponsored an act of terrorism if it is established that it explicitly ordered the commission of the terrorist act.<sup>40</sup> At the other extreme, the inability of a state that attempted in good faith to locate a terrorist in its territory does not constitute state-sponsorship. In between these two extremes, when states refuse to cooperate in good faith and law enforcement fails, the simple and powerful guidepost is that a state never loses its inherent right to use necessary and proportional armed force in self-defense.<sup>41</sup> For example, state sponsorship could be established if a state aids and abets by encouraging, inducing, inciting, or soliciting a terrorist act against another state; assists in the planning or otherwise facilitates the commission of a terrorist act; or, knowingly receives, harbors, or assists in the escape of a non-state terrorist.

The most recent and perhaps the most instructive precedent that demonstrates how a state's refusal or unwillingness to cooperate in good faith may constitute sponsorship of a terrorist act is Afghanistan and Sudan's failure to cease their cooperation with the known terrorist Osama Bin Laden. On August 7, 1998, twin truck bombs struck the U.S. Embassies in Kenya and Tanzania, killing more than 200 people, including twelve Americans.<sup>42</sup> President Clinton announced that the United States had "convincing information" that Osama Bin Laden was behind the embassy bombings and "compelling evidence" that Bin Laden was planning further attacks on Americans.<sup>43</sup> Bin Laden has been linked to a number of other major international terrorists incidents such the 1995 and 1996 bombings of U.S. military facilities in Saudi Arabia and plots to kill Egyptian President Hosni Mubarak and Pope John Paul II.<sup>44</sup> He also supplied troops to fight U.S. forces in 1993 in Somalia,<sup>45</sup> and had publicly threatened to strike more American targets.<sup>46</sup>

Investigations, bolstered by the confessions of defectors from Bin Laden's terrorist network, determined that he had an extensive terrorist training complex in Afghanistan and ties to a pharmaceutical plant in Sudan determined to produce

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40. See Simma, *The Charter of the United Nations* at 674 (cited in note 21).

41. See Sharp, *Cyberspace and the Use of Force* at 48 (cited in note 24).

42. Vernon Loeb, *U.S. Wasn't Sure Plant Had Nerve Gas Role*, Wash Post A1 (Aug 21, 1999).

43. Watson and Barry, *Our Target was Terror*, Newsweek at 24 (cited in note 3).

44. See Sam Skolnik, *The Law Behind the Bombs: Experts Debate Legality of U.S. Airstrikes Against Terrorists*, Legal Times 8-9 (Aug 24, 1998).

45. See Watson and Barry, *Our Target was Terror*, Newsweek at 24 (cited in note 3).

46. See Skolnik, *The Law Behind the Bombs*, Legal Times at 8 (cited in note 44).

precursors for nerve agents.<sup>47</sup> Soil samples established the presence at this Sudanese plant of a synthetic chemical that has no use except in making nerve gas.<sup>48</sup> "Highly reliable evidence" also established that Bin Laden poured millions of dollars into Sudan and had reached an agreement with the Sudanese government enabling him to produce chemical weapons in Sudan with government assistance.<sup>49</sup> The United States made repeated efforts to convince the Sudanese government and the Taliban regime of Afghanistan to cease their cooperation with Bin Laden.<sup>50</sup> Afghanistan insisted that Bin Laden had clean hands and that he had no terrorist training camps in Afghanistan.<sup>51</sup> It also stated it could never hand Bin Laden over to the United States.<sup>52</sup> Similarly, Sudan denied any connection with Bin Laden and insisted the pharmaceutical plant produced medicines.<sup>53</sup> In response to the unwillingness of Afghanistan and Sudan to cooperate, President Clinton ordered cruise missile attacks on August 20, 1998 against the training facilities in Afghanistan and the pharmaceutical plant in Sudan.<sup>54</sup> The U.S. Federal Bureau of Investigation has put Bin Laden on its Ten Most Wanted list, and the U.S. Department of State has offered a \$five million reward for information leading to his capture.<sup>55</sup> Bin Laden and eight other co-defendants have been indicted by the United States for plotting the bombings of the U.S. Embassies in Kenya and Tanzania.<sup>56</sup> These eight codefendants are in custody in New York and London awaiting trial by the United States.<sup>57</sup> Bin Laden, however, still resides in Afghanistan "as a guest of the fundamentalist Taliban militia."<sup>58</sup>

The United States justified the lawfulness of its August 1998 missile strikes in Afghanistan and Sudan as an exercise of its inherent right of self-defense in response to an attack and a continuing threat of attack.<sup>59</sup> It had been established that Bin Laden was responsible for the attacks on two of its embassies and the murder of 12 Americans, and he publicly threatened future attacks against Americans. Despite the evidence and the urging of the United States, Afghanistan provided Bin Laden a safe haven, and Sudan refused to terminate its support of Bin Laden.

When a state, such as Afghanistan or Sudan, supports terrorism or interferes

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47. See Watson and Barry, *Our Target was Terror*, Newsweek (cited in note 3).

48. See Loeb, *U.S. Wasn't Sure*, Wash Post at A1 (cited in note 42).

49. See id at A2.

50. See Frederic L. Kirgis, *Cruise Missile Strikes in Afghanistan and Sudan*, Am Socy Intl L Flash Insight (Aug 1998), available online at <<http://www.asil.org/insight.htm>> (visited Mar 4, 2000).

51. See Watson and Barry, *Our Target was Terror*, Newsweek (cited in note 3).

52. See id at 26.

53. See id.

54. See id.

55. Barbara Slavin, *U.S. Must Deal with a New Facet of Terrorism*, USA Today 7A (Aug 4, 1999).

56. Bill Nichols, *U.S. Builds Bombing Case as Bin Laden Still at Large*, USA Today 7A (Aug 4, 1999).

57. Id.

58. See Daniel Klaidman and Evan Thomas, *Americans on Alert*, Newsweek 10 (Jan 1, 2000).

59. See Skolnik, *The Law Behind the Bombs*, Legal Times at 9 (cited in note 44).

with the ability of the United States to defend itself through law enforcement channels, then the United States has the right under international law to defend itself with the use of armed force. The Security Council could have authorized coercive measures to include the use of armed force against the terrorist infrastructures of Bin Laden in response to his terrorist acts because they constitute threats to international peace and security.<sup>60</sup> It was very unlikely, however, that the Security Council would have authorized armed force to root out Bin Laden or have taken any other effective action to prevent him from engaging in future terrorist acts.<sup>61</sup> Accordingly, the United States had to rely upon its inherent right of self-defense. The U.S. attack on Bin Laden's terrorist infrastructure within Afghanistan and Sudan was a necessary and proportional exercise of its inherent right of self-defense.

#### IV. CONCLUSION

Even horrific acts of international terrorism committed by non-state actors remain a law enforcement issue. Despite what their destructive effects may be, acts of international terrorism committed by non-state actors do not constitute a use of force within the meaning of the law of conflict management. Similarly, the ineffectiveness and practical difficulties of law enforcement arrangements among cooperative states to address the problem of international terrorism do not change a crime to a use of force or the basic nature of the legal issues. In the absence of any state sponsorship of terrorist or criminal activities, a use of force by a state against those non-state actors in the sovereign territory of another state without that state's consent may very likely be an unlawful use of force against that territorial state.

The U.S. bombing of Libya in April 1986 was a stern warning to states who openly sponsor terrorism that they could not attack Americans and American interests abroad with impunity. Accordingly, the issue of state and non-state sponsorship has become very factually complicated by a number of circumstances such as the activities of state-owned commercial enterprises and surrogate actors, as well as the anonymity afforded by clandestine operations and technology. Determining when state-owned commercial enterprises, for example, are acting as commercial enterprises or at the direction of a state is a determination surrounding facts, such as who controls the enterprise, who directed the activity, and the nature of the activity. It is not an issue of law.

Consequently, the legal analysis remains rather straightforward. From a legal

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60. See Daniel Pickard, *When Does Crime Become a Threat to International Peace and Security?*, 12 Fla J Intl L 1, 14-19 (1998).

61. See Michael J. Glennon, *The New Interventionism: The Search for a Just International Law*, Foreign Aff 2-3 (May-Jun 1999) ("When American embassies were bombed in Kenya and Tanzania last August, world attention focused entirely on the propriety of American air strikes against perpetrators allegedly ensconced in Afghanistan and Sudan; the idea that the United Nations might actually do something to combat such bombings was never even raised, so conditioned had observers become to expect it to do nothing.").

perspective, *all* acts of international terrorism are either non-state sponsored and thus a crime addressed by national and peacetime treaty law, or are state sponsored and thus a use of force governed by the law of conflict management. The complete refusal or unwillingness of a state, for example, to cooperate in the suppression or prevention of an acknowledged non-state-sponsored terrorist activity that originates in its sovereign territory constitutes state-sponsorship of a use of force ipso facto—thereby invoking the law of conflict management which authorizes a use of necessary and proportional force in self-defense against such a state or the non-state actors in that state. A state either cooperates and is a part of the solution to control non-state-sponsored terrorism, or it becomes a part of the problem and a sponsor of terrorism by aiding and abetting or offering a safe harbor.

International law requires that states first consider law enforcement, diplomacy, and other peaceful mechanisms to control international terrorism and resolve threats to international peace and security, but international law does not require timidity in the face of senseless murder and slaughter by non-state actors or states. The United States is far from being impotent in its fight against terrorism—and it must continue to prevent and deter terrorism sponsored by non-state actors and states with the use of necessary and proportional armed force when states fail to cooperate and cause the law enforcement option to fail to protect Americans and American interests abroad.🙏



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