

## EVIDENCE OF TERROR

Mary Ellen O'Connell\*

### ABSTRACT

*In the hours after the 11 September attacks on the United States, some called for counter-attacks on America's enemies, regardless of any evidence of wrong-doing. Those calls were rejected and some evidence was produced linking Osama bin Laden, his organization, al-Qaeda, and the Taliban regime of Afghanistan to the attacks. The United States and United Kingdom began a bombing campaign of Afghanistan on the strength of that evidence on 7 October 2001. This article explores the law of evidence in international law. It seeks to identify what evidence is sufficient for supporting a case of self-defence to clandestine terror attacks.*

### 1 INTRODUCTION

From the moment the first passenger plane hit the first of the two World Trade Centre towers on 11 September 2001, the issue of evidence confronted us: what happened? Who was responsible and what response could and should be made? Within the first hours and days, some prominent voices in the current and past Bush administrations urged reaction without waiting for evidence. A former secretary of state, Lawrence Eagleburger, has said:

You have to kill some of these people; even if they were not directly involved, they need to be hit.

The present Deputy Defence Secretary, Paul Wolfowitz, even says the US should 'end States' that support terrorism. Reportedly, he wants the US to destroy Iraq, despite the lack of evidence that it supported the September 11 atrocity.<sup>1</sup>

The evidence did matter enough to President Bush for the United States and its allies to wait until 7 October to strike back. By 7 October, the United States and the United Kingdom had gathered evidence linking the persons responsible for the plane crashes on 11 September to an organization known as al-Qaeda operating out of Afghanistan under the direction of a man named Osama bin Laden. The US already had an indictment outstanding for bin Laden in connection with bombing two US embassies in Africa.<sup>2</sup> The UK further revealed on 4 October that al-Qaeda

\* Professor, Moritz College of Law and Mershon Centre for International Security and Public Policy, The Ohio State University. With thanks to colleagues John Quigley, Barbara Stark, Sharon Davies and Louis Jacobs.

<sup>1</sup> Brian Tohey, 'Questions for Howard and Beazley on How to Wage War', *Australian Financial Review*, 29 Sept. 2001, Westlaw (WL) 27345798.

<sup>2</sup> See SC Res. 1333 (2000).

and the Taliban, Afghanistan's *de facto* rulers, acted in close co-operation. With this information, the US and UK launched Operation Enduring Freedom against Afghanistan. They bombed government and military targets in Afghanistan and sent advisers to assist the loose coalition of fighters, known as the Northern Alliance, who were opposing the Taliban.

The question posed here concerns the legality of Enduring Freedom. Did the US and UK have the right under international law to take action in individual and collective self-defence against the state of Afghanistan? The answer to that question depends on the evidence and in this case on the evidentiary standard to which we hold these states. Whether the US and UK had the right to launch Enduring Freedom depends on whether the United States made the factual case that it was the victim of an actual armed attack on 11 September as defined by international law, and whether it had evidence of future attacks. Moreover, the attacks have to be the responsibility of Afghanistan to justify self-defence against Afghanistan.

In many cases of self-defence the facts of the attack and the responsible party are evident for all the world to see. Iraq's 1990 invasion of Kuwait is a case in point. International terror attacks, certainly those against the United States, by contrast, are undertaken clandestinely. If they are sponsored by a state, the state in question seeks to hide the sponsorship. Thus in responding to attacks, the United States has inevitably had to make a case for its response, trying to persuade that it has acted legitimately. The US has presented evidence to the international community, which it believed a trier of facts would weigh in America's favour. That has been the US approach in the 1986 bombing of Libya, the 1993 bombing of Baghdad, the 1998 bombings of Afghanistan and Sudan, and the 2001 bombing of Afghanistan. In all of these instances the United States made a case that it was acting in self-defence. The Baghdad bombing was criticized because the US did not seek to meet the classical legal standard for self-defence. In the other cases the classical test was used, and the assessments were made based on the strength of the factual case under that test. The US evidence for bombing Libya was seriously questioned. The evidence regarding Sudan was heavily criticized. Indeed, the US case was derided. In the two Afghanistan cases, the evidence was more widely accepted. The criticism so far of Enduring Freedom has rather focused on whether the amount of force used in self-defence has been proportional to the injury.

The United States has typically characterized its evidence in these cases as 'convincing' or even 'compelling'. A convincing standard is consistent with the few authorities we have on evidence in international law, which specify evidence must be 'clear and convincing'. One of the purposes of this article is to review these authorities to clarify that states must meet the clear and convincing standard when making a case to use force in self-defence. Another purpose is to apply the standard to Enduring Freedom. The article concludes that on 7 October the international community found the evidence justifying Enduring Freedom convincing. The article also considers the situation where new evidence emerges and the states claiming self-defence turn out, after the fact, to have been wrong.

## 2 THE CASE FOR CLEAR AND CONVINCING EVIDENCE

Despite over one hundred years of international adjudication, and sixty years of Security Council fact-finding, we cannot point to any well-established set of rules governing evidence in international law in general or in the case of self-defence in particular. According to Lobel:

Questions involving the standards and mechanisms for assessing complicated factual inquiries are generally not accorded the same treatment given by the legal academy to the more abstract issues involved in defining relevant international law standards. Unfortunately, international incidents generally involve disputed issues of fact, and in the absence of an international judicial or other centralized fact-finding mechanism, the ad hoc manner in which nations evaluate factual claims is often decisive.<sup>3</sup>

Nevertheless, some rules are solidly established. The first and most important is that no use of force is permitted against a state unless it responds to an actual armed attack as established by objective evidence. How much objective evidence is needed before responding with force is largely an open question. We have some authority supporting the conclusion that in a case like *Enduring Freedom*, the US must meet a clear and convincing standard. The Security Council is the body responsible for weighing the case. Where it fails to do so, the jury of public opinion will make the assessment, in its *ad hoc* way as described above.

### 2.1 A General Principle of Law Enforcement

In the case of the attacks on the United States of 11 September 2001, a lawful response had to be founded in the first instance on sufficient evidence of who the legally responsible party was, and what they had done and would do in the future. The comments by Eagleburger and Wolfowitz above are in opposition to the very principles of law the United States invoked in condemning the attacks and in calling on states around the world to join in the suppression of terrorism. Rule violations must be confirmed by some objective evidence of wrong-doing and not merely an opinion that Afghanistan or Iraq is to blame or are rogue states deserving of punishment regardless of the evidence in a particular case. The United Nations Charter states clearly that armed force may be used only in self-defence.<sup>4</sup> Force may not be

<sup>3</sup> Jules Lobel, 'The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan' (1999) 24 *YJIL* 537, 538.

<sup>4</sup> Art. 51 provides: '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

used to punish, send a message, display power, etc. The implication of these rules is that where a question might be raised, evidence is required to prove the state is acting in self-defence and not acting to punish or wreak revenge. The rules regarding lawful responses to terror and what must be proven prior to making such a response are discussed in detail in part 3. Before going into more specific rules, the general point must be made that no legal system countenances forceful measures against parties in the absence of some evidence tying them to wrongdoing.

The principle that force is only lawful in limited circumstances against wrongdoers is evident by implication from the Charter and is therefore a treaty rule. It is also a well-established general principle of law. It is inherent in the very nature of legal systems as reflected in the maxim *nulla poene sine lege* (no penalty without a law)<sup>5</sup> and the presumption of innocence until proof of guilt.<sup>6</sup> Both principles are commonly found in national legal systems. No nation-state permits the use of force by police or individuals acting in self-defence absent specific provocations defined in the law and demonstrated by certain proveable facts. These principles have and will restrict some international law from being enforced, but they ensure that international law is a true legal system, subjecting force to law.

## 2.2 The Clear and Convincing Evidence Standard

To justify the right to use armed force in self-defence, the party making the claim must show by clear and convincing evidence that the circumstances warrant the use.

The alternatives to the clear and convincing standard include standards both lower and higher than clear and convincing. Lower standard requires only a preponderance of the evidence;<sup>7</sup> the higher standard mandates proof beyond a reasonable doubt.<sup>8</sup> While these last two have some support, the greater weight of authority favours a clear and convincing standard in cases of armed force. This is consistent with domestic law evidence standards:

While the preponderance standard applies across the board in civil cases, sometimes a higher standard of 'clear and convincing evidence' applies. This

take at any time such action as it deems necessary in order to maintain or restore international peace and security.' Articles 51 and 59 of the UN Charter.

<sup>5</sup> International Covenant on Civil and Political Rights, 19 Dec. 1966, art. 14, 999 UNTS 171.

<sup>6</sup> Rome Statute of the International Criminal Court, 17 July 1998, art. 66, UN doc. S/Res/955 & (annex 1994).

<sup>7</sup> 'Normally the burden of persuasion in civil cases is defined in terms of a preponderance of the evidence. This standard applies unless there is some special reason to prefer a higher one. If the plaintiff is to win (to take the most common situation), she must carry the burden by proving the elements in her case by a preponderance. By the prevailing view, this standard means the jury is persuaded that the points to be proved are more probably so than not.' C.B. Mueller & L.C. Kirkpatrick, *Evidence* (2<sup>nd</sup> edn, 1999) 121–122.

<sup>8</sup> Proof beyond a reasonable doubt is the standard typically applied in criminal trials of individuals. It is the standard that will be used by the International Criminal Court, for example.

higher standard applies in civil commitment cases, termination of parental rights, and deportation and denaturalization cases, where the Court has found that due process requires more persuasive proof. Beyond these examples, strong and enduring common law tradition typically requires proof to satisfy a similar high standard in cases claiming fraud or undue influence, suits to set aside or reform a contract for fraud or mistake, suits on oral contracts to make a will or seeking to establish the terms of a lost will, suits for specific performance of an oral contract, and in other special situations involving disfavored claims or defenses.<sup>9</sup>

The international authority for the standard consists of several decisions of international courts and tribunals, including the implicit standard found in the International Court of Justice's decision on the use of force in the Nicaragua case; it is the standard in the opinion of scholars, and it is found in the re-iterated statements of US officials.

Two binding decisions support the clear and convincing standard. In an arbitration between the United States and Canada where the United States claimed Canada was responsible for environmental damage, the arbitrators found 'no State has the right to use or permit the use of its territory in a manner as to cause injury . . . to the territory of another, when the case is of serious consequence and the injury is established by *clear and convincing evidence*.'<sup>10</sup> Also, the Inter-American Court of Human Rights determined in the Velasquez Rodriguez case that forced disappearance could be proven by less than evidence beyond a reasonable doubt.<sup>11</sup> Shelton reasons that clear and convincing evidence is the generally appropriate standard where allegations against states are made of systematic and grave violations of human rights.<sup>12</sup> The European Court of Human Rights has required proof beyond a reasonable doubt in torture cases, but recently moved down from that standard in a forced disappearance case.<sup>13</sup>

The International Court of Justice has no established rules of evidence according to Highet:

The court's function in establishing the facts consists in its assessing the weight of the evidence produced in so far as is necessary for the determination of the concrete issue which it finds to be the one which it has to decide.

<sup>9</sup> Mueller & Kirkpatrick, *op. cit.*, 121 (emphasis added).

<sup>10</sup> Trail Smelter (US v Can.), 3 RIAA1905, 1963-65 (1941)(emphasis added).

<sup>11</sup> Velasquez Rodriguez v Honduras, Inter-Am. Ct. HR (Ser. C), No. 4, para. 127 (1988).

<sup>12</sup> Dinah Shelton, 'Judicial Review of State Action by International Courts' (1989) 12 *Fordham ILJ* 361.

<sup>13</sup> Gobind Singh Sethi, 'The European court of Human Rights' Jurisprudence on Issues of Forced Disappearances' (2001) 3 *Hum. Rts. Brief* 29, 30-31. ('There are, however, some positive signals for the ECHR's future adjudication of these issues based on its recent decisions in *Timurtas* and [Ç]içik. [T]he [ECHR] has moved away from requiring the proof beyond a reasonable doubt standard to establish a violation of the right to life. It need now only lower the evidentiary burden for torture claims, and be more willing to recognize the existence of a pattern or practice of forced disappearances when one exists.')

For this reason, there is little to be found in the way of rules of evidence, and a striking feature of the jurisprudence is the ability of the Court frequently to base its decision on undisputed facts, and in reducing voluminous evidence to manageable proportions. Generally, in application of the principle *actori incumbit probatio* the court will formally require the party putting forward a claim to establish the elements of facts and of law on which the decision in its favour might be given.<sup>14</sup>

In the Nicaragua case, the International Court of Justice (ICJ) did not enunciate a standard of evidence but did refer to the need for 'sufficient proof.'<sup>15</sup> By implication this is a standard of convincing evidence. The judgment certainly does not reveal that the ICJ required proof beyond a reasonable doubt. On the other hand, in rejecting some of Nicaragua's claims, the Court appeared to require more than a mere preponderance of the evidence. The United States did not contest the case on the merits. Nicaragua still put in evidence with respect to all its claims; presumably it had a preponderance. Nevertheless, the court felt some of the claims failed.<sup>16</sup> The court held some claims did not meet the requirement that the case be 'well founded in fact and law' as required by article 53 of the Court's Statute, governing cases where one party fails to defend.

The Nicaragua case reveals other points regarding evidence. The Court was willing to take any evidence, relevance did not need to be demonstrated.<sup>17</sup> Only late evidence was rejected. In the more recent case of Qatar v Bahrain, Qatar withdrew evidence that Bahrain suggested was fraudulent.<sup>18</sup> Presumably the court itself would reject evidence which it concluded was inauthentic.

Scholars have been more direct than the ICJ regarding the standard of evidence.

<sup>14</sup> Keith Highet, 'Evidence, the Court and the Nicaragua Case' (1987) 81 *AJIL* 1, 7-8 (citing, Shabtai Rosenne, *The Law and Practice of the International Court* (1965) 580).

<sup>15</sup> *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, 1986 ICJ Rep. 14 at 437, para. 101.

<sup>16</sup> Highet summarizes: 'In several instances the Court in the Nicaragua case determined generally that there was insufficient evidence to prove a point. There was no "direct evidence of the size and nature of the mines" laid in the Nicaraguan ports. There was no evidence of U.S. involvement in the planning or execution of certain attacks on Nicaraguan installations. There was no evidence relating to "the military effectiveness of" the contra bands. Most importantly, "despite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the contras as acting on its behalf." "In sum, the evidence available to the Court indicates that the various forms of assistance provided to the contras by the United States have been crucial to the pursuit of their activities, but is insufficient to demonstrate their complete dependence on United States aid." Acts committed by the contras were not imputable to the United States, because the Court was "not satisfied that the evidence available demonstrates that the contras were 'controlled' by the United States when committing unlawful acts," any more than publication of a document entitled *Freedom Fighter's Manual* was found to be attributable to the United States.' Highet, *loc. cit.*, 40-41 (footnotes omitted.)

<sup>17</sup> *Ibid.*, 7-8.

<sup>18</sup> Bahrain Exposes Faked Documents, Middle East Newsfiles 1998, WL 15174694.

In cases of force in response to terror, Greenwood refers to ‘sufficiently convincing’ and ‘convincing evidence’.<sup>19</sup> Lobel advocates ‘stringent’ evidence:

Given the potential for abuse of the right of national self-defense, international law must require that a nation meet a *clear and stringent evidentiary standard* designed to assure the world community that an ongoing terrorist attack is in fact occurring before the attacked nation responds with force. Such a principle is the clear import of the International Court of Justice’s decision in *Nicaragua v. United States*.<sup>20</sup>

Henkin raises the structural reason for requiring a clear and convincing standard. Force in self defence is meant to be allowed in only a very few cases: international law ‘recognize[s] the exception of self-defense in emergency, but limit[s] to actual armed attack, which is clear, unambiguous, subject to proof, and not easily open to misinterpretation or fabrication.’<sup>21</sup>

Finally, in several of the counter-attacks launched by the United States following acts of terror, US officials referred to either the United States’s ‘convincing’ or ‘compelling’ evidence. Since the United States is almost the only state that uses armed force in response to terror attacks from abroad, in line with the *North Sea Continental Shelf Case*, its statements are of particular weight in the matter.<sup>22</sup>

The United States bombed Libya in 1986 in response to the terror bombing of a discotheque in Berlin.<sup>23</sup> Two US servicemen and a woman were killed in the incident.<sup>24</sup> The Reagan Administration revealed evidence of the source of the bombing, evidence that US service personnel were targeted, and plans for future attacks. The US then bombed military sites in Libya, though, tragically, the Libyan head-of-state, Colonel Gadhafi, lived at one of these sites and his young daughter was killed. Presumably the United States knew of Gadhafi’s living arrangement, and thus, one can question whether the US attack was sufficiently discriminatory. Subsequently, the United States was the target of another terror act by Libya, the bombing of the Pan Am flight over Lockerbie, Scotland. Since these incidents, two national courts have found that Libyan agents carried out both the Pan Am and La Belle Discotheque bombings.<sup>25</sup> Prior to bombing Lybia, the United States said it had ‘convincing evidence’ even though it was widely perceived that it had less than

<sup>19</sup> Christopher Greenwood, ‘International Law and the United States’ Air Operation Against Libya’ (1987) 89 *W. Va. L. Rev.* 933, 935.

<sup>20</sup> Lobel, *loc. cit.*, 537, 547 (emphasis added).

<sup>21</sup> Louis Henkin, *How Nations Behave* (2<sup>nd</sup> ed., 1979) (emphasis added).

<sup>22</sup> See *North Sea Continental Shelf Cases*, 1969 ICJ Rep. 3, para. 72.

<sup>23</sup> Greenwood, *loc. cit.*, 934.

<sup>24</sup> Lobel, *loc. cit.*, 548.

<sup>25</sup> Christiane Wirtz, Eine Diskotehk wurde zum Kriegsschauplatz, Berliner Landgericht: Hochrangig Angehörige des libyschen Geheimdienstes planten den Anschlag, *Süddeutsche Zeitung*, 14 Nov. 2001, 9; Allen Nacheman, Libyan Agent Guilty, Tripoli Blamed at Lockerbie Bombing Trial, 31 Jan. 2001, *Agence Fr-Presse*, WL 23333591.

convincing evidence.<sup>26</sup> Interestingly, the United States did not try to argue that it had 'some credible evidence' or to use another standard, such as the preponderance of the evidence test. '[F]ollowing the bombing of the La Belle discotheque on April 5, 1986, the United States staged a retaliatory air raid against Libya. On Monday, Secretary of State George P. Shultz said there was convincing evidence that linked Libya to the West Berlin bombing.'<sup>27</sup>

On 26 June 1993, the United States carried out an armed attack against Iraq for an alleged assassination attempt against former president George Bush.<sup>28</sup> The raid targeted the Iraqi intelligence headquarters and was planned for night to minimize casualties. Nevertheless, eight civilian deaths occurred according to Iraqi sources.<sup>29</sup> Though the US did not share the most critical evidence, which it said supported the raid,<sup>30</sup> a number of governments that received the evidence accepted the US attack as a legitimate act of self-defence.<sup>31</sup> It met none of the elements of self-defence: the United States apparently made no mention of any on-going campaign;<sup>32</sup> the bombing was out of proportion to the injury and not necessary for self-defence. As to the evidence, however, President Clinton said the United States had 'compelling evidence'; 'the United States launched a cruise missile attack on Baghdad that hit and heavily damaged Iraq's intelligence complex in the capital. Clinton said he ordered the attack based on "compelling evidence" that Hussein was behind the plot against Bush.'<sup>33</sup>

In 1998, trucks rigged with bombs blew up outside the United States embassies in Nairobi and Dar-es-Salaam killing more than 200 people.<sup>34</sup> The United States

<sup>26</sup> 'Before and after the 1986 air raids on Libya, U.S. officials showed European allies evidence of what Washington called Libyan involvement in the bombing of the West Berlin disco. However, many European officials said they found the evidence less than convincing. And subsequent reports have suggested a Syrian, rather than Libyan, role in the terrorist incident.' William Tuohy, 'US Pressing Allies on Libya Chemical Plant', *LA Times*, 3 Jan. 1989, WL 2355167.

<sup>27</sup> Barry Schweid, 'State Department Revives Terrorism Charges Against Syria', *Associated Press*, 12 Jan. 1988, WL 3762493. Gregory Francis Intocchia, 'American Bombing of Libya: An International Legal Analysis' (1987) 19 *Case W. Res. JIL* 177, 191 (emphasis added).

<sup>28</sup> Note, 'Terror and the Law: The Unilateral Use of Force and the June 1993 Bombing of Baghdad' (1995) 5 *Duke J. Comp. & Int'l L.* 457.

<sup>29</sup> *Ibid.*, 459.

<sup>30</sup> *Ibid.*, 460–62.

<sup>31</sup> *Ibid.*, 460–62, 475.

<sup>32</sup> Eric Schmitt, 'U.S. Raid Smashes Iraq "Terror" Center', *Int'l Herald Trib.*, 28 July 1993, 1; John Quigley, 'Missiles with a Message: The Legality of the United States Raid on Iraq's Intelligence Headquarters' (1994) 17 *Hastings Int'l & Comp. L. Rev.* 241. See also views of Israeli counter-terror operations in southern Lebanon. Gregory M. Travalio, 'Terrorism, International Law and the Use of Military Force' (2000) 18 *Wis. Int'l LJ* 164.

<sup>33</sup> 'In Review, The Year Gone By', *LA Times*, 4 Jan. 1994, WL 2121075; 'The Navy fired 23 Tomahawk missiles June 26 at the headquarters of Iraqi intelligence in response to what Clinton termed "compelling evidence" that Iraqi agents had plotted to kill Bush at Saddam's command.' 'US Defends Evidence of Iraq Plot', 26 Oct. 1993, WL 2092050.

<sup>34</sup> Pamela Constable, 'Russia, U.S. Converge on Warnings to Taliban, Ex-Rivals Fear Afghan Support for Terrorists', *Wash. Post*, 4 June 2000, A23, available in 2000 WL 19612609; William Claiborne, 'Bombs at 2 U.S. Embassies in Africa Kill 81', *Wash. Post*, 8 Aug. 1998, A01, available in WL 16548641.



determined that a terrorist group under the leadership of a wealthy Saudi named Osama bin Laden was responsible. The US believed bin Laden had ties to a manufacturer in Khartoum, Sudan who the US said was producing chemical weapons. The US also believed bin Laden was training terrorists at a remote site in Afghanistan. The US bombed a factory in Khartoum owned by the manufacturer and bombed a camp in Afghanistan. The US's evidence regarding the factory and the claim that it produced chemical weapons was widely questioned and never proven.<sup>35</sup> The raid on the camp in Afghanistan has received more support, though the criticism of the Khartoum bombing clouded the US's claims in general.

Regarding the evidence of nerve gas inputs in Sudan as the justification for bombing in 1998, a US State Department official said: 'In response to your question about investigations, we've made very clear-the Security Council took this up on Monday-we made clear that in our view . . . it wasn't necessary. We believe we have *convincing evidence* that satisfied us; and the Security Council didn't go further with it on Monday.'<sup>36</sup> A 'senior intelligence office' stated regarding the same issue:

With regard to the question you raised to the Secretary, why did we do this today? Obviously we felt the information was compelling. We wanted to act quickly. We had *compelling evidence*, indeed we have ongoing evidence that bin Laden's infrastructure is continuing to plan terrorist acts targeted against American facilities and American citizens around the world.<sup>37</sup>

A few years after the 1986 Libya bombing, the US apparently decided not to bomb a suspected chemical weapons plant in Libya when it could not convince allies of its evidence regarding the plant, in face of the lingering scepticism regarding the Tripoli bombing.<sup>38</sup> Nor did the US take military action after the attack on the US airforce residence in Saudi Arabia, Khobar Towers, on the USS Cole, or the first World Trade Centre bombing in 1993. All, apparently because the US had insufficient evidence of the responsible parties, though it did have suspicions.<sup>39</sup>

Finally, with regard to the evidence of a case for bombing Afghanistan Secretary of State Colin L. Powell said the Bush administration would produce a document that would contain compelling evidence showing that exiled Saudi extremist Osama bin Laden and his global terrorist network, al-Qaeda, were responsible for the devastating attacks against the World Trade Centre and the Pentagon. 'I think in the near future, we'll be able to put out a paper, a document, that will describe quite

<sup>35</sup> Tim Weiner & Steven Lee Myers, 'After the Attacks: The Overview, Flaws in the U.S. Account Raise Questions on Strike in Sudan', *NY Times*, 19 Aug. 1998, A2; Paul Richter, 'Sudan Attacks Claim Faulty, U.S. Admits', *LA Times*, 1 Sep. 1998, A1.

<sup>36</sup> See Excerpts from Daily Press Briefing by Dep't of State Deputy Spokesman Foley, 26 Aug. 1998, (1998) 9 *Foreign Pol'y Bull.* 17 (emphasis added.)

<sup>37</sup> Daniel Benjamin & Steven Simon, 'A Failure of Intelligence?', *NY Rev. of Books*, 20 Dec. 2001, 78 (emphasis added).

<sup>38</sup> Tuohy, 'U.S. Pressing Allies', *loc. cit.*

<sup>39</sup> Richard Perle, 'Next Stop, Iraq', 30 Nov. 2001, available at [www.fpri.org](http://www.fpri.org) (Perle regrets force was not used).

clearly the evidence that we have linking him to the attack,' Powell said on the NBC news programme 'Meet the Press.'<sup>40</sup> NATO members heard the US evidence regarding Afghanistan and found it 'compelling.'<sup>41</sup>

US officials were not speaking to a court in these cases, but the consistency of reference to 'clear', 'compelling' or 'convincing' evidence, combined with the arbitral and judicial decisions and the writing of scholars, supports a clear and convincing standard of evidence to justify the use of force in self-defence. What, however, must be proven by clear and convincing evidence? That is the question to which we now turn.

### 3 THE CASE FOR ENDURING FREEDOM

On 7 October, the US and UK launched a major military offensive against government and military targets throughout Afghanistan. To justify this action under international law, the United States must prove it acted in legitimate self-defence. Absent Security Council authorization, the only justification in international law for the use of major military force is self-defence. Self-defence in the case of Enduring Freedom requires a showing by the United States that it:

- (i) was the victim of on-going
- (ii) armed attack
- (iii) for which Afghanistan is legally responsible.

In the absence of any one of these elements, armed force against Afghanistan could not be justified. In that case, either armed force against al-Qaeda alone, counter-measures, or criminal procedures would be the appropriate alternatives, depending on the facts.

#### 3.1 Self-Defence Against Afghanistan

US UN Representative John Negroponte reported to the Security Council on 7 October that Enduring Freedom was an exercise of individual and collective self-defence under article 51 of the United Nations Charter.<sup>42</sup> The Security Council may authorize some uses of force beyond self-defence under article 39 of the Charter

<sup>40</sup> Dana Milbank & Vernon Loeb, 'U.S. Response Portrayed as Calm, Methodical'; Powell, 'Evidence Against Bin Laden Will Be Produced', *Wash. Post*, 24 Sept. 2001, WL 28359319.

<sup>41</sup> William Drozdiak and Rajiv Chandrasekaran, 'Nato: U.S. Evidence on Bin Laden "Compelling"'; 'Allies Give Unconditional Support for Retaliatory Strikes'; 'Taliban Official Asks to see Proof', *Wash. Post*, 3 Oct. 2001, WL 28361574.

<sup>42</sup> UN Charter, 26 June 1945, 59 Stat. 1031. TS No. 993, 3 Bevans 1153, amended 24 UST 2225, TIAS 7739, articles 2(4), 51; see also the *Nicaragua* case, 1986 ICJ Rep. 103. UN doc. S/2001/946 (7 Oct.). Art. 51 permits armed force in self-defence until the Security Council 'takes measures necessary to maintain international peace and security.'

when it finds a threat to the peace, breach of the peace or act of aggression. Enduring Freedom does not have Security Council authorization, however, and is, therefore, only justifiable to the extent it is an exercise of self-defence.<sup>43</sup> Nothing in the two Security Council resolutions preceding Enduring Freedom, 1368 (12 September) or 1373 (28 September), authorized anything more than freezing assets. The non-operative preambles to the resolutions do refer to the right of self-defence, suggesting that provided the US had evidence it was the victim of an on-going armed attack by Afghanistan, it could react with self-defence and others could aid in that self-defence. The Council did not make a finding that Afghanistan had attacked the United States. Nor has it condemned Enduring Freedom. Thus assessing US/UK claims falls to *ad hoc* world reaction, including the comments of legal scholars.

The textbook case on self-defence is the Iraqi invasion of Kuwait. After Iraq invaded Kuwait, Kuwait had the right to use force in self-defence and other states could join it in collective self-defence. The right of self-defence allows the victim of an armed attack to take the defence to the territory of an attacking state. The victim may use that force necessary to prevent future attacks. Force was used to liberate Kuwait and to create a security zone on the territory of Iraq to ensure the future security of Kuwait.<sup>44</sup>

The Kuwait case has two features missing from 11 September. No one doubted who carried out the aggression: Iraq. Plus, the occupation of Kuwait created a continuing wrong that could be righted, especially since the Security Council had authorized a coalition of states to liberate Kuwait. In the case of 11 September and other terror attacks, in the immediate aftermath, the first task was the gathering of evidence. Because the state must respond quickly to an armed attack or respond in anticipation of an attack about to occur not long after a prior attack, states have a problem responding lawfully to terror attacks. These attacks are usually brief and do not result in an on-going wrong such as the unlawful occupation of territory.<sup>45</sup> It usually takes some time to find out who the perpetrators are and where they are. But force may not be used long after the terror act. Absent a continuing wrong, force long after an attack is an unlawful reprisal.<sup>46</sup>

Reprisals are not considered measures of self-defence – they do not repel on-going armed attack or seek to dislodge an unlawful occupation. Some have argued,

<sup>43</sup> At the time of writing there is an on-going debate among international lawyers regarding the right of states to use force for 'humanitarian' purposes even if the use is not in self-defence and if it lacks Security Council authorization. No government unequivocally supports humanitarian intervention. Lacking that support, humanitarian intervention cannot justify a use of armed force.

<sup>44</sup> See Mary Ellen O'Connell, 'Enforcing the Prohibition on the Use of Force: The U.N.'s Response to Iraq's Invasion of Kuwait' (1991) 15 *S. Ill. U. LJ* 453; John Norton Moore, *Crisis in the Gulf: Enforcing the Rule of Law* 253–81 (1992).

<sup>45</sup> Travaglio, *loc. cit.*, 145; Lobel, *loc. cit.*, 537; Ruth Wedgwood, 'Responding to Terrorism: The Strikes Against bin Laden' (1999) 24 *YJIL* 559.

<sup>46</sup> In the General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations 1970, 'States have a duty to refrain from acts of reprisal involving the use of force.' GA Res. 2625 (xxv), UN GAOR, Supp. No. 28. See also the *Corfu Channel Case* (UK v Alb.), 1949 ICJ Rep. 4, 108-09 (5 Dec.).

however, that if terrorists plan an on-going series of attacks or, in other words, a terror campaign, the state responding to prevent future attacks cannot be distinguished from a state acting in self-defence.<sup>47</sup> Responding within a reasonable time to the first terror act in order to stop future attacks, is also arguably lawful self-defence.<sup>48</sup> While the analogy may be apt, the problem with this argument is an evidentiary one.<sup>49</sup> The weakest part of the case for Enduring Freedom on 7 October may have been the lack of clear and convincing evidence of future attacks. Prime Minister Blair referred to such evidence,<sup>50</sup> but the real case regarding future attacks emerged subsequent to 7 October. Clear and convincing evidence has been found in Afghanistan of plans for biological and chemical attacks.<sup>51</sup> As will be explained later in the discussion of mistake, if subsequent evidence proves the case for self-defence existed, a defending state will not be held responsible for insufficient evidence at the time of the defence.

To take the attack to the territory of a state, the defending state must have evidence the territorial state is responsible for the acts. Typically terror attacks are launched by non-state actors, groups like al-Qaeda, Hamas, or the Irish Republican Army. In some cases the defending state can show legal responsibility for the acts of these groups – that showing must also be by clear and convincing evidence. In other cases, the territorial state is not responsible for the acts themselves but simply cannot control the acts of groups on their territory. In those cases, arguably a far lesser response is warranted – one aimed at the group and not the state as a whole.

At least UK lawyers understood the facts they needed to show: the UK's paper of 4 October carefully detailed links between al Qaeda and the Taliban.<sup>52</sup> Acts of

<sup>47</sup> See Lobel, *loc. cit.*, 540-542; Yoram Dinstein, *War, Aggression, and Self-Defense* (3<sup>rd</sup> ed., 2001) 194-203; Louis Henkin, *International Law: Politics, Values and Functions* (1989-IV) *Recueil des Cours* 216, revised and republished as Louis Henkin, *International Law: Politics, Values and Functions* (1990) 159-62.

<sup>48</sup> According to Dinstein, defensive armed reprisals are post-attack measures of self-defence short of war. They are a necessary option for a victim state as an alternative to on-the-spot reaction or war. Dinstein, *op. cit.*; see also Oscar Schachter, *International Law in Theory and Practice* (1995) 162-175.

<sup>49</sup> Fundamentally, the principles of necessity, proportionality and discrimination are the central customary law principles of international humanitarian law. The three concepts are closely related and not always listed separately. The International Court of Justice (ICJ) confirmed the status of necessity and proportionality as customary international law in *Nuclear Weapons* opinion, 1996 ICJ Rep. 226, 240-246; *Nicaragua* case, ICJ Rep. 176. See also Theodor Meron, 'The Continuing Role of Custom in the Formation of International Humanitarian Law' (1996) 90 *AJIL* 238, 240. See also Christopher Greenwood, 'Scope of Application of Humanitarian Law', in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (1995) 30-33.

<sup>50</sup> 'Incidentally, the intelligence evidence, significant when I first drew attention to it on October 3, is now a flood confirming guilt.' Mr. Blair warned that bin Laden was planning further attacks.

<sup>51</sup> Robert Cottrell & Richard Wolffe, 'Attack on Afghanistan, Diplomacy and Transition – Safe Houses Yielding Documents on Weapons of Mass Destruction', *Financial Times*, 23 Nov. 2001, WL 30141729.

<sup>52</sup> 'British Release Evidence Against bin Laden', [www.salon.com/news.../2001/10/04/british\\_evidence/print.htm](http://www.salon.com/news.../2001/10/04/british_evidence/print.htm) (visited 5 Oct. 2001).

persons or groups will be attributable to the state if certain connections to the state are established. Three examples are well known: a state is responsible for attacks if they are carried out by persons sent by the state;<sup>53</sup> the state is responsible if it controls the attackers,<sup>54</sup> and the state is responsible if it adopts the actions of the attackers.<sup>55</sup> A more recent case suggests a ‘role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group’ is enough.<sup>56</sup>

The test of attribution would certainly be met if al-Qaeda or the Taliban gave orders to the other. It may be sufficient that the two parties closely coordinated or intertwined their activities.<sup>57</sup> The British paper states most significantly, that:

- (i) In 1996 Osama bin Laden moved back to Afghanistan. He established a close relationship with Mullah Omar, and threw his support behind the Taliban. Osama bin Laden and the Taliban regime have a close alliance on which both depend for their continued existence. They also share the same religious values and vision.
- (ii) Osama bin Laden has provided the Taliban regime with troops, arms and money to fight the Northern Alliance. He is closely involved with Taliban military training, planning and operations. He has representatives in the Taliban military command structure. He has also given infrastructure assistance and humanitarian aid. Forces under the control of Osama bin Laden have fought alongside the Taliban in the civil war in Afghanistan.

<sup>53</sup> See United Nations Definition of Aggression Resolution, Annex, GA Res. 3314(xxix) UNGAOR, 29th Sess., Supp. No. 31, at 142, UN doc. A/9631 (1974), art. 3, ‘Any of the following acts, regardless of a declaration of war, shall . . . qualify as an act of aggression . . . (g): “The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.”’ See also, International Law Commission, Titles and Texts of the Draft Articles on Responsibility of States for Internationally Wrongful Acts . . ., UN doc. A/CN4/L602/Rev.1, 53<sup>rd</sup> sess., Geneva (26 July 2001), articles 4-11 [hereinafter Articles on State Responsibility].

<sup>54</sup> The ICJ found in the Nicaragua Case that acts of the Contra rebels were not attributable to the United States because the United States did not exercise ‘effective control’ over the Contras. *Nicaragua* case, 1986 ICJ Rep. 64–65.

<sup>55</sup> In the *Hostages* case, the ICJ found Iran was responsible for the hostage-taking at the United States Embassy because of the ‘failure on the part of the Iranian authorities to oppose the armed attack by militants’ and ‘the almost immediate endorsement by those authorities of the situation thus created.’ *Case Concerning United States Diplomatic and Consular Staff in Tehran (US v Iran)*, 1980 ICJ Rep. 3, 42.

<sup>56</sup> *Prosecutor v Tadic*, Opinion and Judgment, No. IT-94-1-T, para. 137 (7 May 1997).

<sup>57</sup> The ICJ found in the *Nicaragua* case that acts of the *Contra* rebels were not attributable to the United States because the United States did not exercise ‘effective control’ over the Contras. *Nicaragua* case, 1986 ICJ Rep. 64–65; The International Criminal Tribunal for Yugoslavia in the *Tadic* case may have lowered the threshold. It found attribution when there is evidence.

- (iii) Omar has provided bin Laden with a safe haven in which to operate, and has allowed him to establish terrorist training camps in Afghanistan. They jointly exploit the Afghan drug trade. In return for active al-Qaeda support, the Taliban allow al-Qaeda to operate freely, including planning, training and preparing for terrorist activity. In addition the Taliban provide security for the stockpiles of drugs.

An independent expert recently stated that 'The Taliban Army, . . . includes Al Qaeda . . .'.<sup>58</sup> NATO members found the evidence presented by the US of al-Qaeda's role in 11 September 'compelling'.<sup>59</sup> Thus, the case may have been made for attribution, especially under the *Tadic* case standard.

### 3.2 Less than Self-Defence

If, however, the right of self-defence against a state is not triggered because no series of attacks is evident or the attacks cannot be attributed to a state, the victim of terror must find an alternative response to armed force. The first alternative is the domestic criminal justice system of states. Individuals and groups carrying out attacks without the sponsorship of a state are common criminals. They clearly fall under the jurisdiction of the state on whose territory they are found. IRA terrorists in the United States are examples. Territorial states have an obligation to try or extradite individuals accused of terrorism.<sup>60</sup> Failure to hold a trial, which means a fair and credible trial, or failure to extradite can give rise to the right to take countermeasures. Countermeasures are also the option for a state responding to another state's use of violence or even armed force, if the act is a single incident, rather than an on-going series. In such a case, countermeasures may be used until the wrongdoer provides a remedy for the wrong. Appropriate remedies can include compensation and assurances of non-repetition.

Countermeasures are actions which violate the law but are taken in response to prior violations.<sup>61</sup> Countermeasures must be proportional to the injury suffered and are available only if the parties involved have no prior commitment to resort to

<sup>58</sup> Serge Schmemmann, 'U.N. Envoy Says All Options are Open on a Post-Taliban Afghanistan', *NY Times*, 19 Oct. 2001, B4.

<sup>59</sup> Drozdiak and Chandrasekaran, 'Nato: U.S. Evidence', *loc. cit.*

<sup>60</sup> See Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), 23 Sept. 1971, 24 UST 565; Hague Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), 16 Dec. 1970, 22 UST 1641. See also, US Department of State Office of Counterterrorism, *International Terrorism Conventions* (17 Aug. 1998).

<sup>61</sup> *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* 1997 ICJ Rep. 7, 47 (paras 82–87); *Air Services Agreement Case (US v Fr.)*, 18 RIAA 416, para. 83 (1978). See also, Articles on State Responsibility, see n.53, arts. 49–54; Karl Doehring, 'The Unilateral Enforcement of International Law by Exercising Reprisals', in Ronald St. John Macdonald (ed.), *Essays in Honor of Wang Tieya* (1994) 235–236; E. Zoller, *Peacetime Unilateral Remedies* (1984).

means of binding dispute settlement. Certain measures are prohibited, in particular, armed force, violations of human rights, and violations of diplomatic immunity. Countermeasures may be taken by the injured states, but in the case of universal jurisdiction crimes, any state may take measures. The attacks of 11 September involved the intentional killing of so many innocent people that they qualify as crimes against humanity, which are universal jurisdiction crimes.<sup>62</sup> Any state's courts may exercise judicial jurisdiction over persons accused of universal jurisdiction crimes.<sup>63</sup> Any state may aid in the enforcement of the law prohibiting such crimes by taking countermeasures.

The most common form of countermeasure is economic sanctions. Yet, forceful action short of armed force also fits the definition of lawful countermeasure. For example, a state may be able to send agents to apprehend terrorists from another state that refuses to try or extradite them. A police action or incursion is short of armed force and is arguably proportional to the wrong of harbouring terrorists. The evidence for this interpretation of the law is limited, however. Evidence exists that police actions and the like on state territory or areas beyond national jurisdiction do not amount to prohibited armed force.<sup>64</sup> On the other hand, the 'volunteer' action

<sup>62</sup> See Frederic L. Kirgis, 'Terrorist Attacks on the World Trade Center and the Pentagon', ASIL Insight, available at [www.asil.org](http://www.asil.org) (visited 13 September 2001) (citing the Rome Statute of the International Criminal Court definition of a crime against humanity: 'widespread or systematic attack directed against any civilian population, with knowledge of the attack.'). Rome Statute of the International Criminal Court, UN doc. No. A/Conf. 183/9, art. 1, (1998) 37 ILM 999.

<sup>63</sup> See, e.g., Kenneth Randall, 'Universal Jurisdiction Under International Law' (1988) 66 *Tex. L.R.* 785.

<sup>64</sup> States may use minimal armed force to enforce the law without violating article 2(4). Minimal use of force on the high seas or in air space over the high seas is permissible. For example, states may use armed force in affecting arrests by shooting across the bow of a pirate ship on the high seas or dropping a bomb on an oil tanker in international waters to prevent pollution damage. See the Definition of Aggression Resolution, see n. 53, art. 2: 'The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.' See also Dinstein, *op. cit.*, 117, who refers to the '*de minimis* clause of Article 2' in the Definition of Aggression.

In the *Nicaragua* case, the ICJ distinguished 'frontier incidents' from uses of force in violation of art. 2(4). Presumably, the Court was referring to minimal uses of cross-boundary force: 'The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another States, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces.' *Nicaragua* case, 1986 ICJ Rep. paras 194–95.

In 1967, the UK bombed the Torrey Canyon, an oil tanker which had run aground in international waters and threatened serious oil pollution damage to the UK coast. See in *Re Barracuda Tanker Corp.*, 409 F.2d 1013 (1968). The action was universally approved and codified at art. 216 of the United Nations Convention on the Law of the Sea, opened for signature, 10 Dec. 1982, art. 107, UN doc. A/Conf.62/122 (1982), reprinted in United Nations,

to kidnap Eichmann from Argentina on behalf of Israel was condemned.<sup>65</sup> Yet that incident occurred before the development of the 'try or extradite' principle.<sup>66</sup> Israel could not justify its action as a countermeasure because it was not responding to a prior wrong by Argentina. While unlawful, the kidnapping was not a use of armed force or an otherwise-prohibited measure. Still, this is an open question of international law. The best approach for a state interested in taking forceful measures on the territory of another state is to seek Security Council authorization for such an action.<sup>67</sup>

In the case where a territorial state is unable to prevent on-going attacks, some limited force may be used to prevent future attacks. These are cases where the attacks are not attributable to the territorial state. Turkey's pursuit of Kurdish separatists into Iraq is one example.<sup>68</sup> Israeli attacks on terrorists in Lebanon is another.

Israel's response to terror attacks perpetrated by Palestinians and other anti-Israeli groups operating out of Lebanon have been particularly criticized for their lack of proportionality. Israel invaded Lebanon in 1982 in response to attacks by the Palestine Liberation Organization. The invasion went as far as the capital, Beirut, far from the area where attacks on Israel originated. The Israelis remained in Lebanon at that time for three-and-a-half months. Although the United States felt Israel had a right of self-defence with regard to the attacks it was suffering, even it felt Israel's response was out of proportion to those attacks.<sup>69</sup>

Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index, UN Sales No. E.83.v.5 (1983), (1982) 21 ILM 1261. It is said to have led to an international 'right of intervention when a threat of pollution of a state's coastal zone presents a grave and imminent danger.' Linda A. Malone, 'Discussion in the Security Council on Environmental Intervention in Ukraine' (1994) 27 *Loy. L.A. L. Rev.* 893, 905.

In the Red Crusader incident, a Danish fishing control vessel fired on a British fishing trawler on the high seas. A Commission of Inquiry found Denmark had used excessive force, but it did not suggest that Denmark had violated art. 2(4). *Report of the Commission of Inquiry into the Red Crusader Incident*, (1962) 35 ILR 485; J.G. Merrills, *International Dispute Settlement* (3rd ed., 1998) 52–55. Spain did suggest this with regard to Canadian enforcement action against Spanish fishing vessels on the high seas. It alleged that shooting across the bow was a violation of article 2(4) in an application to the International Court of Justice. The case was withdrawn from the Court. Spain did not complain to the Security Council nor have commentators supported Spain's interpretation of article 2(4) in the case. See Marvin Soroos, 'The Turbot War: Resolution of an International Fishery Dispute' in N.P. Gleditsch (ed.), *Conflict and the Environment* (1997) 235. Peter G.G. Davies, 'The EC/Canadian Fisheries Dispute in the Northwest Atlantic' (1995) 4 *ICLQ* 927.

<sup>65</sup> Louis Henkin, et al., *International Law* (3rd ed., 1993) 1083–1086.

<sup>66</sup> See Schachter, *op. cit.*, 163.

<sup>67</sup> Plainly secrecy would be required in such a case. The Security Council can operate in secret when necessary.

<sup>68</sup> Michael Bothe & Torsten Lohmann, *Der Türkische Einmarsch in Nordirak*, SZIER, (1995) 441.

<sup>69</sup> D. Brian Hufford & Robert Malley, 'The War in Lebanon: The Waxing and Waning of International Norms', in W. Michael Reisman & Andrew Willard (eds.), *International Incidents, The Law That Counts in International Politics* (1988) 144, 176–180; see also Travaglio, *loc. cit.*, 169.



The Security Council may authorize the use of armed force and lesser measures by a state when it finds a threat to the peace, breach of the peace, or act of aggression. The Council may respond with force to a broader range of violence than may states acting in self-defence. Again, the force authorized must be necessary, proportional and discriminatory in the circumstances. In two cases where the Security Council sought the extradition of wanted terrorists, it imposed economic sanctions rather than authorizing the use of force or forceful apprehension of persons.<sup>70</sup> In the case of the 11 September attacks, too, the Security Council has found the attacks to be a threat to international peace and security. It has called on 'all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and stresses that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable.'<sup>71</sup> It calls on the international community to co-operate to suppress terrorism. The Council does not authorize the United States or any other state to use armed force or all necessary means in response to the 11 September attacks, though it could.

#### 4 THE CASE OF MISTAKE

In the Berlin Discotheque case, subsequent evidence from Stasi files confirmed that the US case for bombing Libya was sound. Evidence in Afghanistan is also supporting Enduring Freedom – after the fact. Subsequent evidence can well disprove a case, too. What if evidence emerges that the Taliban were not linked to al-Qaeda and/or that no subsequent attacks were planned by al-Qaeda? Writers often provide the example of Israel in the 1967 war as having engaged in lawful, anticipatory self-defence against Egypt. Subsequent evidence suggests, however, that Israel knew Egypt did not plan an armed attack on Israel. If so, Israel's attack can only be seen as unlawful, along with the resulting occupation of territory stemming from that unlawful act.<sup>72</sup> What if, however, Israel had only been mistaken? Responsibility for mistake is a debated point in international law.<sup>73</sup> Some writers suggest that if the state taking enforcement measures was mistaken regarding the

<sup>70</sup> The Security Council demanded that the Taliban hand Osama bin Laden over to a country where he was under indictment in Resolution 1267, para. 2 (1999). In Resolution 1333 (2000) it further refined and strengthened the sanctions imposed in 1267. The Security Council imposed sanctions on Libya until it extradited two persons wanted for the bombing of the Pan Am flight over Lockerbie, Scotland. See SC Res. 731 (1992), SC Res. 748 (1992); see also, *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* 1992 ICJ Rep. 114 (14 Apr.) (Request for Provisional Measures).

<sup>71</sup> SC Res. 1368 (2001).

<sup>72</sup> Quigley, *loc. cit.*, 203-213. Dinstein writes regarding the 1967 war, 'Hindsight knowledge, suggesting that – notwithstanding the well-founded contemporaneous appraisal of events – the situation may have been less desperate than it appeared, is immaterial.' Dinstein, *op. cit.*, 191.

<sup>73</sup> Ian Brownlie, *System of the Law of Nations* (1983) 40-47.

existence of a wrong or the gravity of the wrong, its response based on that mistake should be excused as long as the state acted in good faith.<sup>74</sup> State practice confirms this. On many occasions states have used force, then subsequently claimed they did so under a mistaken understanding of the facts – the US shootdown of an Iranian passenger jet, the Soviet shootdown of a Korean passenger jet, the US bombing of the Chinese embassy in Belgrade. As long as states believed the claim of mistake, the use of force was not treated as a violation of the Charter.<sup>75</sup>

Trying to prove the intentions of states is difficult. The law should require that inferences be drawn from objective facts only.<sup>76</sup> Such a requirement may restrain coercive action. In those cases where a state is not entirely certain that it is in the right, it should err on the side of caution. Better to use a less coercive response or no coercion at all than to later discover the response was disproportionate or unnecessary and the state is in the wrong, with only the claim of mistake as a defence. This is an important principle governing enforcement of international law generally. It is related to the doctrine of necessity, which characterizes all of enforcement. If no violation has occurred, no response is necessary. All mistakes cannot be avoided, and the ability to defend actions by claiming mistake has in practice limited the escalation of forceful response. True mistakes in good faith, however, should be few.

## 5 CONCLUSION

On 11 September 2001, four passenger planes were hijacked in the United States and made to crash against three buildings: two towers of the World Trade Centre and the Pentagon. On 7 October, the United States and United Kingdom began a bombing campaign in Afghanistan in response to those hijackings. These states said they were acting in individual and collective self-defence. Under the terms of the United Nations Charter and customary principles of state responsibility, self-defence may only be used to prevent on-going armed attacks or a continuing wrong as a result of an armed attack. If the self-defence is carried to the territory of a sovereign state, that state must be responsible. Responsibility in a case like 11 September requires a showing by clear and convincing evidence that Afghanistan is responsible, that the attacks can be attributed to it because of its close interconnection with the al-Qaeda terror organization and that future attacks were planned. Members of NATO found the evidence 'compelling.' No attempt was made to condemn the grounds for justifying Enduring Freedom in the Security Council. On 7 October 2001, it was a defensible action based on the evidence.

<sup>74</sup> See, e.g., Dinstein, *op. cit.*, 171–173.

<sup>75</sup> Sean D. Murphy, 'Contemporary Practice of the United States Relating to International Law' (1999) 93 *AJIL* 628, 632 (bombing of the Chinese Embassy); 'U.S. and Iran Settle Financial Claims, \$132 million Agreement Covers Airbus Downing', *Wash. Post*, 23 Feb. 1996, A23; Craig A. Morgan, 'The Shooting of Korean Airlines Flight 007: Responses to Unauthorized Aerial Incursions', in Reisman & Willard (eds.), *op. cit.*, 202, 204–210.

<sup>76</sup> Ian Brownlie, *Principles of Public International Law* (5<sup>th</sup> ed., 1998) 444–446.