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## Rules of Evidence for the Use of Force in International Law's New Era

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## THE LAWS OF FORCE AND THE TURN TO EVIDENCE

The panel was convened at 9:00 a.m., Thursday, March 30, by its chair, Dino Kritsiotis of the University of Nottingham, who introduced the panelists: Thomas Franck of New York University School of Law; Marie Jacobsson of the Foreign Ministry, Sweden; Mary Ellen O'Connell of Notre Dame Law School; and Thérèse O'Donnell of the University of Strathclyde.

### QUESTIONS OF FACT AND EVIDENCE AND THE LAWS OF FORCE

*By Dino Kritsiotis\**

This panel has been convened in order to discuss questions of fact and evidence as they relate to the international legal regulation of force.

The topic has gained particular importance in recent years, in view of the increased litigation of “force” cases before the International Court of Justice, and of the resulting concentration on these questions in the Court’s jurisprudence. We should observe that this cadre of cases falls into line with the need for demonstration or the “evidential challenge” which the Court issued to accusing states in the very first contentious case to come before it—the *Corfu Channel* litigation between the United Kingdom and Albania.<sup>1</sup> However, as we have also learnt from the *Oil Platforms Case* of November 2003, the Court’s pronouncements on evidence bear additional importance for the revelations which these might announce for the law itself, for the substantive content of the *lex lata*. There, the Court remarked that “[t]here is no evidence that the minelaying alleged to have been carried out by the *Iran Ajr* . . . was aimed specifically at the United States.”<sup>2</sup> Our immediate instinct is to shelve this observation as an evidential matter when it is, in fact, also suggestive of a further element in the Court’s evolving definition of the concept of an armed attack—that of the *intention* of the attacking state—and could well mark out the Court’s future argumentative and evidential expectations when confronted with claims involving the right of self-defense.<sup>3</sup>

All of this is to say nothing of the diplomatic history that has presented “evidence” to the court of political and public opinion in the anticipation or explanation of force—the historic presentation by U.S. Secretary of State Colin Powell to the Security Council on February 5, 2003, drawing immediate correlations with U.S. Ambassador Adlai Stevenson’s photographic showcase to the Council concerning Soviet missile installations on Cuban territory in October 1962.<sup>4</sup> Evidence therefore matters outside the hallowed chambers of the International Court of Justice as much as it matters within it. A failure to produce evidence—or the right sort of evidence, or enough of the right sort of evidence—might not only prove problematic but fatal to the case a government is seeking to make. We might cite in this regard the claim of self-defense made by the United States for Operation Infinite Reach in

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<sup>1</sup> *Corfu Channel (UK v. Alb.)*, Merits, 1949 ICJ REP. 4 (Apr. 9).

<sup>2</sup> *Oil Platforms (Iran v. U.S.)*, 2003 ICJ REP. 161, 192, §64 (Nov. 6).

<sup>3</sup> See William H. Taft IV, *Self-Defense and the Oil Platforms Decision*, 29 YALE J. INT’L L. 395, 302–03 (2004). Taft is equally tentative in his interpretation of this aspect of the Court’s ruling, noting that “[t]he Court’s statements might be read to suggest that military attacks on a State or its vessels do not trigger a right of self-defense as long as the attacks are not aimed specifically at the particular State or its vessels but rather are carried out indiscriminately” (emphasis supplied). *Id.* at 302.

<sup>4</sup> Adam Clyner, *A Reprise of 1962, with Less Electricity*, N.Y. TIMES, Feb. 6, 2003, at A17.

August 1998,<sup>5</sup> where reason was given to distinguish the force used against the Sudan from that undertaken against Afghanistan on the grounds of the differing viabilities of the evidence(s) rendered.<sup>6</sup>

As we cast our eyes across these questions of fact and evidence, let us bear in mind their generic importance—for the sweep of the laws of force as a whole. Claims of the right of self-defense or of Security Council “authorization” have surely excited interest in *evidence* but it will serve us well to recall that to the application of each law, its evidence is and must be due. Thus, in relation to solicited interventions, the Court intimated in the *Case Concerning Armed Activities on the Territory of the Congo* that the effect of evidence—evidence of the consent of the Government of the Democratic Republic of the Congo for the presence of Ugandan armed forces on its soil—would have been determinative in that case; it would end up “validating that presence in law.”<sup>7</sup> In relation to claims of the right of humanitarian intervention, states are and have been conscious that a successful invocation of that right cannot rest on the simple laurels of that invocation alone; the facts on the ground need to be rallied, and to be rallied cogently, in order to underpin why a “need” has actually arisen for preventing an “impending humanitarian catastrophe” in a given situation.<sup>8</sup>

## EVIDENCE AS AN ISSUE IN INTERNATIONAL LEGAL PRACTICE

*By Marie Jacobsson\**

President John F. Kennedy shocked the citizens of the United States on October 22, 1962, when in a television speech to the nation he revealed that the United States had clear evidence of Soviet installations of missiles on Cuba—missiles that contained nuclear devices that could reach U.S. soil.

The Security Council met the following day, on October 23, 1962. Following a tense and short conversation between the U.S. Ambassador to the United Nations, Adlai Stevenson, and the Soviet Ambassador Valerian Zorin, Stevenson made his dramatic move. Like the unveiling of an artist’s painting, Stevenson unveiled photographs taken by U-2 reconnaissance planes. The pictures clearly showed the Soviet installations. The move was a success.<sup>1</sup>

More than 40 years later, on February 5, 2003, U.S. Secretary of State Colin Powell attempted to repeat that successful move. Using modern media technology—audio, visuals, and monitors—he spoke for more than an hour and showed pictures in order to reveal that Iraq had weapons of mass destruction.<sup>2</sup> That move was *not* a success.

- Why were the pictures shown by Stevenson accepted as “evidence,” while the pictures shown by Powell met with scepticism?
- Why would these events be of an interest to a government lawyer?

<sup>5</sup> UN Doc. S/1998/780 (Aug. 20, 1998).

<sup>6</sup> See Leah M. Campbell, *Defending Against Terrorism: A Legal Analysis of the Decision to Strike Sudan and Afghanistan*, 74 TUL. L. REV. 1069, 1090 (2000).

<sup>7</sup> *Case Concerning Armed Activities on the Territory of the Congo*, Judgment (Dem. Rep. Congo v. Uganda) (Int’l Ct. Justice Dec. 19, 2005), 44 (§105).

<sup>8</sup> The useful formulation of the Security Council in Resolution 1199 (Sept. 23, 1998).

\* Of the Swedish Foreign Ministry.

<sup>1</sup> The situation is described in THEODORE C. SORENSON, KENNEDY 706–07 (1965). See also ABRAM CHAYES, THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISIS AND THE RULE OF LAW 84–85 (1974).

<sup>2</sup> Powell also referred to human sources and indicated that he could not reveal everything he knew. BOB WOODWARD, PLAN OF ATTACK 307 ff. (2004). It was apparent to anyone who saw Powell’s performance that it was inspired by Stevenson’s move. Woodward describes the planning of the “performance” in his book.

The two cases show that there is a thin line between what is considered evidence of a fact and what is not. The political context is crucial. No one could possibly argue that the pictures Ambassador Stevenson showed to the Council were the ultimate evidence of the installation of missiles on Cuban territory. Likewise, Secretary Powell's pictures might have been true evidence of weapons of mass destruction.

\* \* \*

International relations and international politics are not questions of proof in the legal sense of the word. Evidence, proof, and burden of proof belong to the sphere of courts, trials, and justice—or, for that matter, to mathematics and philosophy. Yet the two spheres, the political and the legal, are bound to meet—in particular when critical political and legal issues are at stake. A reversed situation might then arise: politicians require “proof” and courts evaluate evidentiary material.

There is an abundance of international relations theories on how to interpret political incidents and developments. Governments and politicians act on signals. In a sense, this is no different from how human beings act in other contexts: in our personal relations and in our daily lives. We do not normally wait for “evidence” in all situations and all contexts—if, that is, it can be produced at all. We tend to act on speculation and on more or less qualified calculations. In the end, an immediate reaction might be a matter of survival.

But states and governments bear a special responsibility when it comes to reacting on signals. They are under an obligation to keep their relations within the framework of international law, particularly the United Nations Charter. This is where the matter also becomes a concern for a government lawyer.

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Let us now take a look at a few situations where issues of evidence are raised. The first example relates to territorial infringements in peacetime. Such infringements are not unusual, at least not in Europe or in other areas where there are a considerably large number of states that share a limited geographical area. The cause of the infringement can range from a mere mistake to an act of reconnaissance preceding an armed attack.

Assume that a state discovers that another state has violated its territorial sea or air space. A violation of airspace can last a very short time—seconds or a few minutes. But it can also last longer—perhaps caused by a misinterpretation of the contents or duration of a bilateral over-flight treaty. The crucial questions before formulating a legal opinion are:

- (1) Who infringed the territory?
- (2) Was the infringement on purpose or was it a mistake?
- (3) What is the current political situation?

Assume that the violation does not amount to an armed attack and that self-defense is thus not a proper response. Yet a state whose territory has been violated cannot simply ignore the violation. It must respond, not least to show that it has effective control over its air space.

How does the victimized state act? If the violating state has not already apologized (i.e., before the first state has protested, or even discovered the violation), the victimized state informs the violating state of the infringement and requests an explanation. It never, or rarely, presents the “evidence” of the violation. It simply informs other states about the

circumstances, the time when and the place where the infringement took place. This is done through diplomatic channels.

The responding state most often checks its own sources, before it apologizes for the incident that has occurred. Further “evidence” is not requested or required. On the whole, the process would not have “survived” a court trial procedure. International law requires that the two states involved act *bona fide* in light of their interests to solve disputes by peaceful means if there is a dispute, or simply to act just as good neighbors.

But there are also territorial infringements of a more serious nature. How serious a violation is must be determined by the character of the act itself and the political situation in which it occurs—whether in peace-time or a time of tensions. The response must be proportionate—to speak in legal terms.

Every now and then remarkable incidents occur that turn “evidence” into proof. This was the case some decades ago when Sweden had had numerous indications of submarines violating its territorial waters. Evidence of submarines operating in territorial waters in a submerged mode is not difficult to obtain. What is more problematic is to identify the intruder, and it is almost impossible to provide the violating government with “evidence” that is obtained by surveillance and intelligence systems. If it were to do so, the government would be likely to disclose its own means and methods.

So one November morning, the people living in the Karlskrona archipelago, home of the Karlskrona naval base, woke up to find that the Soviet Whisky class submarine U137 had run aground. While not even the Soviet Union could deny that the submarine was where it was—particularly due to the worldwide media coverage of the so-called *Whisky on the rocks*—the diplomatic dispute focused on whether or not it was there due to a mistake or through a planned but illegal operation. The response had to be appropriate. At the same time, a small country like Sweden did not want to be “at war” with the Soviet Union.

Government lawyers in Sweden worked closely with the politicians and the military authorities. Evaluation of “evidence,” i.e., facts on the ground, was directly relevant for the legal advice given by the legal advisers. An act of aggression it was; an armed attack it was not.<sup>3</sup>

The second example relates to self-defense and the use of force. The *right* of self-defense does not require evidence. The existence of the incident that gives rise to self-defense does. The kind of evidence that is needed depends on the situation. If a state claims that it is taking measures of self-defense in response to an overwhelming and immediate threat, evidence—at least of political character—is crucial.<sup>4</sup> If the response has caused a dispute, such as in the *Case Concerning Oil Platforms*, the evidence required is of a formal, procedural character since it will be subject to evaluation in a court procedure.<sup>5</sup>

If armed attacks have occurred, such as those in the United States on September 11, 2001, there is little problem. No one doubted that the attacks had taken place. For a few minutes, there were those who might have wondered whether it was an accident, but the questions soon focused on:

<sup>3</sup> The best description of the government’s legal analysis and handling of the U137 is written by Bo Johnson Theutenberg, the principal legal adviser on international law to the Swedish Ministry for Foreign Affairs. BO JOHNSON THEUTENBERG, *INTERNATIONAL LAW AND NATIONAL SECURITY* 431–81 (1986). The text is available only in Swedish.

<sup>4</sup> There are two aspects: when the right to self-defense commences (the legal debate) and whether the situation of an imminent threat is at hand (the evidence aspect).

<sup>5</sup> *Oil Platforms (Iran v. U.S.)*, 2003 ICJ REP. 161 (Nov. 6).

- Who committed the heinous acts?
- How to respond?
- Against whom?

Shortly after the attacks, the United States claimed to have identified the perpetrators. Evidence was presented to allies, although it is unlikely that all available intelligence was shared. The international community was prepared to rely on the U.S. evaluation. Correspondence with the Security Council by the United States and the United Kingdom reported that measures of self-defense had been taken, but contained no “evidence”—and did not need to do so.

The intervention in Iraq in March 2003 was different. It presented the interesting legal challenge of both evidence on the content of the applicable law *and* evidence of the facts on ground. Did Saddam Hussein have weapons of mass destruction or not? Contrary to what many non-lawyers think, the lack of support for the military action against Iraq in 2003 was not primarily due to a question of evidence but, rather, a matter of interpretation of the meaning of the previously adopted Security Council resolutions. Indirectly, evidence played a role in that there was a competition between the evaluation of evidence by Hans Blix’s team and the evaluation of evidence presented by Secretary Powell. But the real issue was not a matter of proof of fact, but of the meaning of the law.

A third example is when states are under a legal obligation to act due to treaty-based obligations, primarily binding decisions by the Security Council, but also within the framework of the cooperation within the European Union.<sup>6</sup> The final example worth discussing is the obligation to act in order to prevent violation of *jus cogens* obligations and how far such an obligation reaches. A renewed debate was initiated by the failure to prevent the Srebrenica and Rwandan catastrophes. Accordingly, the military actions in Kosovo in the spring of 1999 sparked a renewed discussion on “humanitarian intervention” in relation to military actions that took place to prevent a humanitarian catastrophe. No state wanted to see a recurrence of the Rwanda failure. When intelligence and political reports indicated what was going on, while at the same time it was becoming clear that a decision by the Security Council would be vetoed, governments were faced with a political dilemma: the need to act without a clear legal basis.

One of the basic ideas in the so-called Responsibility to Protect concept is that governments have an obligation to act before the catastrophe has taken place.<sup>7</sup> Preventive action is rarely buttressed with “proof” or even “evidence.” The action, that is the response, is based on a calculation of probability. The essential idea embedded in this concept is to act before matters have been proved. In relation to a discussion on evidence this idea certainly merits further analysis.

### CONCLUDING REMARKS

Evidence is a tool in international relations. Hence a government lawyer cannot disregard from aspects of evidence in a legal opinion. He or she must alert the government of the possible legal consequences of countermeasures that are based on insufficient evidence or

<sup>6</sup> See e.g., *Yusuf and Al Barakaat International Foundation v. Council and Commission*, Case T-306/01 (Sept. 21, 2005).

<sup>7</sup> INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, *THE RESPONSIBILITY TO PROTECT* (2001).

false premises. In the end, the lawyer might need to defend the government's action in a court case, arbitration, or other legal contexts.

There is a strong connection between the law of state responsibility, countermeasures, and reparation. Although the International Law Commission excluded questions of evidence and proof of breach of an international obligation,<sup>8</sup> the connection between an international wrongful act or omission and responsibility is clear.<sup>9</sup>

The consequences of an act, preventive act, or a countermeasure, based on rudimentary evidence, can be serious.

## RULES OF EVIDENCE FOR THE USE OF FORCE IN INTERNATIONAL LAW'S NEW ERA

*By Mary Ellen O'Connell\**

International law is ready for a period of renewal in this post-post-modern era. I predict this renewal will come from reviving classical doctrines, such as the positive-law doctrine of sources, and from revisiting formalism.<sup>1</sup> Such renewal will not be possible for the international law of evidence because there is no classical doctrine. Perhaps, as Charles Brower suggests, this is because of the differing civil and common law attitudes toward the rules of evidence, especially with respect to the burden of proof.<sup>2</sup> It seems to me, however, that we need a law of evidence in international law, especially for the international law on the use of force. Rules regulating force need to be as clear as possible and so do the rules that support the substantive principles, such as the law of state responsibility and the law on evidence—the clearer the rules, the less discretion available to states, and the greater the chance of actually restraining the use of force in international law.

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Plainly international law does not currently have a well-developed body of evidentiary rules on the use of force. 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>

The International Court of Justice has made statements regarding what is credible evidence, evidence to be given “weight” in international cases. It has not, to date, made any straightforward, express statement of the standard of proof expected. We generally know which party carries the burden, but we do not know with certainty what the burden is. Still, there are

<sup>8</sup> JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 124 (2002).

<sup>9</sup> *Id.* at 61.

\* Professor, Notre Dame Law School.

<sup>1</sup> See Anne Orford, *The Gift of Formalism*, 15 EUR. J. INT'L L. 179 (2004).

<sup>2</sup> Charles N. Brower, *Evidence Before International Tribunals: The Need for Some Standard Rules*, 28 INT'L L. 47 (1994).

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

indications in international law that the standard should be something like the clear and convincing standard found in the United States. In the United States, the burdens are generally characterized as (1) preponderance of evidence; (2) clear and convincing evidence; or (3) evidence beyond a reasonable doubt. Several judicial decisions, scholarly comments, and examples of State practice support the clear and convincing standard for evidence.

For example, several self-defense cases, including the Oil Platforms case (2003) and the Nicaragua case (1986), indicate that the ICJ wanted more than a mere preponderance of the evidence to support claims of the United States that it acted in self-defense. On the other hand, there is no indication that the United States had to provide proof beyond a reasonable doubt. The closest category is clear and convincing. I do not think this can be said of the Corfu Channel case (1949) where the Court drew inferences from indirect evidence of Albanian officials' knowledge. This seems less than clear and convincing. The Democratic Republic of Congo case (2005) gives indications of both preponderance and the clear and convincing standard:

71. The Court thus concludes that, on the basis of the evidence before it, it has not been established to its satisfaction that Uganda participated in the attack on Kitona on 4 August. ...

91. The Court makes no findings as to the responsibility of each of the Parties for any violations of the Lusaka Agreement. It confines itself to stating that it has not received convincing evidence that Ugandan forces were present at Mobenze, Bururu, Bomongo and Moboza in the period under consideration by the Court for purposes of responding to the final submissions of the D.R.C.<sup>4</sup>

In *Ethiopia-Eritrea Jus Ad Bellum Claim*, decided on December 19, 2005, the tribunal referenced a standard of "clear" evidence: "it is clear from the evidence that these incidents involved geographically limited clashes between small Eritrean and Ethiopian patrols along a remote, unmarked, and disputed border."<sup>5</sup>

Decisions of other tribunals in non-use of force cases indicate that the standard of evidence in international law generally should be "clear and convincing."<sup>6</sup> In the Trail Smelter Arbitration (1941) between the United States and Canada, the United States claimed Canada was responsible for environmental damage. The arbitrators held "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>7</sup> Also, the Inter-American Court of Human Rights determined in the Velasquez Rodriguez case (1988) that forced disappearance could be proven by less than evidence beyond a reasonable doubt.<sup>8</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>9</sup>

<sup>4</sup> Case Concerning Armed Activities on the Territory of the Congo, Judgment (Dem. Rep. Congo v. Uganda) (Int'l Ct. Justice Dec. 19, 2005).

<sup>5</sup> Available at <<http://www.pca-cpa.org>>.

<sup>6</sup> The remainder of this section is adapted from Mary Ellen O'Connell, *Evidence of Terror*, 7 J. CONF. & SEC. L. 19 (2002).

<sup>7</sup> Trail Smelter (U.S. v. Can.), 3 R.I.A.A.1905, 1963-1965 (1941) (emphasis added).

<sup>8</sup> Velasquez Rodriguez v. Honduras, Inter-Am. Ct. H.R. (ser. C), No. 4, at para. 127 (July 29, 1988).

<sup>9</sup> Dinah Shelton, *Judicial Review of State Action by International Courts*, 12 FORDHAM INT'L L.J. 361 (1989).



Scholars have been more direct than the ICJ regarding the standard of evidence. In cases of force in response to terror, Greenwood refers to “sufficiently convincing” and “convincing evidence.”<sup>10</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>11</sup>

Henkin makes clear the policy reason for a clear and convincing standard. Force in self-defense is meant to be allowed in only a very few cases. International law permits the use of force in self-defense but only when there is an actual armed attack, “which is clear, unambiguous, subject to proof, and not easily open to misinterpretation or fabrication.”<sup>12</sup>

Finally, in several of the counter-attacks launched by the United States following acts of terrorism, U.S. officials referred to either “convincing” or “compelling” evidence. Regarding the evidence of nerve gas inputs in Sudan as the justification for bombing in 1998, a U.S. State Department official said: “We believe we have *convincing evidence* that satisfied us.”<sup>13</sup> A “senior intelligence officer” 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>14</sup>

In regard to the 1993 Baghdad bombing, 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>15</sup> Despite the compelling evidence, however, this use of force was clearly unlawful under the United Nations Charter.

In the 1986 Libya bombing, the United States said it had “convincing evidence” even though it was widely perceived that it had less than convincing evidence.<sup>16</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. “Following 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>17</sup>

A few years after the Libya bombing, the United States apparently decided not to bomb a suspected chemical weapons plant in Libya when it could not convince allies of its evidence

<sup>10</sup> Christopher Greenwood, *International Law and the United States’ Air Operation Against Libya*, 89 W. VA. L. REV. 933, 935 (1987).

<sup>11</sup> Lobel, *supra* note 3, at 547 (emphasis added).

<sup>12</sup> LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 142 (2d ed. 1979).

<sup>13</sup> See Excerpts from Daily Press Briefing by Department of State Deputy Spokesman Foley, Aug. 26, 1998, available at <<http://www.secretary.state.gov>> (emphasis added).

<sup>14</sup> Daniel Benjamin & Steven Simon, *A Failure of Intelligence?*, N.Y. REV. OF BOOKS, Dec. 20, 2001, 78 (emphasis added).

<sup>15</sup> *In Review, The Year Gone By*, L.A. TIMES, Jan. 4, 1994.

<sup>16</sup> William Tuohy, *U.S. Pressing Allies on Libya Chemical Plant*, L.A. TIMES, Jan. 3, 1989.

<sup>17</sup> Barry Schweid, *State Department Revives Terrorism Charges Against Syria*, Associated Press, Jan. 12, 1988.

regarding the plant, combined with the lingering skepticism regarding the Tripoli bombing.<sup>18</sup> Nor did the United States take military action after the attack in June 1996 on the U.S. Air Force residence in Saudi Arabia, the Khobar Towers, or on the USS *Cole* in October 2000 or the first World Trade Center bombing in February 1993—apparently because the United States had insufficient evidence of the responsible parties, though it did have its suspicions.<sup>19</sup>

Finally, with regard to the evidence of a case for the 2001 bombing of Afghanistan, Secretary of State Colin Powell said the Bush Administration would produce a document containing compelling evidence which would show that exiled Saudi extremist Osama bin Laden and his global terrorist network, Al Qaeda, were responsible for the devastating attacks against the World Trade Center and the Pentagon in September 2001. “I think in the near future, we’ll be able to put out a paper, a document, that will describe quite clearly the evidence that we have linking him to the attack,” Secretary Powell said on the NBC news program “Meet the Press”.<sup>20</sup> NATO members heard the U.S. evidence regarding Afghanistan and found it “compelling.”<sup>21</sup>

Officials of the United States were not speaking to a court, but the consistency of reference to “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-defense.

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Two of the major accomplishments of international law after World War II have been the prohibition of the use of force and the development of human rights law.<sup>22</sup> A new law of evidence in international law is needed, but it needs to reflect both of these achievements by subjecting claims to use force to a high standard of proof and by making clear that the collection of evidence must be carried out in a way consistent with human dignity.

### **SECURITY COUNCIL RESOLUTION 1530, EVIDENCE AND THE UNITED NATIONS SECURITY COUNCIL**

*By Thérèse O'Donnell\**

#### **EARLY DAYS**

Following the Madrid terrorist bombings the United Nations swiftly responded with Security Council Resolution 1530 (2004) [hereafter Resolution 1530] condemning the “ETA” attacks as a threat to peace, urging states to comply with their Security Council Resolution 1373 (2001) obligations in locating those responsible. While a symbol of sympathy, Resolution 1530 unequivocally and incorrectly attributed responsibility, unintentionally prompting a

<sup>18</sup> Tuohy, *supra* note 16.

<sup>19</sup> Richard Perle, *Next Stop, Iraq*, Nov. 30, 2001, available at <<http://www.fpri.org>> (Perle regrets force was not used).

<sup>20</sup> Dana Milbank & Vernon Loeb, *U.S. Response Portrayed as Calm, Methodical; Powell: Evidence Against Bin Laden Will Be Produced*, WASH. POST, Sept. 24, 2001.

<sup>21</sup> William Drozdiak & 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, Oct. 3, 2001.

<sup>22</sup> For further development of this latter issue, see Mary Ellen O’Connell, *Affirming the Ban on Harsh Interrogation*, 66 OHIO ST. L.J. 1231 (2005).

\* Of the University of Strathclyde.

reflection about standards of evidence in denunciations of terrorism. Our consideration of the importance of standards of proof incumbent upon states demanding an institutional reaction following a terrorist attack should be set within the context of proposals that have been made for the establishment of an independent, standing fact-finding commission—perhaps one of the more interesting innovations advanced for the Security Council.<sup>1</sup>

While the notion of adducing evidence might be more honored in the breach than the observance, in the context of self-defense the *rhetoric* at least is clearly (albeit variably) adhered to. We can note in this respect the actions taken against Libya in 1986, Sudan in 1998, Afghanistan in 2001, and Iraq in 2003.<sup>2</sup> The final example occurred after, and despite, President Bush's caution that the United States could not wait for "final proof . . . that could come in the form of a mushroom cloud."<sup>3</sup> However, this (contested) trend towards the production of supporting evidence seemed to take a plunge in the case of Madrid. The condemnation of ETA and the consequent reification of Spain's intense counter-terrorism strategies, hardly seemed to necessitate a half-hearted attempt to adduce *any* evidence, much less a smoking gun.

Although Resolution 1530 did not envisage use of force, it did concern a state which had been introducing increasingly draconian anti-terrorist measures, and whose treatment of ETA incommunicado detainees had been an issue of concern for the UN Special Rapporteur on Torture in February 2004.<sup>4</sup> Although not foreseeing *particular* enforcement, Resolution 1530 cross-referenced Resolution 1373. In its December 2001 report to the Counter-Terrorism Committee, Spain specifically recounted its experience with ETA, in relation to its post-9/11 initiatives.<sup>5</sup> Consequently Resolution 1530 had significant potential for ETA suspects or detainees in Spain—the Aznar Administration's anti-ETA stance much strengthened by this international endorsement. Bearing this in mind, Resolution 1530's reference to a "mere" threat rather than an act of aggression or a breach of the peace—as some lesser form of Charter breach<sup>6</sup>—should not have dissipated Spain's burden of proof. While Spain was never subject to a criminal standard of proof, it apparently obtained Resolution 1530 on a fraction of the evidence required in any domestic criminal conviction of an ETA suspect. Thus, in its own way, Resolution 1530 removed the presumption of innocence, potentially seriously impacting upon any subsequent judicial criminal proceedings against ETA suspects, had it not been debunked as early as it was. Obtaining resolutions can be a subtle enterprise and once one resolution has been obtained, there is often a seamless segueing towards the next one. While potentially catastrophic in the case of a resolution condemning a terrorist act then demanding enforcement action (or impliedly authorizing self-defense)—even in Resolution 1530's case—consequences such as ordaining other states to extradite ETA suspects (*à la* Lockerbie) or authorizing force against ETA networks believed to be operating internationally could have arisen.

Sometimes dilatory in action, the Security Council acted within hours of the attacks, thus reinforcing a perception that Spain was experiencing clear and present danger.<sup>7</sup> No debate

<sup>1</sup> At <<http://www.oxfordgovernance.org/fileadmin/Publications/GA002.pdf>>.

<sup>2</sup> UN SCOR 58th Sess., 4701st Mtg, UN Doc S/PV. 4701 (2003).

<sup>3</sup> At <<http://www.whitehouse.gov/news/releases/2002/10/20021007-8.html>>.

<sup>4</sup> E/CN.4/2004/56/Add.2.

<sup>5</sup> UN Doc. S/2001/1246 1B(b)(1) (Dec. 21, 2001).

<sup>6</sup> Karl Wellens, *The U.N. Security Council and New Threats to the Peace: Back to the Future*, 8 J. CONF. & SEC. L. 15, 31 (2003).

<sup>7</sup> Vaughan Lowe, 'Clear and Present Danger': Responses to Terrorism, 54 INT'L & COMP. L.Q. 185 (2005).

occurred, with explicatory comments from Council members emerging off-the-record. Spain's certainty as to ETA's responsibility was embodied and emphasized in its lightning-speed drafting and tabling of the resolution.<sup>8</sup> This seemed cruelly ironic in the light of Spain's Innocencia Arias' 2003 statement as Security Council President insisting there were "no shortcuts" in the fight against terrorism and urging resistance to the "siren songs" calling for swift and drastic solutions.<sup>9</sup> Post-Resolution 1530, Spain's UN Deputy Permanent Representative Ana María Menéndez thanked "the international community" and Security Council members for their "solidarity" and "support." Such references broadened out and transformed Spain's domestic concerns and objectives into global ones, embracing the hegemonic "war on terror" which was acceptable because this hegemonic ideal was wise and good.<sup>10</sup> Nevertheless, an Algerian representative on the Council indicated early trepidation saying incorrect attribution would be "really embarrassing."<sup>11</sup> ETA's involvement was doubted fairly quickly in days following the attacks given mobile phone detonation and discovery of a van containing the Koran and explosives, which pointed toward Al Qaeda involvement instead of domestic terrorism. Only suspects' arrests finally put the nail in the coffin of the Spanish government's ETA incantations.

## EVIDENCE

No one seems to doubt the need for some evidence, be it clear, convincing, stringent, preponderant, probable, converging, or otherwise—but the texture of such standards is not clear.<sup>12</sup> Even when evidence is adduced there is no guarantee that it is of any quality: witness the criticism heaped upon the "dodgy dossier" produced in the United Kingdom prior to Operation Iraqi Freedom. Additionally, "piling it up and piling it high" might seem a diversionary tactic. In the *Nicaragua* case, the ICJ adopted the *contra proferentum* approach regarding statements of state representatives and affidavits and sworn statements of Government members. The rest of the evidence was treated with "great reserve." Witnesses' mere opinions as to the probability or otherwise of the existence of indirectly known facts was not treated as evidence. Objectivity is clearly the key consideration. Indeed, deriving from the *Nicaragua* decision, Lobel suggested reconfigured criteria including the importance of publishing relevant facts, that such facts are open to international scrutiny and investigation and that the defending state has carefully evaluated the evidence.<sup>13</sup>

On March 11, 2004—or 3/11—to have suggested as desirable something more than evidence emanating solely from the Spanish government prior to a resolution (which actually named a group rather than merely condemning an outrage) would not have juridified, but legitimized, political choice. Generally, *Nicaragua's* legacy on objectivity, though not followed to the letter, clearly cannot be (seen to be) ignored. Following the 9/11 attacks, the U.S. letter to the Security Council referred to Taliban support for Al Qaeda and "clear and compelling information" regarding the latter's involvement, although continuing, "[t]here is still much

<sup>8</sup> UN Doc. S/2004/186 (Mar. 11, 2004).

<sup>9</sup> UN SCOR 58th Sess., 4792nd Mtg, UN Doc S/PV. 4792 (2003).

<sup>10</sup> See Martti Koskeniemi, *Comments, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW* 95 (M. Byers & G. Nolte eds., 2003).

<sup>11</sup> Thalif Deen, *UN Loses Face over Hurried Vote on Spain Bombing*, *Inter Press Service*, Mar. 16, 2004, available at <<http://www.globalpolicy.org>>.

<sup>12</sup> See Mary Ellen O'Connell, *Evidence of Terror*, 7 J. CONF. & SEC. L. 19 (2002) for a discussion of the various standards.

<sup>13</sup> Jules Lobel, *The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan*, 24 YALE J. INT'L L. 537, 547 (1999).

we do not know. Our inquiry is in its early stages.”<sup>14</sup> However, what was known was enough for NATO and the OAS.<sup>15</sup> The letter’s cautiousness may even have enhanced its credibility. Despite not suggesting exacting examination, the importance accorded to *some* scrutiny or international review is clear. If unilateral state action in self-defense demands evidential scrutiny, why should the same rigor not be demanded of a resolution impliedly invoking the United Nations Charter?

Even if a resolution is primarily declaratory, any state requesting that the Council consider a situation under its responsibilities for international peace and security still bears *some* burden of proof. No one suggests subjecting the Council to criminal standards of proof. However, even a departure from the “compelling” or “clear and convincing” standard towards lower standards like the U.S. “preponderance of evidence” or the “balance of probabilities” demands support or corroboration. It is not clear that Spain even satisfied such lower standards. Post-3/11, the preponderance of evidence (absence of warnings, scale of the attacks, and ETA’s official denials) indicated ETA’s non-involvement. Resolution 1530 indicated and embodied a commonplace, not reasonable, suspicion. Information disclosure need not have jeopardized security or Spanish intelligence sources. Counter-terrorism’s operational detail (regarding, e.g., joint operations with French police forces) cannot and does not need to be adduced. However, this is distinctive from information regarding attribution of responsibility which substantiates the government’s rationale and its evidence of culpability.<sup>16</sup> In the event, Spain was not even required to invoke a “national security” exception.

Some claims were made that Spain had in fact supplied evidence, but these were less than convincing. A senior French official indicated that “nobody wanted to say no.”<sup>17</sup> Yet, asking for this evidence was the Security Council’s right if not its obligation, one taken seriously prior to Iraq’s invasion. The Council—not Spain—condemned ETA. It seems trite to state that solid evidentiary ground (rather than emotional outpouring) is an indispensable requirement for the resulting decision to enjoy legitimacy. Perceptions of committing a social *faux pas* or being “soft on terrorism” should not inhibit requests for proof. The Council is not a place for easy truths or (even sincere) simple certainties.<sup>18</sup>

### THE SECURITY COUNCIL IS NOT THE INTERNATIONAL COURT OF JUSTICE

Direct comparison cannot be made between evidence in the political context of the Security Council and the ICJ’s judicial context. There is a queasiness regarding the juridification of political choices,<sup>19</sup> but resolutions of the Council provide evidence in themselves when surveying a legal landscape. Although legal argumentation can present obstacles to practical decision-making, this does not imply taking liberties with a basic legal *technique* of collecting and presenting evidence to justify a particular position. It also seems that recent ICJ guidance could be utilized by the Council, e.g., were the materials specially prepared, do they emanate

<sup>14</sup> UN Doc. S/2001/946 (Oct. 7, 2001).

<sup>15</sup> Sean Murphy, *Terrorism and the Concept of “Armed Attack” in Article 51 of the U.N. Charter*, 43 HARV. INT’L L.J. 41, 48 (2002).

<sup>16</sup> Sara N. Schneideman, *Standards of Proof in Forcible Responses to Terrorism*, 50 SYRACUSE L. REV. 249, 255 (2000).

<sup>17</sup> Elaine Sciolino, *Many in Europe Suspect Spain Misled Them About Attackers*, N.Y. TIMES, Mar. 16, 2004.

<sup>18</sup> Martti Koskeniemi, *International Law in Europe: Between Tradition and Renewal*, 16 EUR. J. INT’L L. 113, 121 (2005).

<sup>19</sup> Matthias Herdegen, *Comments*, in Byers & Nolte, *supra* note 10, at 187.

from a single source?<sup>20</sup> Rhetoric such as the “war on terror” should not invoke a second class/lower threshold standard for any measures taken in the offensive. International law as a process of communication implicitly demands an evaluation of evidence supporting opposable positions, particularly given the absence of judicial review and the fact that a Security Council resolution on a legal issue indicates members’ support for the legal claim embodied within it.<sup>21</sup> The irony of Resolution 1530 was that it itself provided clear, convincing and compelling evidence of Spain’s impulsive error and the Council’s complicity therein.

## REFLECTIONS ON FORCE AND EVIDENCE

*By Thomas M. Franck\**

Monday’s *New York Times* (March 27, 2006) carried yet another embarrassing story based on leaked British government papers that purport to summarize discussions between President Bush and Prime Minister Blair.

This time it was a memo written by David Manning, Blair’s chief foreign policy adviser, summarizing a meeting between his chief and President Bush, in the Oval Office, on January 31, 2003, less than six weeks before the invasion of Iraq. In this meeting between the two leaders, supported only by a handful of close advisers, the president makes clear to the prime minister that he intends to launch the attack on Iraq by March 10 and to do so regardless of whatever the UN inspectors led by Dr. Hans Blix, may or may not turn up by way of evidence of weapons of mass destruction.

This is a new reminder of what, by now, is an old story: that the decision to invade Iraq was not based on serious evidence of Saddam being in possession of weapons of mass destruction and having the capability to deliver them to targets as far away as Europe.

It is also a reminder of the important but ambiguous role that evidence plays in the global security system. Only a few days after this White House meeting, Secretary of State Colin Powell was at the Security Council, presenting his evidence to support the call for a second resolution finding Iraq in non-compliance with its obligation to disarm, and authorizing the use of force.

These events are important because the failure of the Security Council to pass that second resolution has been continuously held up by the president and others to illustrate the folly of relying on the UN Charter system to protect global security. In the president’s words, it justifies the conclusion that we will never submit to a system that requires us to obtain a permission slip to defend the security of the United States. He and his vice-president made that a centerpiece of their reelection campaign and, for that matter, were able to wring a meekly concurring statement from Senator Kerry. The import of that position is that the United States no longer considers itself bound by the UN Charter’s constraints in Article 2 (4), which prohibits first use of force, and Article 51, which permits recourse to force only in the event of an armed attack. Indeed, the president has stated, and recently repeated, that the United States has the right to use force preemptively, and not only in situations where an attack is imminent.

<sup>20</sup> Case Concerning Armed Activities on the Territory of the Congo, Judgment (Dem. Rep. Congo v. Uganda) (Int’l Ct. Justice Dec. 19, 2005), para. 61.

<sup>21</sup> Steven R. Ratner, *The Security Council and International Law*, in *THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY* 602 (David M. Malone ed., 2004).

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The Bush Administration acts as if to scuttle the UN collective security system. By way of justification it asserts that the system has failed, a failure most recently demonstrated by its weakness in facing down a defiant Iraq. We tried to play by the rules of the Charter, the song goes. We dutifully went before the Security Council to get that first resolution, the one dispatching the inspectors and demanding Iraq's compliance with earlier resolutions ordering its disarmament. Then, we went back to the Security Council, still by the rules, and presented a lot of evidence of Iraq's non-compliance, and asked for authorization to use military force. But, the majority of Security Council members simply chickened out, reneging on the Council's obligation to enforce its own mandates.

This sad experience, we are told in mournful tones, highlights the utter folly of delegating our sovereignty to a group of fifteen states, most of them chosen more or less at random by regional groupings rather than by merit, or capability, leaving it to them to decide when something a state is doing—to quote Article 39 of the Charter—constitutes a “threat to the peace, breach of the peace, or act of aggression.” None of these countries has our best interest at heart, we are told, and, even more to the point, they do not have either our intelligence-gathering capability to discover what is actually going on, or our military capacity to do something about it. How could we possibly entrust out safety to such a process?

This explanation for kicking over the UN's traces is important, because it purports to show that the entire collective security system, established by the UN Charter after the last global bloodbath, has failed in the new era of weapons of mass destruction, fanatical terrorism and intercontinental rocketry. In this story, Iraq was a much-needed wake-up call. There is no longer a credible system of collective security. Who stood with us over Iraq? Not the United Nations. Not even NATO. In responding appropriately to challenge to our self-interest, we Americans can only depend on ourselves and such *ad hoc* coalitions as opportunism or serendipity may give us.

That seems a pretty clear statement of the most radical shift in American foreign policy since the end of isolationism.

That's what makes it important. What makes it ambiguous is that almost every presumption that underpins the rationale for that radical shift is a lie.

We did not try to play by the rules. That's what the Manning memo shows. It turns out that President Bush merely pretended to do so, but was all along determined that, when we were ready, we would attack, whether or not that attack was authorized by the Security Council and regardless of what the inspectors did, or did not, find. So much for having tested the system and found it wanting.

It is also untrue that Iraq demonstrates that we have no choice but to determine our own course of action in response to a perceived threat because we have lots of reliable intelligence and the members of the Security Council do not. In fact, it turns out that key parts of the evidence presented to the Security Council by Secretary Powell were not proof of our superior information-gathering capability, but just of our willingness to mislead. And, although the falsity of that evidence may have been unknown to him at the time, its veracity had already been questioned within the Administration and elsewhere. Part of it—the stuff about the tubular rods—had been exposed as false, months before, by the International Atomic Energy Agency. Part had been debunked by the U.S. diplomat sent to West Africa to find evidence of the sale of “yellow cake” to Iraq, a potential ingredient in the manufacture of nuclear weapons, who had reported that the story was not credible. Part of it was debunked by Václav Havel, the revered president of Czechoslovakia, who, on the basis of his own country's intelligence services' briefing, had said that an alleged meeting between Al Qaeda and an

Iraqi government representative in Prague just before 9/11 had never taken place. And the reliability of other presented evidence, such as the report of the biological weapons manufacturing trailers, had been questioned by the American intelligence community itself, before it was presented by our leaders to the United Nations, the Congress, and the media.

I do not mean to argue that we do not have better intelligence-gathering capability than the other members of the Security Council. We do. But Iraq proves that we do not necessarily make better deductions from what we have.

The Iraq debacle, especially, demonstrates that being well-informed requires two steps: you need good intelligence and, then, you need sensible use of the intelligence by the policy-makers.

It turns out that the intelligence the United States was using to try to convince the Security Council to authorize the invasion we were determined to launch was mostly stuff generated by unreliable sources with agendas of their own, information introduced directly into the mainstream of policy-making without being filtered through the intelligence-evaluating processes of the CIA and the NSA. We shared dubious information and called it facts. We rushed to conclusions that were based on predetermined policy and which ignored inconvenient evidence.

This somewhat different take on the lessons of Iraq might help to put in perspective the idea that the Security Council can't make these sorts of global security decisions because of the inadequacy of its intelligence capability. As it turned out, the Security Council's common sense evaluation of the evidence with which it was being presented by the United States and the United Kingdom, when taken together with its access to the astonishingly accurate information being generated by Hans Blix and his inspectors from the field, well, it turned out that the Security Council was absolutely right and the U.S. and British governments, with all their vaunted intelligence capability, were just dead wrong. The Security Council was right, in refusing to pass that second resolution, not necessarily because it was acting on better information but, rather, because it had better common sense about the information it did have, and, because it was not committed to going to war, it was able to deploy a corrosive skepticism that disregarded most of the shoddy disinformation and misinformation it was being fed, whereas the White House was cherry-picking its intelligence to support a predetermined policy driven by an all-consuming ideological bent.

There is a lesson, here, but it is not the lesson the Bush Administration offers. If those in a position to take intelligence and turn it into policy are driven not by information but by ideology, then we have good and bad stuff going in, but only rubbish coming out. Iraq did, indeed, expose a serious problem. But it was a political problem, not of the Security Council but of the administration in Washington. The president took us into a pointless and costly war without end, while the Security Council sought to act as a brake on hasty and ill-advised action, just as the Charter intended.

So, it seems that the matter of evidence is now on the radar screen. And, being controversial, it gets attention. Who decides, and on the basis of what evidence?

The Charter demands that states back their claims with evidence. A law-abiding state, if it wishes to use force in compliance with the requisites of Articles 2 (4) and Article 51 of the Charter, must be able to demonstrate to the satisfaction of the world's governments that there is good and clear evidence that an overwhelming danger—an attack by weapons of mass destruction, for example—is a realistic expectation, and that there are no ways other than a preemptive strike to prevent that expectation being realized. But it is the Security Council that the evidence must convince.



Such a system of global jurying is precisely what the Charter's drafters had in mind. If it is not a brilliant system, because, yes, the designated jury consists of self-interested states with their own political agendas, it is, at least, the worst system, except for all the alternatives. Indeed, there seems to be only one alternative, which is for every state to determine for itself when to attack another to "preempt" whatever it may perceive as a threat. If the Charter had any purpose, it was to commit every state to renounce that primordial and pernicious right to judge for itself when its national interest required a first strike against another.

The Charter is certainly not perfect—it is sixty years old and badly in need of reform—but lack of reform does not happen to be the principal problem here. The problem, indeed, is not so much with the rules, but with the scofflaw, and with the effect flaming scofflawery is having on the system.

True, it is more difficult to convince fifteen states on the Council than it is to convince oneself. Still, the Council has not always been an instrument of caution. It was the Security Council that initiated the system of highly intrusive ground inspections in Iraq. Had Dr. Blix's mandate been expanded and extended, and had the U.S. and British troops been positioned in Afghanistan to support the inspectors and ensure their freedom of movement, might the "threat" not then have been dealt with more economically and effectively than in the way devised by Bush, Cheney, and Rumsfeld?

When good evidence has been properly put before it, the Council has acted appropriately. After the attack of 9/11, it instantly legitimated the use of force not only against the terrorists but also against states that harbor them. When Kuwait was attacked, the use of collective force was approved and approximately thirty states participated in it. When it was necessary to use force in Bosnia, the Council authorized it. This jurying is not perfect, but neither is it possible to prove that it is broken, especially not by reference to Iraq.

True, the veto-power of members may distort the outcome of the Security Council's deliberations, as one hold-out may paralyze any jury. The threat of a veto prevented authorization of the urgently-needed interventions in Rwanda and in Kosovo. So, yes, something needs to be done about the veto. But this problem, over time, will remedy itself. If the permanent members cannot agree among themselves how to restrict the use of frivolous vetoes to prevent action generally perceived as essential, then broad coalitions of states such as NATO and the African Union increasingly will act on their own. Those groupings will still need the United Nations to help re-normalize the situation they have created, as was the case with respect to the unauthorized use of force by ECOMOG in Liberia and Sierra Leone, and NATO's use of force in Kosovo.

The problem of irresponsible use of the veto will eventually have to be addressed by the veto-holders. The problem of the scofflaw must be addressed by the American voter.