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International Law and the Use of Force: 
May the United States Attack the Chemical Weapons Plant at Rabta?

Marshall Silverberg*

During the waning days of 1988 and continuing into 1989, the Reagan Administration, the news media, and the American public expressed increasing consternation over reports that the Libyan government was building a large chemical weapons plant at Rabta, forty miles south of Tripoli.¹ They based their concerns on a realization that such a facility, controlled by Libya's unpredictable and volatile leader, Colonel Muammar Qadhafi, would represent a significant threat to America's national security.² Such a threat seemed particularly acute, especially in view of Qadhafi's support of international terrorism and his vow to retaliate for the American bombing of Tripoli in 1986.³

As American concerns grew, the controversy quickly escalated. The Reagan Administration considered several options that

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² See, e.g., Cannon & Ottaway, supra note 1, at A1, col. 1; Editorial, supra note 1, at A14, col. 1.

³ The American bombing of Tripoli in 1986 is discussed in Part III of this Article. See infra notes 63–114 and accompanying text.
ranged from multinational condemnation to a military attack. In preparation for an international conference on the prohibition of chemical weapons, Administration officials discussed the possibility of using military force to destroy the plant with the United States' NATO allies. At one point, a large United States Navy strike force sailed towards Libya. The Washington Post noted that despite the presumption that "circumstances must be very special in order to justify the use of force, . . . [g]iven Libya's record of support for terrorism and the export of violence, however, one could argue that here the circumstances must be special in order to avoid the use of force, if it could reasonably be established that force was the only reliable way to reduce the particular threat."

While policymakers discussed national security considerations, some officials and commentators questioned whether a United States military attack on the Rabta plant would be permissible under international law. Secretary of State George Shultz implied that an American attack would be lawful in order to prevent Colonel Qadhafi from using the plant to supply chemical weapons to terrorists or combatants. Director of the Arms Control and Disarmament Agency (ACDA) William F. Burns supported the Secretary by stating that the plant could be attacked pursuant to the United Nations Charter because the United States would be acting in "self-defense." Kenneth Adelman, Burns's predecessor at ACDA, reached a different conclusion, stating that international law would allow the United States to attack the facility only if it "supplied poisons used against our country or citizens, or if there's an imminent threat of such use. Neither has happened."

To date, no commentator has extensively discussed the relevant considerations under international law of a U.S. attack on the facility at Rabta. The issue is important, however, for although

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4 See Cannon & Ottaway, supra note 1, at A1, col. 1.
6 Editorial, supra note 1, at A14, col. 1.
9 Adelman, Qadhafi's Poison Potential, Wash. Times, Jan. 4, 1989, at F1, col. 5. Adelman also opined that although international law did not prevent the Israeli attack on Iraq, the United States was not in as precarious a strategic situation as Israel and thus "[could] afford to be more legal minded." Id.
10 The only published discussion appears in Roberts, Would Law Allow U.S. Attack on
the United States has not yet attacked the plant, the possibility it may do so still exists. Moreover, history suggests that if the United States does attack the plant, it will attempt to justify its actions under international law.\textsuperscript{11}

Whether or not a U.S. attack on the Libyan chemical weapons plant would be permissible under international law depends on the facts existing at the time of the attack. Thus, at this point in time, it is impossible to state with any degree of certainty what the proper conclusion would be. Notwithstanding this limitation, however, it is useful to discuss the relevant considerations that would be raised under international law and to establish a framework that policymakers and lawyers may rely on in deciding whether to authorize such an attack and by which commentators could decide to approve or criticize such an attack.

Part I of this article sets forth the international legal principles pertaining to the use of force and evaluates their adequacy in light of the threat posed by weapons of mass destruction. Part II applies these principles to the 1981 Israeli attack on the Iraqi nuclear reactor at Osiraq, which has important implications in evaluating any future attack on the plant at Rabta. Part III focuses on the threat Colonel Qadhafi poses to U.S. national security and the response of the United States to that threat. Part IV evaluates the publicly disclosed information on the Rabta facility and the particular threat Libya's possession of chemical weapons would present to the United States. Part V discusses the U.S. response to the threat thus far, and applies relevant principles of international law. Part VI considers the analyses imparted by the preceding sections to determine whether the United States may attack the Rabta facility under international law.

This comment concludes that although the Rabta facility poses a potential threat to the United States, at present the U.S. may not attack it under any theory of international law. Clearly, however, a foundation exists that, together with further developments, could support an attack under the modern theory of anticipatory self-defense.

\textit{Plant in Libya}, L.A. Daily J., Jan. 5, 1989, at 1, col. 6. That article quotes the opinion of various legal scholars but does not provide an extensive analysis of the issues.

\textsuperscript{11} For example, the United States attempted to justify the 1986 attack on Tripoli as being valid under international law while opponents of the attack criticized it as being unlawful. \textit{See infra} notes 104–114 and accompanying text.
I. INTERNATIONAL LAW AND THE USE OF FORCE

A. The Peaceful Settlement of Disputes

One fundamental principle of modern international law obligates states to try to resolve disputes peacefully before they resort to the use of force. Article 2(3) of the United Nations Charter (Charter) requires states to "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." Article 33 of the Charter requires states involved in international disputes to "seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice." Article 2(4) provides that all states must "refrain from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations." Thus, the Charter places an affirmative duty on states to try to resolve their disputes peacefully and restricts the customary right of states to resort to force. The Charter does not, however, prohibit the use of force by a state in self-defense.

B. Self-Defense Under the U.N. Charter

Article 51 of the Charter preserves "the inherent right of individual or collective self-defense if an armed attack occurs against a member [state] . . . ." That right of self-defense continues to exist, according to article 51, only "until the Security Council has taken measures necessary to maintain international peace and security." The Charter thus creates an international order in which states may act in self-defense until the Security Council provides for their requisite national security.

Because members of the Security Council usually cannot agree on whether to send peacekeeping forces to a region experiencing armed conflict, the Security Council has become largely ineffec-

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12 U.N. CHARTER art. 2, para. 3.
13 Id. at art. 33, para. 1.
14 Id. at art. 2, para. 4.
15 Id. at art. 51.
16 Id. The Charter makes clear that one goal of the United Nations is "to ensure, by acceptance of principles, and the institution of methods, that armed force shall not be used save in the common interest." Id. at preamble.
tive. The possibility of an absolute veto over such an initiative by one or more of the five permanent members of the Security Council guarantees that no state can be certain that the Security Council will provide for its security. The result of this impasse is that states frequently resort to self-help and use force when their national security is significantly threatened by another state.\textsuperscript{17} The increasing proliferation of nuclear, chemical, and biological weapons has exacerbated the problem over the last few years. Because such weapons are capable of sudden and mass destruction, states must not only wonder whether the Security Council will act on their behalf but whether such assistance, if offered at all, will arrive too late. In the absence of a genuine guarantee of collective security, states must consider whether they should preempt a likely attack of another state in order to preserve their own national security. International legal scholars commonly refer to this type of preemptive attack as the use of anticipatory self-defense.\textsuperscript{18}

The legal question that arises from the use of anticipatory self-defense is whether it is lawful under the United Nations Charter. The early writings that addressed this question usually focused on the condition precedent of an "armed attack" required by article 51 to justify the use of force in self-defense.\textsuperscript{19} This narrow interpretation of permissible self-defense may have been appropriate when only the superpowers possessed weapons of mass destruction: for against all others, nations usually would have adequate time to resort to the United Nations or to prepare their own defenses. In contemporary times, however, in which the peacekeeping function of the Security Council has been largely ineffective and weapons of mass destruction are possessed by many countries, scholarly writings have tended to interpret article 51 more broadly in order to validate appropriate uses of anticipatory self-defense.\textsuperscript{20}

\textsuperscript{17} See infra notes 30–40 and accompanying text.


This change in philosophy seems to have been first adopted by legal scholars writing about the 1967 Arab-Israeli war. Before that war began, Israel faced extremely provocative acts by surrounding Arab states that would have led any reasonable Israeli government to conclude that an all-out invasion was imminent. The Israeli government did so conclude and responded by launching a massive preemptive strike. The United Nations recognized Israel's predicament and did not condemn its use of anticipatory self-defense.

The remarkable Israeli victory was due in part to its preemptive attack. The Israeli success demonstrated the significant advantage to future aggressors and defenders of attacking first, especially when mobile weapons such as airplanes and tanks are used. The evolution of warfare capability in the form of fast and accurate weaponry has made it clear to many international legal scholars that the Charter's condition precedent of an "armed attack" before acting in self-defense is no longer militarily pragmatic. Consequently, scholars have begun to reject the unduly restrictive requirement of an armed attack under article 51 and have instead started to return to the pre-Charter customary law formulation of anticipatory self-defense. That principle, embodied in the Caroline Doctrine, allows resort to force only if the necessity is "instant, overwhelming, and leaving no choice of means, and no moment for deliberation." But the customary international law formulation may be just as unacceptably restrictive as the "armed attack" requirement provided by article 51 of the Charter. In circumstances involving the possible use of weapons of mass destruction, a state simply may not be able to afford to wait until the necessity to act is so dire.

A better approach that seems to be gaining acceptance among scholars allows the use of force in anticipatory self-defense when a state reasonably perceives a significant threat to its national security and responds to that threat in a reasonable manner.

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21 Id. at 192-93.
22 Id. at 193.
23 McCredie, supra note 20, at 215; Note, supra note 18, at 187.
24 Letter from Secretary Webster to Mr. Fox (Apr. 24, 1981), reprinted in 29 BRITISH AND FOREIGN STATE PAPERS 1129, 1138. The traditional principle of anticipatory self-defense was first enunciated by Secretary of State Daniel Webster in his response to a Canadian attack on the American ship Caroline, which had been assisting Canadian rebels in their efforts against the Canadian government. See Jennings, The Caroline and McLeod Cases, 32 AM. J. INT'L L. 82 (1938).
Determination of whether a perception of a threat is reasonable requires a subjective analysis of whether the state itself actually perceives the threat and an objective analysis of whether third party states would view the threat in the same manner. Determination of whether a response is reasonable requires an objective analysis of whether the force used to counter the threat is proportional to the threat and narrowly tailored to its elimination. This approach, similar to one used by U.S. courts to determine objectively whether acts of self-defense by criminal defendants are justified, places a greater burden on the states to mean what they say and act as they intend. In an age when many nations hold weapons of mass destruction this emphasis is appropriate: for the interpretation of other nations' intentions may instantaneously mean the difference between peace and war.

C. Reprisals Distinguished

The right of anticipatory self-defense must be distinguished from the right of reprisal. The former is concerned with preventing future attacks whereas the latter refers to punishment for past transgressions. Once permissible under customary international law, reprisals are now forbidden by the United Nations Charter. Despite criticisms of the unduly restrictive provisions of the Charter concerning acts of self-defense, commentators continue to believe that reprisals are still prohibited under international law.

Similarly, a preemptive strike cannot be justified under a theory that the offending nation has engaged in a series of ongoing illegal acts, such as continual support of international terrorism. This “accumulation of events” theory has been rejected by the Security Council in other circumstances. This theory also seems contrary to the international order envisioned by the Charter’s drafters. Nations may be able to undertake preemptive strikes to

26 Note, supra note 18, at 208–17.
27 For a discussion of the law of reprisals, see McCredie, supra note 20, at 236–40.
29 See Bowett, Reprisals Involving Recourse to Armed Force, 66 AM. J. INT’L L. 1, 4 (1972); Greenwood, supra note 28, at 954.
prevent future attacks, but they cannot do so in retaliation for one or more past attacks. Thus, the United States may not lawfully attack the facility at Rabta in retaliation for past Libyan acts of terrorism. Rather, a lawful attack on the Rabta facility must, at the very least, be undertaken with the intent to prevent future attacks. It also would be subject to the other constraints of the modern anticipatory self-defense analysis, particularly the requirement of proportionality.

Before analyzing the threat the Libyan chemical weapons plant poses to U.S. national security and whether destruction of the plant would be lawful under a modern anticipatory self-defense analysis, it is useful to consider first the 1981 Israeli attack on the nuclear reactor at Osirak, Iraq. Certain startling similarities and contrasts appear that aid an evaluation of an attack on the facility at Rabta.

II. ISRAEL'S ATTACK AT OSIRAK

On Sunday June 7, 1981, Israeli warplanes attacked and destroyed an Iraqi nuclear reactor under construction at Osirak, near Baghdad. At least one person was killed during the attack. Israel's Prime Minister, Menachem Begin, defended the attack on the grounds that his country lawfully acted in anticipatory self-defense. Begin asserted that Iraq intended to use the nuclear reactor to produce atomic bombs that would ultimately be exploded in Israel. He further argued that the attack could not have been postponed because the reactor would have been completed shortly and, once completed, could not safely be destroyed without the possibility of radioactive fallout reaching Baghdad.

Despite these contentions, the international community condemned the Israeli attack. When Iraq's Minister of Foreign Affairs, Saadoun Hammadi, requested that the matter be discussed...
in the Security Council, the United Nations became the forum for debate. The foreign minister called the attack a "barbarous act" and later added that the reactor was being constructed for peaceful purposes. He also argued that Iraq, in contrast to Israel, was a signatory of the Nuclear Non-Proliferation Treaty and did not violate its safeguard agreement with the International Atomic Energy Agency. Finally, Hammadi contended that Israel possessed nuclear weapons, and that by destroying the reactor at Osiraq, Israel was attempting to maintain its military superiority in the Middle East.

Israel replied to these accusations through its Ambassador to the United Nations, Yehuda Blum. He argued that the reactor would have been used to produce nuclear weapons and that the target of the weapons would have been Israel. He further noted that the attack was conducted on a Sunday when it was least likely that there would be a loss of life. In effect, he argued that the reactor posed a significant threat to Israel and that Israel responded reasonably to defend itself against that threat. Although the Security Council unanimously condemned Israel's actions, it may have done so for political, rather than legal, reasons. To undertake a nonpolitical legal analysis, one must first evaluate the threat to Israel and then examine Israel's response to that threat.

A. The Threat to Israel

Application of the modern theory of anticipatory self-defense requires analysis to focus on the reasonableness of Israel's general apprehensions that Iraq intended to produce nuclear weapons at Osiraq and use such weapons against Israel. There is indeed

35 Id.
36 Id.
37 Id. Hammadi's contention undermines his argument that Iraq constructed the reactor for peaceful purposes, for he implies that Israel correctly perceived a challenge to its military superiority.
39 Id.
41 Many of the writings on the use of force by American international legal scholars have focused on Israel. This is partly due to the numerous military engagements that Israel has been involved in since its independence in 1948 and partly because of its role as America's closest ally in the region. In addition, Israel has sought international acceptance of its military actions and has consistently tried to justify its actions under interna-
evidence to justify both beliefs. Iraq possessed 200,000 pounds of yellowcake natural uranium that has little use except for conversion into plutonium.\textsuperscript{42} In fact, Iraq refused to accede to the French suggestion that it replace the high-enriched uranium with a low-enriched fuel known as caramel. Caramel would have been suitable to operate the reactor but could not have been used to produce weapons-grade plutonium.\textsuperscript{43} Further, the type of reactor built at Osiraq was fully capable of transforming yellowcake uranium into weapons-grade plutonium in sufficient quantities for production of nuclear bombs,\textsuperscript{44} and Iraq clearly had the requisite technical knowledge and skill to take the weapons-grade plutonium and construct nuclear weapons.\textsuperscript{45} Illustratively, the reactor at Osiraq was much larger than Iraq needed for research purposes and much larger than the oil rich country needed for energy production.\textsuperscript{46} These factors led some U.S. Senators to conclude that Iraq was developing a nuclear weapons program.\textsuperscript{47} In this light, a similar conclusion by Israeli policymakers seems reasonable.\textsuperscript{48} The more immediate question facing Israeli officials was whether Iraq would use such weapons against Israel.

\textsuperscript{42} The Israeli Air Strike: Hearings Before the Comm. on Foreign Relations United States Senate, 97th Cong. 1st Sess. 125–26 [hereinafter Senate Hearings] (comments by Dr. Herbert Kouts, Chairman, Department of Nuclear Energy, Brookhaven National Laboratory and Roger Richter, former International Atomic Energy Agency Inspector).

\textsuperscript{43} See id. at 139 (statement by Senator Rudy Boschwitz); id. at 191 (testimony by Representative Jonathan Bingham).

\textsuperscript{44} Id. at 124 (testimony of Dr. Robert Selden, Division Leader, Applied Theoretical Physics Division, Los Alamos National Laboratory, stating, “There is no question that plutonium can be produced in this reactor . . . . For the purpose of producing plutonium there are many reactors which are far better than this reactor.”); id. at 173 (statement of Dr. Carnesale, John F. Kennedy School of Government and Public Policy, stating that OSIRAK is not the best reactor for producing plutonium but it may have been the best available to Iraq for that purpose).

\textsuperscript{45} See id. at 124.

\textsuperscript{46} See id. at 126 (Dr. Kouts commenting, “I believe it is probably well beyond anything they need for the level of technology they have.”).

\textsuperscript{47} See id. at 15 (statement of Senator Paul Sarbanes); id. at 19 (statement of Senator Paul Tsongas); id. at 21 (statement of Senator Alan Cranston).

\textsuperscript{48} The Senate Hearings also revealed that Israel must have had little regard for the fact that Iraq was a signatory to the Nuclear Non-Proliferation Treaty and its reactors thereby subject to International Atomic Energy Agency (IAEA) inspections and controls. One problem with the IAEA inspections was that since 1976 they were always performed by Soviet and Hungarian citizens. Also, Iraq could withdraw from the Treaty with three months’ notice, thereby ending all IAEA inspection. Treaty on the Non-Proliferation of Nuclear Weapons, 1 July 1968, art. X, 21 U.S.T. 438, T.I.A.S. No. 6839, 727 U.N.T.S.
Israel’s perception that Iraq would use such weapons against Israel seems reasonable in light of Iraqi statements of intent and the historically hostile relations between the two states. Iraq has been extremely hostile towards Israel since the founding of the latter in 1948 and has called consistently for the elimination of the “Zionist entity” even though the two countries share no common border. In a 1980 interview with a Lebanese weekly, Iraqi Foreign Minister Hammadi stated:

Iraq cannot agree to the existence of Zionism—neither as a movement nor as a state . . . . The Arab nation cannot agree to the amputation of any part from its body . . . because the land of Palestine is an Arab land and we cannot conceive giving it up . . . . The struggle against Zionism is for us a struggle in which there can be no compromise.

Similarly, in August 1980, while discussing a proposed boycott of any nation that maintained an embassy in Jerusalem, Iraqi President Saddam Hussein declared: “Some people ask if this [boycott] decision is the best that can be taken. No, a better decision would be to destroy Tel Aviv with bombs. But we have to use the weapons available until it is actually possible to respond to the enemy with bombs.”

Iraqi antagonism towards Israel is more than just rhetoric. Israel believes that Iraq is a major sponsor of terrorist activities that, until recently, were conducted by the Palestine Liberation Organization. Iraq also led the Arab rejectionist front in condemning the Camp David Accords. Iraq never signed the armistice.

161. Senator John Glenn remarked that the Israeli attack was “the first gigantic vote of no confidence in the international nonproliferation regime, including the IAEA safeguards.” Senate Hearings, supra note 42, at 12.

49 Iraq has never used the name “Israel” when referring to the Jewish State; rather, it has referred to Israel as the “Zionist entity.”


51 This statement was by Baghdad’s “Voice of the Masses” and later recorded by FBIS on August 21, 1980. In response to the statement, the Iraqi Information Ministry announced that:

We ask Khomeini and his gang: who is going to benefit from destroying the Iraqi nuclear reactor—is it Iran or the Zionist entity? This reactor does not constitute danger to Iran because Iraq looks at Iranian people with a brotherly look . . . . The one who fears the Iraqi nuclear reactor is the Zionist entity.


52 Iraq convened an Arab summit at the conclusion of the Camp David Summit and led the movement to condemn the Accords. See D. Berindranth, Iraq: The Land of Arab Resurgence 93 (1979). The Iraqi Revolutionary Command Council stated that “all
Agreements of 1949 and thus is still technically at war with Is­

3 Israel. Although these facts alone do not legally justify the Israeli attack, they do support Israeli apprehension about Iraq’s intentions. As Professor John Norton Moore testified before the Senate Foreign Relations Committee: “These unlawful actions [by Iraq] contributed significantly to the Israeli concerns about Iraqi acqui­
sition of nuclear weapons. As such, however we characterize the Israeli air attack against Osiraq, it would seem that Iraq shares sub­stantial responsibility for the overall climate that produced it.”

B. Further Thoughts on the Israeli Perception of a Threat

Israel’s particular national security requirements help place Israel’s perception of the Iraqi threat in perspective. Israel is a tiny nation bordered on the north and east by hostile nations. Other states provide billions of dollars to support terrorist attacks against Israel. Even some states that are not hostile to Israel are afraid to speak out on its behalf because of the powerful oil weapon wielded by Arab nations. Still others probably feel that Israel’s remarkable military successes over its larger and better equipped adversaries means that its national security is no longer threatened. Finally, Israel’s support from the United States also contributes to a sense that the threats it faces are no longer so dire.

The size of the country, however, and the fact that the vast majority of its population lives in just three cities, makes it par­
ticularly vulnerable to weapons of mass destruction. Moreover, Iraq’s recent use of chemical weapons against Iran and against its own Kurdish minority indicates that it seems to have little or no reservation about using weapons of mass destruction that the international community abhors. Although these chemical weapons attacks occurred after the Israeli attack in 1981, the Iraqi leadership was essentially the same, and there cannot be any sure convictions that Iraq would not use nuclear weapons if it pos­
sessed them. Indeed, in view of the fact that Iraq started the war

attempts for reconciliation with the Zionist entity should be discarded” and proposed that Iraq and Syria consolidate military troops to confront Israel. Id. at 94–95.


54 Senate Hearings, supra note 42, at 247–48 (statement of John Norton Moore, Professor of Law and Director, Center for Law and National Security, University of Virginia).
with Iran and then used its chemical weapons once Iran appeared to be winning, the chief beneficiary of the Israeli attack may have been Iran and not Israel. In any event, Israel seems to have been acting under a reasonably perceived threat to its national security.

In this light, it is clear that Israel could reasonably perceive that it could not wait any longer. Iraq must have known that building the peculiar reactor would be perceived by Israel as a significant threat to its national security. Despite this probability, Iraq continued to build it content with the knowledge that it had no common border with Israel and that it had the superpower patronage of the Soviet Union. Neither of these defenses, however, prevented the Israelis from acting.

C. Israel's Reaction to the Threat

As discussed, international law requires an aggrieved nation to seek a diplomatic solution to any conflict before resorting to force. Because Israel allegedly did not seek such a diplomatic solution, the United States joined other nations in condemning the attack. Commentators suggested that Israel could have tried to negotiate directly with Iraq or could have attempted to establish the Middle East as a nuclear nonproliferation zone. Commentators also suggested that Israel could have further complained to the Security Council, "which would not be expected to react with indifference to a nuclear menace."

Hyperbole aside, the fact of the matter is that in view of Iraq's intractable hatred of and hostility towards Israel, direct negotiations between the two countries would have been impossible. Similarly, negotiations through a third-party also would not have been realistically feasible. With respect to the second suggestion, Israel could have replied that it had been trying to persuade the United Nations to establish the Middle East as a nuclear nonproliferation zone since 1975. Israel unsuccessfully renewed that effort one year before the raid. The last suggestion, that Israel

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51 Rubin, supra note 30, at 12, col. 6.
52 Senate Hearings, supra note 42, at 229 (statement of Professor Mallison, George Washington University School of Law).
could have sought assistance from the Security Council, is equally implausible. Paralyzed by the veto wielded by Iraq’s Soviet ally, the Security Council probably would not have acted and certainly would not have done so before the reactor was completed.  

Israel faced criticism in the United States for not waiting until the reactor was completed and the threat became more urgent. Israel’s response—that a delay in the attack on the reactor until after it was operational could result in the release of radioactive fallout endangering Baghdad—was scoffed at by scientists of the Congressional Research Service. Since the Congressional hearings, however, the disaster at Chernobyl seems to lend support to Israeli concerns. Indeed the explosive destruction of an operating nuclear facility employing high-enriched uranium that Iraq insisted on using, could have caused even more significant damage than the tragedy at Chernobyl.

In light of the threat perceived by Israel and indeed posed by Iraq, Israel could not reasonably be expected to postpone the exercise of its right of self-defense until after Iraq’s reactor became operational, let alone until after Iraq possessed nuclear weapons. The only adequate defense left to Israel was the immediate destruction of the reactor. Israel limited the attack to the facility under construction that could be used for producing nuclear weapons and did not extend its strike to other targets. Furthermore, Israel purposely conducted the attack on a Sunday, when most of the workers at the site were absent, and did so with almost surgical precision. Thus, it seems clear that Israel responded proportionally to a reasonably perceived threat and thus conducted a lawful attack against Iraq.

a draft resolution on this issue to the U.N. General Assembly. See U.N. Doc. A/C 1/358 (1980). There were no results from this initiative.

60 See Senate Hearings, supra note 42, at 253 (Professor John N. Moore testifying, “I am rather sympathetic with the Israeli feeling that if Iraq were suddenly one day to announce to the world that it had three nuclear weapons or a number of nuclear weapons, it is unlikely there would be any international sanctions taken.

61 The Congressional Research Study conducted a study and concluded that “it would be most unlikely for an attack with conventional bombs upon the reactor when operating to have caused lethal exposures to radioactivity in Baghdad . . . .” Congressional Research Service, Possible Contamination of Baghdad from Bombing of Iraqi Reactor, June 18, 1981, reprinted in Senate Hearings, supra note 42, at 154, 156.

62 The fact that only one person was killed, although lamentable, is directly attributable to the amazing proficiency of the Israeli Air Force.
III. Recent Relations Between the United States and Libya

A. Background

Before 1969, Libya was not active in international affairs. The discovery of oil and Colonel Qadhafi’s subsequent military coup, however, dramatically changed Libya’s position internationally. Colonel Qadhafi used the country’s oil revenues to develop Libya’s economy, build an army, and support terrorist groups around the world. Colonel Qadhafi is perhaps best known, however, for his support of Arab terrorist groups such as the Popular Front for the Liberation of Palestine-General Command, the Fatah, and the Abu Nidal organization. Indeed, in 1984, the Abu Nidal organization, which has been linked to numerous terrorist attacks against Americans, moved its headquarters to Libya.

The focus of much of Colonel Qadhafi’s rhetoric and terrorist activity has been the United States. On several occasions, the Colonel has stated that the United States is the primary obstacle to achieving peace in the Middle East. In 1984, he announced to his fellow Libyans that “we are capable of exporting terrorism to the heart of America.” He later added: “We have the right to fight America, and we have the right to export terrorism to them.”

Indeed, terrorist acts by Arabs have been committed against Americans with Qadhafi’s support. On December 27, 1985, terrorists attacked airline offices in Rome and Vienna killing twenty...
civilians, including five Americans, and injuring over eighty others.\(^{68}\) The terrorists used passports supplied by Libya.\(^{69}\)

American relations with Libya quickly deteriorated after the Rome and Vienna attacks. President Reagan explicitly accused Libya of assisting the Abu Nidal organization which had committed the attacks. Qadhafi denied that his country had assisted the terrorists, but he called their acts “heroic.”\(^{70}\) President Reagan responded by sending a United States carrier task force into the Mediterranean Sea,\(^{71}\) and forbidding Americans from traveling to or conducting business in Libya without a license.\(^{72}\) In addition, the President severed all economic ties between the two countries\(^{73}\) and sought support for these sanctions from other nations. Finally, the President announced that economic sanctions against Libya would not be terminated unless Qadhafi ended Libya’s support of terrorist groups.\(^{74}\)

Tensions between the United States and Libya escalated in response to U.S. economic sanctions and Qadhafi’s subsequent reaction. In January 1986, United States warships engaged in exercises in the Gulf of Sidra which most nations, including the United States, regard as international waters.\(^{75}\) Qadhafi, in contrast, claims those waters are part of Libya’s territorial seas and, in response to the United States naval exercise, placed Libya’s armed forces on “full alert.”\(^{76}\) Despite a high tension level during those naval exercises, no military engagements between the two nations occurred.

The United States conducted further exercises in the Gulf of Sidra in March 1986.\(^{77}\) This time, Libyan forces fired six missiles

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\(^{69}\) *Libya Under Qadhafi*, supra note 63, at 2.


\(^{73}\) *Id.* The regulations prohibited imports, exports, transportation, or travel to or from Libya; performance of contracts supporting projects in Libya; and extension of any credit or loans to the Libyan Government.


\(^{76}\) *Id.*

\(^{77}\) The announced purposes of these operations were “to gather intelligence, to assert
at U.S. planes flying more than twelve miles from the Libyan coastline but within the area in dispute.\textsuperscript{78} The U.S. Navy responded by attacking Libyan patrol boats and missile sites.\textsuperscript{79} Despite these American counterattacks, Qadhafi declared the incident a Libyan “triumph.”\textsuperscript{80}

Tensions increased once again when, on April 5, 1986, a bomb exploded in a West German discotheque frequented by American servicemen.\textsuperscript{81} Two Americans, including one serviceman, were killed in the attack. One hundred and fifty-four persons were wounded, including fifty to sixty Americans. U.S. government officials announced that they believed that the bombing was part of a “pattern of indiscriminate violence” by Libya against Americans. They further alleged that Colonel Qadhafi was planning to attack some thirty U.S. installations abroad and had targeted American diplomats as potential victims of terrorist attacks.\textsuperscript{82} U.S. policymakers apparently concluded that a strong show of force was needed to persuade Qadhafi to cancel those attacks. That conclusion led to the decision to attack Tripoli.

\textbf{B. The American Attack on Tripoli}

In the early morning hours of April 15, 1986, American aircraft attacked the Libyan capital of Tripoli.\textsuperscript{83} The attack was conducted by Air Force F-111 aircraft based in Great Britain and by Navy aircraft launched from carriers of the Sixth Fleet. It lasted less than a half hour. Specific targets included the Tripoli and Benina military air fields, Benghazi and Azziziyah military barracks, and the Sidi Balal training camp.\textsuperscript{84} Libyan forces downed one of the attacking aircraft, killing both crewmen.

The White House explained the raid in the following manner:

\begin{quote}
the right of innocent passage, and the right to sail in international waters.” Halloran, 2 U.S. Ships Enter Soviet Waters Off Crimea to Gather Intelligence, N.Y. Times, Mar. 19, 1986, at A1, col. 5.


\textsuperscript{80} Kifner, Qadhafi Claiming Victory by Libya, N.Y. Times, Mar. 29, 1986, at A3, col. 1.

\textsuperscript{81} Boyd, U.S. Sees Methods of Libya in Attack, N.Y. Times, Apr. 6, 1986, at A1, col. 5.

\textsuperscript{82} Id.

\textsuperscript{83} Gordon, Pentagon Details 2-Pronged Attack, N.Y. Times, Apr. 15, 1986, at A1, col. 5.

\textsuperscript{84} Id.
U.S. forces struck targets that were part of Qadhafi's terrorist infrastructure—the command and control systems, intelligence, communications, logistics, and training facilities. These are sites which allow Qadhafi to perpetrate terrorist acts.

In addition to the strikes at terrorist centers, the President also authorized limited defense suppression missions in order to defend our own forces engaged in this mission. Every effort was made to avoid civilian casualties and limit collateral damage and to avoid casualties to those American servicemen who are participating.85

The declared purpose of the attack, therefore, was to hinder Libya's ability to sponsor or conduct future terrorist attacks by destroying part of its terrorist infrastructure.

Qadhafi survived the attack, but reports asserted that his step-daughter was killed and two of his sons were wounded.86 According to Libyan official Abdul Salam Talloud, thirty-seven people were killed and another ninety-three were injured, many of them civilians.87 According to U.S. military officials, when viewed in its entirety, the mission was successful, and the strike force was praised for its extraordinary performance.88

C. International Reaction to the Attack

Colonel Qadhafi castigated the United States for conducting the attack and criticized Great Britain for allowing American planes stationed on its soil to be used in the attack.89 In addition, Libyan forces retaliated by firing two missiles at a U.S. Coast Guard communications installation in the Mediterranean but caused no damage.90 Finally, during the two weeks that followed the raid, terrorist groups with ties to Libya committed acts of terrorism against American businesses in France and British busi-

89 Schumacher, Qadhafi, on TV, Condemns Attack, N.Y. Times, Apr. 17, 1986, at A1, col. 5.
nesses in Lebanon. Terrorist threats were made against other American facilities throughout the world.

In the United States, the American public overwhelmingly approved of the attack. One media poll showed that 77 percent of Americans supported the bombing of Libya even though 43 percent predicted that there would be increased tension. Many Americans cancelled summer travel plans to Europe because of a fear that terrorists would retaliate.

Reactions on Capitol Hill were also extremely favorable. Even liberal leaders of the Democratic Party supported the President. Legislation was introduced that would have authorized the President to respond to future acts of terrorism without consulting Congress in advance. The strike also seemed to help persuade the Senate to consent to an amendment to the extradition treaty with the United Kingdom that would include terrorism as an extraditable offense.

The supportive reactions of the American public and Congress were not forthcoming from most of America's allies in Western Europe. Greece claimed that the air strike would "set dynamite to peace," and Italy asserted that the attack would result in "provoking explosive reactions of fanaticism . . ." France characterized the attack as a "reprisal . . . that itself revives the chain of violence," and Belgium expressed "regret [about the] . . . American . . . recourse to a military action." West Germany asserted that "a violent solution will not be successful and is not very promising."

91 McFadden, Bomb Blasts in France and Lebanon Rock American and British Offices, N.Y. Times, Apr. 27, 1986, at 14, col. 5.
100 Id.
101 Id.
Similarly, the United States was severely criticized in United Nations' debate. In the Security Council, the United States, Great Britain, and France vetoed a proposed resolution that "condemn[ed] the armed attack by the United States of America in violation of the Charter of the United Nations." The General Assembly actually passed a resolution condemning the American attack by a vote of seventy-nine to twenty-eight, with thirty-three abstentions.

D. The Attack on Tripoli and International Law

Shortly after the strike, President Reagan asserted that the United States attacked Libyan "terrorist centers" and military bases in response to the "reign of terror" Qadhafi's government had waged against the United States. The President explained that the United States had proof of Libyan involvement in the bombing of the West German discotheque. Relying on evidence that he characterized as direct, precise, and irrefutable, the President described the proof of Libya's involvement in the discotheque bombing in the following statement:

On March 25, more than a week before the [West German discotheque] attack, orders were sent from Tripoli to the [Libyan] People's Bureau in East Berlin to conduct a terrorist attack against Americans, to cause maximum and indiscriminate casualties. Libya's agents then planted the bomb. On April 4, the People's Bureau alerted Tripoli that the attack would be carried out the following morning. The next day they reported back to Tripoli on the great success of their mission.

The United States, according to President Reagan, also had "solid evidence about other attacks Colonel Qadhafi planned against United States' installations and diplomats and even American tourists." The President explained that he ordered the air

106 Id. United States officials later disclosed that they had proof that Libya had planned an attack on an American visa office in Paris. U.S. Aides Provide Details on Paris Plot Tied to Libya, N.Y. Times, Apr. 16, 1986, at A18, col. 1.
strike in order to "alter [Qadhafi's] criminal behavior" and thus to preempt those attacks.107

Having established a basis for asserting the proper exercise of anticipatory self-defense, the President somewhat obfuscated the purpose of the attack by declaring that, "[w]hen our citizens are abused or attacked anywhere in the world, on the direct orders of a hostile regime, we will respond . . . . Self-defense is not only our right, it is our duty."108 Although he used the magic words of "self-defense," the President also seemed to be implying that the strike was a reprisal for past Libyan terrorist attacks. He later reinforced that implication by stating:

I warned that there should be no place on earth where terrorists can rest and train and practice their skills. I meant it.
I said that we would act with others if possible and alone if necessary to insure that terrorists have no sanctuary anywhere.109

The President's rationale for the attack thus appears somewhat ambiguous. He seems to claim that the strike was conducted not only to preempt future terrorist acts but also to punish Libya for its support of past terrorist acts. As discussed, the former may be a lawful pursuit under the modern theory of anticipatory self-defense, whereas the latter is prohibited under international law.110

Despite ambiguities in the President's statement, the official justification for the air strike became more apparent when the U.S. Ambassador to the United Nations, Vernon A. Walters, reported to the United Nations that the United States attacked Libya because of "compelling evidence of Libyan involvement in other planned attacks against the United States in recent weeks, several of which were designed to cause maximum casualties similar to the Berlin bombing."111 Ambassador Walters, while referring to Libyan support of the bombing of the West German discotheque, added that:

In light of this reprehensible act of violence—only the latest in an ongoing pattern of attacks by Libya—and clear evidence

107 Reagan, supra note 105, at 2.
108 Id.
109 Id.
110 See supra notes 15–26 and accompanying text.
that Libya is planning a multitude of future attacks, the United States was compelled to exercise its rights of self-defense.112

The general consensus among commentators is that if the United States conducted the attack to prevent future Libyan use of its terrorist infrastructure, and not merely to punish Libya for supporting past terrorist attacks, the air strike was lawful under international law.113 The commentators also recognize that because the United States must protect its intelligence sources and methods,114 a complete disclosure of all the information in the hands of the President at the time he ordered the attack may never occur. Yet, it is difficult for some scholars to accept blindly a naked assertion of facts, even by the President. As the next section shows, these problems exist, perhaps even to a greater degree, in discussing the facts surrounding the Libyan facility at Rabta.

IV. THE PLANT AT RABTA

The lawfulness of any future attack on the plant at Rabta requires consideration of several factors. It is first necessary to determine from publicly disclosed information whether the facility is in fact a chemical weapons plant. Assuming, arguendo, that it is a chemical weapons plant, the next consideration is the type of threat such a plant poses to the international community, in general, and the United States, in particular. This entails the difficult task of trying to determine Colonel Qadhafi’s intentions about the use of the plant from previous and present statements and behavior. Finally, it is necessary to examine the various U.S. responses to that threat to date and examine whether a military attack on the plant would be justified under international law.

A. Is the Facility at Rabta a Chemical Weapons Plant?

There is strong evidence that the facility at Rabta is designed to produce chemical weapons. Information about the plant first became public in the fall of 1988. Newspaper stories disclosed that President Reagan would “not rule out a preemptive attack

112 Id.
114 See generally Greenwood, supra note 28, at 933; Intoccia, supra note 113, at 177.
on an alleged chemical weapons factory, which U.S. officials say is at Rabta, 35 miles from the Mediterranean coast."115 Such a potential strike was severely criticized by the Organization of African Unity and the Arab League as constituting "a new aggression against Libya under the pretext that Libya has a chemical weapons plant."116 Implicit in their criticism, therefore, was an assertion that the facility is not, in fact, a chemical weapons plant.

Over the next several weeks, a vigorous international debate developed about whether the facility at Rabta was designed to produce chemical weapons or, rather, fertilizer or pharmaceuticals. Director of Central Intelligence William H. Webster claimed that "the complex is the largest chemical weapon facility the [CIA] has detected under construction anywhere in the Third World."117 Qadhafi responded by asserting that the facility is a pharmaceutical factory; and, in order to prove it, he offered to allow a one-time international inspection of the plant.118 The United States rejected that offer on the grounds that "evidence of chemical weapons production could be erased on short notice before the inspection took place."119 In addition, according to the State Department, "the installation could be modified before the inspection to resemble a civilian plant, like a pharmaceutical factory, and could revert to weapons production afterward."120 In effect, according to the Americans, Qadhafi had built a "flexible manufacturing plant . . . [that] can make anything from antibiotics to pesticides to poison gas."121

In the meantime, the American press began focusing on the role of West German companies in helping to build the Rabta facility. In a front page story on New Year's Day, 1989, the New York Times reported that the "United States has concluded that a West German company played a central role in the design and construction of a vast chemical plant in Libya, a discovery that has prompted diplomatic protests to the highest levels of the Bonn Government . . . ."122 U.S. officials added that "President

116 Editorial, supra note 1, at A14, col. 1.
117 Cannon & Ottaway, supra note 1, at A1, col. 1.
118 Gordon, supra note 1, at A1, col. 1.
119 Id.
120 Id.
121 Id.
122 Engleberg and Gordon, supra note 1, at A1, col. 1.
Reagan and Secretary of State George P. Shultz had strongly raised the issue of West German participation in the Libyan plant during a recent meeting with Chancellor Helmut Kohl in Washington on November 16." The West German company referred to by the American officials was Imhausen-Chemie whose president, Dr. Jurgen Hippenstiel-Imhausen, vehemently denied any involvement of his company with the Rabta facility.

His denial was later supported by the West German government on January 2, 1989, when it announced that "preliminary investigations had uncovered no proof that [the company] had helped build [the Rabta facility]." A newspaper story also noted that only Britain had agreed with the American claim that the plant was a chemical weapons facility while France and Italy were skeptical about U.S. claims. The evidence, according to the press, consisted of "American reconnaissance photos and other evidence . . . ." The United States apparently was reluctant to provide additional evidence in order "to protect the intelligence sources that had provided the information."

Shortly thereafter, Secretary of State Shultz answered questions about the Libyan plant. In response to a question about his impressions of the plant, he stated: "Well, first of all, they do have a plant and it's designed to produce chemical weapons." West German officials, however, disagreed with Shultz. After conducting their investigation, the West Germans found no evidence to implicate Imhausen-Chemie in the Rabta plant's construction. Because of these findings, the West German media became very critical of their American counterparts for unfairly accusing the German company.

123 Id.
124 Id. He stated that the "company had absolutely nothing to do with the allegations now concerning the plant presumed to be making chemical weapons in Libya. We don't even have the know-how in this area. We have no employees there, no technicians there either. We haven't had people there for years." Id.
125 Markham, supra note 1, at A6, col. 1.
126 Id.
127 Id.
128 Id. Engleberg & Gordon, supra note 1, at A1, col. 1.
129 Shultz's Views on Chemical Arms, Libya, supra note 7, at A31, col. 6.
131 One paper stated, "The thought is simply unbearable that, of all people, a German company should be responsible for supplying the unpredictable dictator and terrorists'
The West German government also aggressively urged that the United States produce any additional evidence that would incriminate Imhausen-Chemie. According to newspaper stories, the West German government would not accept the American accusation unless the United States government produced enough evidence that could persuade a court of law as to the company's guilt. American officials, in contrast, were concerned about the company's actual culpability and not about whether a criminal conviction could be obtained. The State Department, however, ultimately acceded to the West German demand and reportedly agreed to supply them with the additional evidence.

Before they received the new evidence, however, the West German officials began to change their public position on the matter. They now claimed that it was not "very clear" as to what would be the true function of the plant. One official stated that "[i]f you're on the outside, it looks like one thing, and if you can get on the inside, it looks like something else." Another West German official acknowledged for the first time that investigators had discovered "indications" that Imhausen-Chemie and another West German company, IBI Engineering, may have helped build a chemical weapons plant at Rabta. This change in the West German government's position was probably due to leaks to the German media about an internal Bonn investigation into the matter. Stern, a West German weekly magazine, claimed it had obtained evidence showing that Imhausen-Chemie had provided Libya with "everything that was needed to build a chemicals factory."

The next day, the change in the West German position became even more pronounced when a Belgian shipping agent was ar-
rested for allegedly disguising a shipment of West German goods that were ultimately sent to Libya. The Bonn government re­acted by announcing that it was intensifying its own investigation into the matter. Two weeks later, West German customs officials searched three companies for evidence of their complicity in building the Rabta facility. Among those searched were Im­hausen-Chemie. According to one account, an employee of Im­hausen-Chemie told Stern that a state owned West German company prepared blueprints to build the Rabta facility for Imhausen-Chemie. The West German government was thereby implicated directly in the growing scandal.

Finally, on February 16, 1989, the West German government issued a report acknowledging that it had information as early as July 1985 which indicated that Imhausen-Chemie was helping to construct a chemical weapons plant in Libya. At a press conference, Wolfgang Schaeuble, Chancellor Kohl's chief of staff, stated that the West German government believed that Libya intended to build a chemical weapons plant at Rabta since 1985. According to the report, however, even though the West German government had this information since 1985, Chancellor Kohl and Foreign Minister Hans-Dietrich Genscher were not informed until more than three years later.

After issuing the report, the West German government continued to investigate the matter. On May 10, 1989, the West German government arrested Jurgen Hippenstiel-Imhausen, who had been director of Imhausen-Chemie until March when he resigned because of the scandal. The West German prosecutor stated that Mr. Hippenstiel-Imhausen was "strongly suspected of having

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139 Id.
143 Id.
144 Id.
played a significant personal role in the planning and building of a plant designed for the production of chemical weapons in Rabta, Libya. We believe he acted as a sort of moderator for the project.”

This episode demonstrates that there is very strong evidence that the plant at Rabta is, in fact, designed to manufacture chemical weapons. The United States initially stood alone in accusing Libya of building such a plant. Steadily, however, the nations of Western Europe, including Great Britain, the Netherlands, and France, all became persuaded by the evidence. Even the West Germans eventually acknowledged the actual existence and designed function of the plant, much to the extreme embarrassment of the Kohl government. It is highly unlikely that Chancellor Kohl would have voluntarily subjected himself to such ridicule if the evidence regarding the plant was not compelling. In sum, there are significant reasons to conclude that, at least until early 1989, the Rabta facility was designed to manufacture chemical weapons.

B. The Threat Posed by the Rabta Plant

The newspaper stories published in early 1989 repeated U.S. government analyses that the Rabta plant was almost complete. Whether or not that is still the case is not clear. One report claims that American officials believe that Colonel Qadhafi is refitting the plant to make pharmaceuticals instead of chemical weapons as a result of diplomatic pressure and to obtain a propaganda coup by inviting independent experts to inspect the revamped facility. In contrast, however, Director of Central Intelligence William H. Webster testified to Congress that “Libya’s chemical agent plant is expected to soon begin large-scale production of mustard and nerve agents, potentially tens of tons per day.” Whichever version is accurate, it should be obvious that it would

146 Protzman, supra note 145, at A14, col. 1.
147 Gordon, Soviets Dispute U.S. Assertion on Libya Plant, N.Y. Times, Jan. 7, 1989, at 1, col. 1; Markham, supra note 134, at A10, col. 4.
149 Chemical Weapons Proliferation, Testimony of William H. Webster, Director of Central Intelligence, Hearing of the Senate Foreign Relations Committee, Mar. 1, 1989 (NEXIS, Federal News Service library).
be relatively easy to make the plant capable of completing its original purpose: the manufacture of chemical weapons.

Having determined the plant's potential, the chief inquiry must be into the nature of the threat such a plant poses. American analysts claim that the potential output of the plant is between 22,000 and 84,000 pounds of mustard gas and nerve agent daily. In comparison, the chemical weapons plants Iraq used to produce the weapons used against Iran produced less than 10,000 pounds daily. According to government officials, only 3,000 pounds is needed to cover a square mile. Thus, the plant appears to have a frightening capability to manufacture significant quantities of chemical weapons.

This manufacturing capability is particularly threatening in light of Libya's efforts to develop a delivery capability. According to American officials, Libya is attempting to acquire refueling capacity for its air force which would place several targets throughout North Africa, Israel, and the Arab world in jeopardy. These efforts have become even more disturbing with the disclosure that six sophisticated Soviet Su-24D bombers have been delivered to Libya. It is not clear, however, whether these Soviet bombers have a refueling capability.

Colonel Qadhafi's efforts to develop a delivery system have not been limited to aircraft. According to a 1988 report, U.S. officials believe that the Colonel is trying to obtain ballistic missiles with a range of up to 3,000 miles. In light of the U.S. conclusion that the Rabta facility may be capable of producing not only chemical weapons but also artillery shells and missile casings to contain them, it becomes apparent that Qadhafi plans to develop a medium range delivery system capable of threatening all of the Middle East and Western Europe and parts of Africa.

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150 Engleberg & Gordon, supra note 1, at A1, col. 1.
151 Id. For a more extensive discussion about the effects of chemical weapons, and the efforts to prohibit their use, see generally Note, International Regulation of Chemical and Biological Weapons: Yellow Rain and Arms Control, U. ILL. L. REV. 1011 (1984); Note, Establishing Violations of International Law: 'Yellow Rain' and the Treaties Regulating Chemical and Biological Warfare, 35 STAN. L. REV. 259 (1983).
152 Engleberg & Gordon, supra note 1, at A1, col. 1.
155 Engleberg & Gordon, supra note 1, at A1, col. 1.
The question remains, however, whether Qadhafi would use such weapons if they are fully developed. State Department spokesman Charles Redman claimed that in light of Libya's reported use of poison gas against neighboring Chad in 1987, Qadhafi has developed a "track record." Even more worrisome from the American perspective, according to Redman, is Qadhafi's "record of irresponsible behavior" in supporting international terrorism. The United States, therefore, fears that Qadhafi will manufacture the chemical weapons and then provide them to international terrorists. Indeed, according to L. Paul Bremer, Director of the State Department's Office of Counterterrorism, the United States Intelligence Community estimates a fifty percent chance that international terrorists will escalate their efforts to include chemical weapons in the next two years.

If the Rabta plant becomes operational and Libya develops a delivery system, then the weapons could be used against America's allies in the Middle East, such as Israel and Egypt, and also against Western Europe. The weapons could also be used to attack American ships and personnel in the area, particularly those who patrol the Mediterranean. One can easily imagine a repeat of the Gulf of Sidra incident involving the use of bombers and missiles carrying chemical weapons. Finally, and perhaps most importantly, Qadhafi could provide the chemical weapons to the numerous terrorist groups that he supports, many of which have engaged in gruesome attacks on Americans. Such use of chemical weapons would allow Colonel Qadhafi to fulfill his pledge of taking terrorism to America's streets.

The potential threat to U.S. national security, therefore, is significant. Whether that threat is immediate, however, is impossible to determine without more concrete and current information on the plant's capabilities and Colonel Qadhafi's intentions. Conceivably, reports on the plant's potential may be inaccurate, and the plant may be capable of producing only pharmaceuticals. As well, Colonel Qadhafi may have intended to build the plant only as a threat to America and others and not to produce and

159 See supra notes 75–80 and accompanying text.
use chemical weapons. The Colonel’s intentions are difficult to ascertain. While it may be possible to assess accurately the capabilities of the plant, deciphering the Colonel’s intentions would frustrate even the most perceptive analyst. Such an exercise merely demonstrates that, in this age of weapons of mass destruction, nations must take care to mean what they say and do as they intend, for other nations will look to their words and acts as evidence of true intentions and react accordingly. The Israeli raid on Osiraq demonstrates this lesson well. Bombing the reactor was a reasonable reaction by Israel to the threat it faced but attacking the Rabta facility does not seem to be a reasonable option for the United States at this time.

C. International Law and the United States’ Reaction to the Rabta Threat

The United States apparently has employed a tripartite strategy in response to the developments at Rabta. First, the United States has encouraged the international community, including Libya, to agree on a new international convention that would prohibit the manufacture of chemical weapons. Second, the United States has tried to convince its European allies that the Rabta plant is a chemical weapons facility and that they ought to prohibit their domestic companies from participating in the plant’s construction. Third, the United States has used the threat of military action to persuade Qadhafi to cease construction of the facility.

1. An International Agreement

The disclosures about the Rabta facility in early 1989 occurred at about the same time that the world’s nations were planning to meet in Paris to discuss chemical weapons in general. The United States organized the conference in response to the use of chemical weapons in the Iran-Iraq war. During the conference, the United States argued that Libya’s potential to produce chemical weapons poses a unique menace to the world community, especially in light of Libya’s support of international terrorism.

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160 Pear, supra note 1, at A1, col. 6.
161 See id.
In response to the U.S. argument, Libya continued to insist on its right to manufacture chemical weapons so long as other nations do so. "How can any member of the international community proclaim a right it denies others?" asked the Libyan Foreign Minister, Jaddallah Azauz al-Talhi. The United States responded by asserting, in effect, that even though the developed nations of the West possess chemical weapons, they can be trusted not to use them while others, such as Libya and Iraq, cannot.

The Conference concluded with mixed results. While no international agreement to prohibit the manufacture of chemical weapons was reached, the Conference did issue a declaration that called for:

the necessity of concluding, at an early date, a convention on the prohibition of the development, production, stockpiling and use of all chemical weapons, and on their destruction. This convention shall be global and comprehensive and effectively verifiable. It should be of unlimited duration.

The world community thus agreed to agree on some new convention at a future date. But, like agreements to agree in the domestic context, such aspirational documents have little or no effect.

The U.S. international effort, therefore, cannot be considered much of a success. While the Conference did focus the world's attention on the problem, the absence of any new binding international agreement, or even a general reprimand of Libya regarding the construction of its plant at Rabta, epitomizes the difficulties of achieving an international consensus on the issue. Similarly, reliance on the United Nations to sanction Libya or to otherwise prevent the completion of the Rabta plant would not

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164 Markham, supra note 162, at A13, col. 6.


be successful. By attempting to address the perceived threat in an international forum, however, the United States has gone far towards meeting its international obligation to settle this dispute in a peaceful manner.

2. The United States and Its Allies

The second part of the U.S. strategy also suggests that the United States has tried to meet its obligation to try and settle its dispute with Libya peacefully. Specifically, the United States has attempted to convince its allies that the Rabta plant is being constructed to manufacture chemical weapons and to prevent their domestic companies from participating in the effort. The American theory is based on the premise that Libya does not have the technical capability for completing the plant on its own and that even if Libya did have such capability, the very withdrawal of foreign support would significantly complicate and impede the Libyan effort.167 This part of the American strategy has been difficult but ultimately successful. From an almost unanimous skepticism or rejection of the U.S. claims about Rabta, America's allies were slowly but steadily persuaded by the United States that the plant would produce chemical weapons. The United Kingdom, the Netherlands, Canada, and France eventually discarded their initial skepticism and publicly announced that they were convinced by the United States of the plant's capabilities.168 The West Germans changed their position completely, much to their chagrin and embarrassment.

The significance of this effort lies in the fact that not only West German companies helped construct the Rabta plant. Although West German companies may have given the most substantial assistance, according to Deputy National Security Advisor Robert M. Gates, the plant was being built with the help of companies from "nearly a dozen nations, East and West."169 Presumably, these companies were pressured, like the West German company, to cease their efforts supporting construction of the Rabta plant once the true nature of the facility was accepted by their countries' governments. Indeed, this may have been a major factor in per-

167 Engleberg & Gordon, supra note 1, at A1, col. 1.
168 Gordon, supra note 147, at 1, col. 1; Markham, supra note 134, at A10, col. 4.
169 Engleberg & Gordon, supra note 1, at A1, col. 1.
suading Colonel Qadhafi to abandon his plans for the plant if, in fact, he has done so.

In view of U.S. attempts to prohibit chemical weapons production by treaty, as well as efforts to coordinate the policies of its European allies, it is clear that the United States has embraced multilateral diplomacy as a means to settle this dispute peacefully. It is not clear, however, that the United States has sought a bilateral solution with equal energy. If developments occur necessitating an attack, the United States should first attempt to undertake a diplomatic initiative with Libya, either directly or through an intermediary.

3. The American Threat of Force

The U.S. response to the threat has not been entirely peaceful. On January 4, 1989, a U.S. Navy strike force comprised of eighteen ships, including a thirteen ship Navy carrier group and a five ship Marine battle group, sailed towards Libya.\(^{170}\) Reportedly, officials at the Pentagon and the Central Intelligence Agency favored a military strike using cruise missiles because the missiles are accurate and their use would avoid the death or capture of any military personnel.\(^{171}\)

This military capability became an effective threat when it was preceded by careful preparatory remarks made by President Reagan. When asked by a reporter whether the United States might bomb the plant at Rabta, President Reagan replied: “Well, let me say that’s a decision that has not been made yet, we’re in communication with our allies and with NATO forces and all, and we’re watching very closely that situation but even if I had made a decision I couldn’t [disclose it].”\(^{172}\) The strike force, however, was ultimately withdrawn without attacking the Rabta plant.

V. INTERNATIONAL LAW AND A FUTURE ATTACK ON THE RABTA FACILITY

At the present time, publicly disclosed information on the Rabta plant’s capabilities and Colonel Qadhafi’s intentions for its use do not support a lawful attack by the United States under any theory of self-defense. No armed attack has occurred as

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\(^{170}\) Almond & Gertz, supra note 5, at A1, col. 3.

\(^{171}\) Id.

\(^{172}\) Cannon & Ottaway, supra note 1, at A1, col. 1.
required by article 51 of the Charter. Similarly, though the plant indeed poses an identifiable potential threat to U.S. national security, the threat does not appear as immediate as required by the Caroline Doctrine. Finally, despite the actual perception by the United States of the plant's potential threat and the reasonableness of that perception in light of recent U.S.-Libyan relations, the threat posed does not rise to a level that allows an attack under the modern theory of anticipatory self-defense.

Future developments, however, may make the information disclosed thus far useful in supporting a lawful attack on the Rabta plant. Specifically, if the United States obtains confirmed reports that the plant is operational to manufacture chemical weapons, that Libya has developed a delivery capability, and that Qadhafi intends to use the weapons directly or indirectly against the United States, then the United States may be able to lawfully attack the plant under the theory of anticipatory self-defense. Analysis of such an attack under each of the theories of self-defense demonstrates that only the theory of anticipatory self-defense allows the United States to adequately defend itself in anticipation of a chemical weapons attack.

Under the traditional restrictive theory of self-defense under the United Nations Charter, the United States would have to wait for the "armed attack" from Libya to occur first.173 The potential devastation of such an attack, however, makes this wait and see approach clearly unacceptable. Another option for the United States is to justify an attack under the traditional theory of anticipatory self-defense. Under the Caroline Doctrine, the United States would have to wait until the threat posed by Libya is "instant, overwhelming, and leaving no choice of means, or no moment for deliberation."174 Yet, the problems in applying this formulation to the potential use of chemical weapons should be obvious. How does a state determine when the standard has been met? There is no precise calculation that can be employed. A miscalculation regarding the possible use of a weapon of such mass destruction could result in the needless deaths of millions of the defending state's own citizens. Requiring a state to wait until confronted with an imminent chemical weapons attack be-

173 See supra note 19 and accompanying text.
174 See supra note 24 and accompanying text.
fore lawfully employing force in self-defense seems unacceptable in light of the magnitude and uncertainty of risks. Adoption, however, of the modern theory of anticipatory self-defense and its standard of reasonableness\textsuperscript{175} would allow the United States to meet its minimum national security requirements and, at the same time, ensure that the use of force is necessary under the circumstances.

The United States would not have to sustain an armed attack before acting to prevent future attacks. Nor would the United States have to wait until the possibility of the attack was so immediate that a failure to successfully extinguish the threat would result in great losses. Rather, under the modern theory of anticipatory self-defense, the United States could preempt a planned chemical weapons attack when the threat to its national security arises but well before its national security is placed in imminent jeopardy. Further information may lead U.S. policymakers to reasonably conclude that the plant is producing chemical weapons and that Libya has attained a delivery capability especially when viewed in light of the plant's original design. Similarly, further information suggesting Libya intends to use such weapons against the United States would be consistent with recent relations between the United States and Libya. Thus, the foundation is laid for a reasonable perception of a threat to U.S. national security. Force reasonably used to suppress that threat would seem lawful under the modern theory of anticipatory self-defense.

Adoption of this theory of self-defense bridges the gap between the failed collective security system and the overly strict requirement of article 51 of the Charter. Volatile and unpredictable leaders like Colonel Qadhafi add uncertainty in policy decisions regarding national security. The United States may not be able to wait until it has overwhelming evidence of the plant's capabilities and Qadhafi's intentions. It certainly cannot wait for the Security Council to act. The margin for error is small, and the consequences of mistaken inaction are unacceptable. Instead, the United States may have to act in reasonable anticipation of an eventual attack like Israel did in 1981. Even though the United States condemned Israel for its attack on Osiraq in 1981, the American bombing of Tripoli in 1986 demonstrates that the

\textsuperscript{175} See supra notes 25–26 and accompanying text.
United States accepts the practice, and presumably the modern theory, of anticipatory self-defense.

VI. Reflections on the Role of International Law in the Policymaking Process

But if the United States does act, it should be done with principles of international law in mind. Many military commanders often scoff at the role international law plays in the national security policymaking process. Despite such rebukes, however, international law consistently shapes the political parameters of the inevitable debate about a particular use of force. When Israel bombed Osiraq in 1981, its actions were debated in the United Nations. Israel and, to a lesser extent, Iraq presented legal arguments about the validity of the attack. Although the Security Council condemned Israel (wrongly, in the opinion of some) for the attack, it did so while the political debate was shaped by legal parameters.

Similarly, when the United States bombed Tripoli in 1986, the United States was prepared with legal support for the attack as soon as the attack was disclosed. At his press conference, President Reagan explained that the attack carried out by the United States in self-defense was lawful under the United Nations Charter. The American Ambassador to the United Nations, Vernon Walters, presented a subsequent legal defense to the United Nations.

In sum, if the United States ever does plan to attack the Rabta plant, it needs to prepare a legal defense in advance or suffer more criticism from the international community than it otherwise would. Compiling and disclosing such a record is often difficult, as demonstrated in the attempt to persuade West Germany about its citizens' involvement in the Rabta facility, because it may involve revealing intelligence sources and methods. The United States Intelligence Community, which takes the long-term view, is very reluctant to disclose such information because of its impact on America's national security. But in certain circumstances, where the stakes are sufficiently high, the United States should be prepared to make such disclosures. If the threat posed by Rabta is or becomes so significant that the United States government concludes that it must attack, then decisionmakers who order the attack should be prepared to support it factually and legally. The increasing interdependence of the international com-
munity demands and deserves such an explanation. Without an explanation, any such use of force properly should be condemned.

VII. Conclusion

Because of the lack of publicly disclosed information about the status of the Rabta facility and Qadhafi’s intentions for it, it is impossible at the present time to conclude with any degree of certainty about whether the United States could lawfully attack the plant. If such an attack eventually occurs, the United States should be prepared to justify the threat it perceived from the Rabta facility and why that perception was reasonable. Whether or not that argument is persuasive could determine the lawfulness of the attack and the eventual evaluation by the international community.