

# International Organizations

## A Message from the Chair

It is a pleasure to present the Spring 2002 Issue of the Newsletter of the ASIL International Organizations Interest Group. I hope all the members of the interest group have been safe during this particularly turbulent year.

This will be my last Message as Chair of the Interest Group, as the reigns will be turned over next month to Professor George Edwards of Indiana School of Law, who was elected at the 2001 Annual Meeting to replace me at the end of my term. I've promised George that I would remain on as Vice Chair of the Interest Group for 2002-2003 to help with the transition to the new leadership team.

In addition to stepping down as Chair of the Interest Group, I will also be leaving Boston in June for Cleveland, where I have accepted an appointment to be Professor of International Law at Case Western Reserve University School of Law.

This issue of the Newsletter contains a summary of the Interest Group's activities over the past year (p.2); a preview of the Interest Group's panel on the Judicial Response to Terrorism, which is being co-sponsored with the International Criminal Law Interest Group at the ASIL Annual

Meeting on March 15 (p.2); the report of the Committee of Experts on Rebuilding Afghanistan, which was co-sponsored by the Interest Group (p.3); an article about the venue for prosecuting Al-Qaeda/Taliban leaders (p.13); and an article on the International Court of Justice's judgment in the Belgium universal jurisdiction case (p.16).

I hope you find the information and articles contained in this newsletter to be of interest, and I encourage you to submit a short article for publication in our next issue of the Newsletter. George and I look forward to seeing you in Washington, D.C.

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## **Interest Group Panel at the 2002 Annual Meeting**

The International Organizations Interest Group and the International Criminal Law Interest Group are co-sponsoring a panel entitled “The Judicial Response to Terror” at the upcoming Annual Meeting of the American Society of International Law in Washington, D.C. The panel will be held from 12:30-2:00 pm on Friday, March 15, room TBA. The panelists are: Jordan Paust, University of Houston Law Center; Allan Gerson, George Washington University and Counsel to the Plaintiffs in the Pan Am 103 bombing law suit; Michael Scharf, New England School of Law; Judge Abraham Sofaer of the Hoover Institute and former Legal Adviser of the U.S. Department of State; and Barry Carter of Georgetown Law School. With the September 11 attacks, the mixed verdict in the Lockerbie case, and the upcoming Pan Am 103 civil trial in New York as backdrops, the panelists will explore the implications of responding to terror through criminal and civil litigation in municipal courts, as opposed to military force and sanctions.

## **Interest Group Activities in 2002**

During the ASIL Annual Meeting in March 2001, our interest group sponsored a very successful and well-attended panel on international criminal tribunals. In November 2001, the interest group was the principal co-sponsor of a conference at the New England School of Law in Boston entitled Responding to Rogue Regimes: From Smart Bombs to Smart Sanctions. The sixteen conference panelists included ASIL President-elect Anne-Marie Slaughter of Harvard Law School;

former State Department Legal Adviser Abe Sofaer; Air Force Judge Advocate General, Major General Bill Moorman; and leading academic experts from Yale, Duke, Georgetown, University of Virginia, and American University Washington College of Law. The conference focused on five issues related to the response to the September 11 attacks: (1) the legality and efficacy of military strikes against state supporters of terrorism beyond Afghanistan; (2) the pros and cons of the Bush administration’s plan for national missile defense; (3) the role and fora of international criminal prosecutions of terrorist leaders and leaders of rogue regimes; (4) the role of domestic civil suits in sanctioning rogue states; and (5) ways to improve the effectiveness of economic sanctions against rogue states. Copies of the New England Law Review symposium issue containing the articles generated from this conference can be ordered (for \$15) from the Editor-in-Chief, New England Law Review, 154 Stuart Street, Boston, MA 02116.

## **Report of the Committee of Experts on Rebuilding Afghanistan**

As an outgrowth of the Rogue Regimes Conference, a blue ribbon committee was formed to address issues related to rebuilding Afghanistan. The report of the Committee follows:

# **Report of the Select Committee of Experts on Nation Rebuilding in Afghanistan**

**December 10, 2001**

## **Introduction**

With the impending destruction of the Taliban regime, the international community is turning its attention toward the establishment of an interim government consistent with the Bonn Accords, and the identification of a process for selecting a more long-term governing arrangement. As is well known, these first steps toward establishing a new government in Afghanistan are the beginning of a long and difficult process for re-establishing peace. Absent a comprehensive and attainable plan for nation rebuilding in Afghanistan, the United States may find that despite its victory on the battlefield, it may be unable to adequately achieve its long term security objectives.

While many groups and organizations were working within the shadow of the Bonn Conference to rapidly consider how best to accomplish a myriad of important objectives, such as reinstating the rule of law, promoting economic development, designing a program of agricultural reform, and creating a transparent form of democratic government, on November 30<sup>th</sup>, 2001 the Public International Law and Policy Group's Peace-Building program convened a Select Committee of Experts to consider broader questions which might properly shape the international community's response to nation rebuilding in Afghanistan. In particular the Committee of Experts examined the opportunity for constructive international

community involvement arising from the recent development of contemporary norms of intermediate and evolving sovereignty arising from the recent precedents of Haiti, Bosnia, Kosovo, Sierra Leone, and East Timor, and the utility of creating a framework of conditionality to guide international involvement in Afghan nation rebuilding.

The November 30 meeting of 25 prominent foreign policy, military, and international legal experts was held as part of the Group's "Intermediate Sovereignty" Project, which is described at [www.intermediate-sovereignty.org](http://www.intermediate-sovereignty.org), and is funded by a grant from the Carnegie Corporation of New York. Participants at the meeting included the former Deputy Assistant Secretary of State for South Asian Affairs, President Clinton's Special Envoy to Yugoslavia, the former Deputy Legal Counsel at the United Nations, a former National Security Council official, a former Ambassador, the Chairman of the American Bar Association's Section of International Law and Practice, and five former members of the Office of the Legal Advisor of the U.S. Department of State. Also participating were several leading academics, journalists, and experts from the U.S. Institute of Peace, the International Peace Academy, the Coalition for International Justice, the Public International Law and Policy Group, and the American Foreign Policy Council.

This report, written by Professors Michael Scharf and Paul Williams, is the product of the November 30 Meeting of Experts. The report should not be taken to reflect the view

of any particular participant on the Committee, all of whom served in their individual capacity.

The report is divided into the following sections: relevant facts, the U.S. interest in participating in Afghan nation rebuilding, general goals for nation rebuilding, specific objectives for nation rebuilding, and the role of the concepts of intermediate sovereignty and phased recognition in achieving these goals and objectives.

## **I. Relevant Facts**

The ability of the international community to structure effective nation rebuilding in Afghanistan will be heavily influenced by the current state of political economic and civil devastation in Afghanistan, as well as by a number of important internal and external factors. As noted by one participant, any plan for nation rebuilding in Afghanistan must acknowledge the fact that Afghanistan is a mean place in a rough neighborhood.

Over the past twenty-two years the foundations of the Afghan state have been eroded by near continuous warfare, and periodic drought and famine. It is estimated that as a consequence over 2 million Afghans have died, and this year over seven million face famine. In addition, two thirds of the population of 26 million are illiterate, and large numbers of children do not live past the age of five. There is also virtually no infrastructure: no paved roads, electricity, or clean water, and there has been no effective central government for the past three decades. The war and the rule of the Taliban have also destroyed many of the basic elements of civil society and good governance.

Compounding the problems created by the sheer destruction of nearly a quarter century of war, are unique internal and external

economic and political factors. Unless the internal and external complications are addressed in tandem, it is unlikely that the primary strategic objectives of the United States and its allies can be achieved.

The internal factors include Afghanistans lucrative trade in poppies, and the de facto ethnic and political partition of much of the country. Afghanistan currently produces eighty percent of the worlds supply of poppies, which bring a profit up to 250 times greater than the profit generated by other crops. The organized crimes and social destruction associated with the poppy export enterprise will challenge even the most basic objectives of nation rebuilding in Afghanistan.

As a result of the ethnic make-up of Afghanistan, its colonial past, the Soviet occupation, and the evolution of traditional modes of governance, most governance in Afghanistan occurs at the local level, where ethnic and tribal political structures dominate the political bargaining process. In fact, in some areas of Afghanistan central authorities have never exercised any effective control. Interestingly, while many outside commentators see this form of decentralized government as a basis for the possible partition or cantonization of Afghanistan, the Afghans themselves express little interest in either option.

The external factors that will influence any nation rebuilding effort relate primarily to the long history of political and economic meddling by Afghanistans neighbors. From the day of the creation of the Afghan state, its neighbors and other interested states have sponsored proxies within Afghanistan in order to promote their unique interests. To structure a successful nation rebuilding effort, there must be agreement among all the interested states, including Russia, China, Iran, India, Pakistan, Tajikistan and Uzbekistan to cease

their efforts for predominate influence in Afghanistan.

Recently, Iran, Uzbekistan, China and Tajikistan have developed common objectives relating to reducing the flow of refugees, curtailing drug shipments, and preventing the export of radical Islam. And in response to the September 11 attacks, most states have heightened concerns relating to the export of terrorism from Afghanistan. A number of important differences remain, however, with Russia vying for a Northern Alliance-dominated government in order to protect its energy-related interests, and Pakistan working toward a Pashtun-dominated government in order to protect its security interests.

There then exists the separate external problem of Pakistan, which will likely soon host more Taliban members and sympathizers than Afghanistan. While Pakistan has played a crucial role in supporting American efforts to defeat the Taliban and destroy al-Qaeda, a number of powerful government institutions are highly supportive of the objectives of the Taliban and al-Qaeda, and favor the transformation of Pakistan into an fundamentalist Islamic state. The Pakistani security service, the Inter-Services Intelligence (which has been described as a state within a state), is of particular concern, as well as certain agencies and personnel involved in Pakistans nuclear weapons program. Without continued and effective secular reform in Pakistan efforts to rebuild Afghanistan and to stabilize the region will unlikely succeed.

## **II. The U.S. Interest in Afghan Nation Rebuilding**

Some have argued that the United States'

primary interest in Afghanistan ends with the destruction of the Taliban and al-Qaeda network, and that other States and international organizations should play the leading role in rebuilding the Afghan state. Although the United States has no affirmative interests in Afghanistan, it will be unlikely to achieve its objectives of destroying and preventing the re-establishment of the al-Qaeda terrorist network, curtailing the export of heroin, and preventing destabilizing political and economic chaos in Afghanistan which could destabilize Pakistan and generate regional instability, unless it plays a far more than a peripheral role in the effort to rebuild Afghanistan. The United States, however, must be realistic in its expectations and should proceed with a set of well established benchmarks in mind. The approach of the United States should thus be driven by four lessons.

First, the United States is now keenly aware of the consequences of its earlier failure to work toward the establishment of a responsible post-Soviet Afghan regime. While the United States must not in every case of post-conflict or post-peacekeeping, assume the primary responsibility for nation building, in the case of Afghanistan it is clear that without a sufficient nation rebuilding effort Afghanistan may slide back into unmanaged chaos which could again pose a threat to regional security and to the direct security interests of the United States. The United States must also be aware that even with adequate funding and responsible international engagement, there is no guarantee that the nation rebuilding efforts in Afghanistan will be fully successful. The United States must thus choose its objectives carefully.

Second, the United States and its Western European allies uniquely have the military and financial assets needed to successfully rebuild

Afghanistan, and to induce its transformation into a responsible non-chaotic state. As experience in the former Yugoslavia teaches, U.N. mediation and peacekeeping efforts, without U.S./NATO military involvement and financial inducements, are almost certain to fail. Similarly, in Sierra Leone, we witnessed the failure of regional troops to restore peace and security, contrasted with the later success of a robust, professional British deployment.

Third, ridding Afghanistan of the Taliban and al-Qaeda will not, in itself, end the threat to America of terrorism and narcotics production posed by Afghanistan. As noted above, the neighboring states cannot be relied upon to take the lead in building a stable, secure, law abiding Afghan State, since each of these countries traditionally seeks to promote its own strategic interests through its proxies in Afghanistan. In many instances, these interests, be they economic, political or military, conflict with long-term U.S. security interests in the region. Without sustained U.S. political leadership, and a commitment to non-intervention by neighboring states, there is a real possibility that the unstable situation in Afghanistan will spawn the creation of new terrorists or other destabilizing networks.

Fourth, the American response to nation rebuilding in Afghanistan will be watched carefully by our allies and future potential coalition partners and will influence their willingness to support American intervention in other states where credible threats are identified. It is therefore in the United States interests to ensure it plays a constructive and leading role, while setting clear and attainable objectives. The United States must also be careful not to support the creation of political structures, such as cantonal forms of government, that may be perceived as prejudging future arrangements or set precedents seen as applicable to American

actions in other theaters, such as Iraq.

### **III. General Goals for Nation Rebuilding**

#### **Establish Non-Chaotic (neutralized) State**

The United States and its allies should set as their first general objective the creation of a neutral, stable, secure, and law-abiding Afghan state. The attainment of this objective is a crucial element of America's long-term campaign against terrorism, and is necessary in order to maintain political support for continued U.S. involvement in rebuilding Afghanistan. Without the articulation of this objective there is the real possibility that when the immediate threat from al-Qaeda is eliminated, the American people and Congress will perceive America's mission in Afghanistan to be accomplished, leading to calls for premature disengagement.

The United States Government must be cautious, however, in the extent to which it defines the terms of its commitment to nation-rebuilding and the objectives it seeks to accomplish. While it will be necessary to rebuild the Afghan state to the point where it does not pose a threat to the security interests of its neighbors or to the United States, the United States must not be pulled into the minutia of nation building, and must not seek to rebuild a type of Afghan state which never before existed and is not possible to create. The United States must also guard against having its military and other resources become political hostages to the interests of our allies, such as in Bosnia and Kosovo where certain troop deployments may no longer be required for military reasons, but nonetheless the continued deployment is deemed to be

politically indispensable.

## **Identify Appropriate Governing Structures**

The second general objective must be to adequately consider how best to facilitate the Afghan peoples ability to establish the most appropriate form of government. While Americas European allies will be quick to push for a form of government similar to a West European democracy, a process must be created whereby the Afghan people are able to craft their own form of government. The difficult task will of course be to determine which entities legitimately express the will of the Afghan people.

The United States must ensure that such deference continues, but must also act to prevent the re-emergence of destabilizing de facto fiefdoms, which may emerge under the rubric of traditional forms of Afghan governance. Any plan to pursue a highly decentralized Afghanistan may in the end present serious challenges to the international community. In the absence of the ruling Taliban, warlords have begun to re-assert control over the Afghan towns and cities. Most of those in power at the local level are not people who can be relied upon to guarantee peace or fairly enforce the rule of law. In the absence of a common enemy, the numerous groups making up the anti-Taliban alliance are likely to pursue their own myopic interests and those of their external sponsors.

## **Implement Intermediate Sovereignty**

The third objective is to establish the level of sovereignty to be attained by Afghanistan. While Afghanistan is a state and a member of

the United Nations and thus entitled to sovereignty, territorial integrity, and political independence, in reality it is a less than fully sovereign entity. While a roadmap for full sovereignty should be crafted, the United States and its allies should not rush to restore every last element of full sovereignty until a number of conditions have been met. It is entirely appropriate to treat Afghanistan in a manner somewhat similar to that of Austria in the post war period in the case of Afghanistan it would be subject to enforced neutralization in order to prevent its own collapse from undermining its neighbors security interests. Afghanistans sovereignty should also be measured in a similar manner to that of post war Germany and Japan with significant interim international involvement in the crafting and establishment of governing structures. More contemporary examples of intermediate sovereignty would be Bosnia and East Timor. The recommended conditions for the attainment of full sovereignty and the process for their establishment are set forth in greater detail below

## **IV. Specific Objectives for Nation Rebuilding**

The specific objectives that the United States and international community should seek to attain with respect to the new Afghan state should include (in order of priority):

1. Establishment of a neutral, peaceful transitional government that does not threaten the States in the region. 19th Century Belgium or 1955 Austria would be good historical analogies of what the international community should press for. This is the main objective of the Bonn process, which may unfortunately have begun too late to be entirely successful in

its implementation given that events on the ground, rather than rational policy, are largely dictating the make-up of the transitional government. Attaining this goal will also require the negotiation of an agreement of non-interference by all of Afghanistan's neighbors, including a pledge not to provide backing to any Afghan faction or to aspire for predominate influence in Afghanistan.

2. The destruction of al-Qaeda and end of Afghan support for terrorist organizations. In addition to a continuing U.S. military presence actively engaged in the search for al-Qaeda members, this will require ongoing efforts of the new Afghan government since many subversive elements have temporarily gone underground. Members of al-Qaeda that are taken into custody will have to be prosecuted according to international standards of justice. Amnesty for those responsible for war crimes, crimes against humanity, or the September 11<sup>th</sup> attack against the United States must be strongly opposed. In the long term it may be possible to expand the jurisdiction of the existing international criminal tribunal at The Hague to cover the leading members of al-Qaeda and the Taliban. Importantly, any peacekeeping or policing operation, headed preferably by Turkey or Great Britain, should not have as its mandate the destruction of al-Qaeda. This task should remain within the purview of those forces currently engaged in the combat operation.

3. Suppression of poppy production. Eighty percent of the world's heroin comes from Afghanistan. More American deaths are attributable to Afghan heroin than to the September 11 attacks. Thus, the U.S. has a significant interest in doing whatever is necessary to extinguish the Afghan narcotics trade. This will be extremely difficult,

however, as seventy percent of the population of Afghanistan are farmers, and the leading cash crop is poppy production. Unless farmers are adequately compensated to substitute other crops for poppies or presented with other economic opportunities, pursuing this objective through strictly military means will almost certainly undermine support for the fragile transitional government.

4. Establishment of a secure environment, including demilitarization of Kabul and other major cities. Convincing the Afghan people to disarm may prove particularly difficult, but de-mining and de-commissioning heavy weapons may be attainable under U.N. monitoring. During the interim period, U.N. authorized forces can also play a role as domestic police and border guards. But an international force of West European and Islamic countries with a robust mandate likely will be necessary to ensure a secure environment and prevent renewed fighting between Afghan groups. While some American forces may be required for this operation, they should be deployed only out of military necessity, and not as tokens of political good faith.

5. Peaceful and safe return of refugees. Over two million Afghan refugees are currently in camps in Pakistan and Iran. As in Bosnia, this raises difficult questions about where they should be returned. Obviously moving them into camps in Afghanistan is not the answer, as refugee camps are notorious for producing radicals, revolutionaries, and terrorists. Efforts must be undertaken to rebuild existing communities and restart local economies.

6. Establishment of accountable and transparent governmental institutions and a workable justice system. There is no existing



legal framework in Afghanistan. The challenge of creating one from scratch will be even greater than that faced in Rwanda after the 1994 Genocide. But this is an area in which international organizations have a great deal of experience and a fairly good track record, provided adequate financial support of this effort is available. While the United States should play an active role in the development of a strategy and in the funding for a transparent government, it should not divert significant military or civilian personnel into the operation.

7. Recognition and enforcement of human rights and protection of minority rights, including in particular basic rights of women. Since 1995, the Taliban were identified as the worst human rights-violating regime in the world. Women in Afghanistan, who held the majority of professional positions (lawyers and doctors) during the conflict with the Soviet Union, were stripped of their rights under the Taliban regime. Although pursuing this objective may come at the expense of popular support of the new government, the re-integration of women professionals and the protection of women's rights serves the strategic (and moral) interests of the United States; in large part because they have not taken part in the widespread human rights violations attributable to most of the leadership structures of many of the parties represented in the interim government.

8. Institution of anti-corruption procedures and an accountability process, such as establishment of a truth commission and the "lustration" of culpable war lords. As in the case of Bosnia, the provision of financial assistance in Afghanistan will be subject to corruption and diversion unless culpable war lords are removed from positions of power.

The various factions in Afghanistan have serious grievances with one another, stemming from war crimes and crimes against humanity committed throughout the 1990s. A truth commission which documents responsibility and victimization will facilitate reconciliation, assist in lustration (removal of perpetrators from positions of authority) and victim compensation, and deter vigilantism. Serious consideration should also be given to an international sponsored regime for the judicial prosecution of those responsible for war crimes and human rights violations.

## **V. The Role of the Concepts of Intermediate Sovereignty and Phased Recognition in Achieving these Goals and Objectives**

While traditional concepts of international law tend to reflect a somewhat rigid perspective of sovereignty as an either/or proposition (a territory was either deemed sovereign or it was not), the political definition of sovereignty is more elastic and reflects a history of numerous precedents of colonies, mandate territories, protectorates, trust territories and a history of foreign or international administration of territories. Working from previous state practice and the long history of varied forms of sovereignty, the United States should expressly employ the concept of "intermediate sovereignty," or "transitional sovereignty," in the case of Afghanistan.

Formal adoption of the notion of intermediate sovereignty broadens the range of options open to the United States in its efforts to influence the nation rebuilding process in Afghanistan. The approach of intermediate sovereignty has recently been employed in

Bosnia, Haiti, Kosovo, and East Timor.

An associated concept is "phased recognition," under which the international community incrementally bestows the attributes of sovereignty on a territory in return for its compliance with a series of stipulated benchmarks. The transitional administration approach for Afghanistan, which was negotiated at Bonn, gives the international community the opportunity to impose a series of benchmarks upon the transitional government. The attainment of each would be accompanied by certain diplomatic or financial rewards, and conversely the failure to attain them would be accompanied by certain diplomatic or financial sanctions.

Taken together, intermediate sovereignty and phased recognition amount to a form of soft international trusteeship. Despite its colonial connotations, the term soft international trusteeship adequately describes many contemporary state building enterprises and forms a useful paradigm for understanding the future role of the international community in Afghanistan. Most importantly it also helps to define the limits of international involvement and the notion that such involvement must work toward an end state of full sovereignty for Afghanistan.

To date, one of the defects of "conditional recognition" has been that provision of rewards and imposition of sanctions was an all-or-nothing proposition. Under such circumstances, the states and international institutions controlling the process were practically unable to withdraw recognition, withhold aid or impose sanctions in the face of a series of minor breaches.

Consistent with the concepts of intermediate sovereignty and phased recognition, the carrots and sticks which the international community can employ to induce

the transitional Afghan government's adherence to the objectives set forth above include:

(1) Formal recognition of the Afghan government by the United States and other countries. There are a variety of legal benefits that flow from formal recognition of a new government that displaces an existing government after an internal conflict. If the United States formally recognizes the new Afghan government, for example, frozen assets of Afghanistan in the United States will automatically be made available to the new government. The situation in Afghanistan, however, is not as simple as Kosovo, where international recognition was the key objective of the parties. Moreover, this option may be limited in that at the conclusion of the Bonn process, the international community effectively recognized the transitional government as the legitimate Afghan government based on general pledges of cooperation, rather than actual achievement of the objectives set forth above.

(2) Recognition of the Afghan Delegation at the United Nations and other international organizations. In the face of challenges by a competing delegation representing the Taliban regime, since 1995 the United Nations has "provisionally accepted" the credentials of the Rabbinni government as the delegation of Afghanistan on the ground that it represented the last legitimate government. But "provisional acceptance" is not the same as full recognition, which could be used as an inducement to achieve attainment of the above objectives, unless the United Nations prematurely formally recognizes the new transitional government. Even if U.N. recognition is part of the deal that emerges from Bonn, other U.N. affiliated international organizations are autonomous when it comes

to recognizing a country's credentials; therefore, recognition in those bodies could still be held out as an award for the government's cooperation.

(3) Provision of IMF/World Bank loans and reconstruction assistance by donor countries. The threatened withholding of large IMF/World Bank loans ultimately induced Croatia to cooperate fully with the Security Council established International Criminal Tribunal for the Former Yugoslavia. Similarly, the offer of \$1.3 billion in foreign assistance to Serbia conditioned on its surrender of Slobodan Milosevic to the Tribunal proved effective in inducing Serbia's cooperation. Rather than a grand lump sum payment, a series of large loans and foreign assistance grants for Afghanistan, each tied to the attainment of one of the objectives set forth above, would be the most powerful mechanism of attaining the full cooperation of the national and local Afghan authorities. Politically, however, the United States and other major powers are likely to lose interest in Afghanistan before all of the goals have been attained as the war against terrorism turns to other countries. To ensure that adequate financial resources are available, a trust fund could be created for Afghanistan, with release of money over time pegged to attainment of the stated objectives.

## **Conclusion**

The lesson to be learned from previous attempts at nation building is not that all such efforts should be eschewed, but that they must be well-funded, subject to enforceable objectives via conditionality of aid and sanctions, and subject to strong and focused leadership. There is no question that rebuilding failed states such as Afghanistan is

politically and economically costly and fraught with unforeseen peril. However, if the United States fails to assume a leading role in such a mission it runs the risk of winning the military conflict, but failing to secure a meaningful or lasting peace.

## **Editorial: The Case for an International Trial of the Al-Qaeda and Taliban Perpetrators of the 9/11 Attacks**

In the aftermath of the September 11, 2001 attacks on the World Trade Center and Pentagon, and the U.S. military action against Afghanistan, the U.S. Government has turned its attention to the question of what to do with the surviving Al-Qaeda and Taliban leaders who were behind the terrorist operation. The Bush Administration has decided that perpetrators apprehended on American soil will be tried in federal district court, while non-citizens captured abroad will be tried before U.S. military commissions.

The Bush Administration's choice of these judicial fora has been rationalized on grounds of political realism: they would ensure optimum U.S. control over the proceedings, provide the greatest protection for intelligence sources and methods, and have the greatest chance of securing a conviction. But perhaps due to its mistrust of international institutions, the Bush Administration has overlooked the comparative benefits of prosecuting the al-Qaeda and Taliban leaders before the existing Security Council-created International Criminal Tribunal for the Former Yugoslavia (ICTY), as advocated by a growing number of international law experts.

To pursue the ICTY option, the Security Council would merely have to adopt a resolution expanding the jurisdiction of the existing ICTY to cover the attacks of September 11, 2001. Because the terrorist acts consisted of a series of attacks against the civilian population, resulting in mass fatalities, they would fit within the definition of crimes against humanity -- a crime already within the jurisdiction of the Tribunal. By confining the temporal jurisdiction to a single

day, September 11, subsequent actions by U.S. forces in Afghanistan would not be subject to ICTY scrutiny.

There are six comparative advantages related to the ICTY option. The first of these is that the ICTY option can better promote President Bush's goals of establishing and maintaining an international coalition (including Islamic States) against terrorism. Trial before a U.S. jury or a panel of U.S. military judges is likely to be perceived especially in the Islamic world as inherently biased. The ICTY, in contrast, is made up of judges from every region of the world. Its bench includes several jurists from Islamic countries who, although unlikely to be the least bit sympathetic to al-Qaeda and the Taliban, would be perceived as ensuring an impartial bench by many in the Islamic world. In addition, the ICTY Prosecutor, Carla Del Ponte, hails from Switzerland, a historically neutral country.

Notwithstanding its international composition, it must be stressed that the ICTY is not some out of control, anti-American international institution. Indeed, a majority of the ICTY's prosecutors and investigators are on loan from the U.S. Departments of Justice and Defense. More could be added to the ICTY staff to ensure sufficient resources to undertake the prosecution of al-Qaeda/Taliban leaders. While these staff members do not take their orders from the U.S. government, they certainly add an American flavor and sensibility to the institution.

Moreover, in contrast to the unwritten verdicts of federal juries and the cursory judgments of military commissions, the ICTY

issues lengthy and detailed written judgments, comprehensively setting forth findings of fact and conclusions of law. The ICTY, therefore, is uniquely suited to establish a detailed historic record of al-Qaeda and Taliban culpability that is capable of piercing denial in the Islamic world and withstanding future revisionism. The Chief Prosecutor at Nuremberg, Supreme Court Justice Robert Jackson, underscored the usefulness of this approach when he reported to President Truman that one of the most important legacies of the international Nuremberg trial was that it documented the Nazi atrocities "with such authenticity and in such detail that there can be no responsible denial of these crimes in+ the future and no tradition of martyrdom of the Nazi leaders can arise among informed people."

Second, the ICTY option is relatively fast and secure. There is an apt saying, "justice delayed is justice denied." That is because over time, evidence gets lost, memories fade, and witnesses disappear or die. In contrast to the proposed military commissions, as an existing institution the ICTY does not require the erection of a new courtroom, prison, and offices; the appointment of prosecutors and judges; and the hiring of translators, guards, investigators, and support staff -- all of which will take many months, if not years, to complete. And unlike federal district courts, with the addition of two new panels of ad litem judges this fall the ICTY does not have a lengthy back log of cases.

The ICTY could conduct the trial of al-Qaeda/Taliban leaders at nearby Camp Zeist, the retired American air base where the Pan Am 103 bombing trial was held in 2000-2001. The specially designed Camp Zeist court facilities, located in away from any population center, are both incredibly secure and high tech, making them an ideal venue in which to

try the al-Qaeda/Taliban leaders.

Third, because of the unique body of law that the ICTY applies, the ICTY option actually presents a better chance of obtaining a conviction, thus up-ending one of the critical assumptions of the Bush Administration. Unlike federal courts, the ICTY applies the principle of "command responsibility," under which a leader can be convicted for failing to prevent or punish the crimes of his subordinates. This basis of culpability renders it much easier to convict leaders than under the federal standard which requires proof that they ordered or directly participated in the crime. And unlike U.S. military commissions, the ICTY completely rejects the "obedience to orders defense." Before a U.S. military commission, a defendant who was following orders will be acquitted unless the Prosecution can show that the order was patently unlawful. An order to hijack a plane might be, but an order to open a bank account and deposit funds might not.

In addition, with the ICTY there is no risk that the Trial verdict will be overturned upon a finding of juror exposure to prejudicial pre-trial publicity. Under the U.S. Supreme Court's precedent in the *Sheppard Case*, it might prove difficult if not impossible to find a jury which has not been contaminated by the extraordinary amount of news coverage concerning persons accused of playing a role in the of the events of September 11. The *Sheppard* rule does not apply to the ICTY's panel of professional judges.

Fourth, the ICTY may actually be able to better protect intelligence information than federal courts and U.S. military commissions. That is because the ICTY does not apply the *Brady* Rule, which in U.S. proceedings permits the defense to undertake "fishing expeditions" for exculpatory information including CIA and NSA documents in the

possession of the government. And contrary to popular belief, the *Brady* Rule trumps the Classified Information Procedures Act, at least with respect to information a judge deems relevant to the defense after an in camera inspection unless the government offers adequate substitutes or stipulations. The ICTY, in contrast, operates under an MOU between the U.S. Government and the Office of the Prosecutor, under which intelligence information that is not used in court may not be disclosed to the defense, whether or not it may be exculpatory.

Fifth, the ICTY provides a greater chance of securing custody over offenders, at least with respect to persons who surface in countries other than Afghanistan or the United States. The recent stance of Spain is indicative of the problems the United States is likely to face. Spanish authorities said they would not extradite to the United States an al-Qaeda operative found in Spain who was accused of playing a major role in the September 11 attacks unless Spain received an assurance that the United States would not apply the death penalty and would not try the accused in a military commission. Other States where al-Qaeda/Taliban perpetrators surface are likely to follow Spain's example in opposing extradition to the United States for trial before a military commission, and Islamic States may oppose their extradition to the United States under any circumstances.

In this respect, the situation is analogous to that which existed in the aftermath of the 1994 genocide in Rwanda. States where the Hutu perpetrators of the genocide had taken refuge refused to extradite them to the new Tutsi-dominated government in Rwanda for fear that they would not receive a fair trial. But these same states were ultimately perfectly willing to extradite the Hutus to the International Criminal Tribunal for Rwanda,

which was established by the Security Council in 1994. Thus, pursuing the ICTY option would increase the chances of bringing al-Qaeda/Taliban leaders to justice.

Finally, trying al-Qaeda/Taliban leaders before military commissions will undermine the protection of U.S. citizens abroad. The United States traditionally protests the trial of American citizens before foreign military courts that do not fully comport to international notions of due process. The well known case of Lori Beronson is illustrative. Beronson was a young American Journalist, who was tried and convicted of conspiring with the Tupac Amaru Revolutionary Movement by a secret military court in Peru, headed by a hooded judge. American authorities successfully pressured the Peruvian government to give her a new trial before a civilian court on the grounds that the trial before the military court violated her human rights. The State Department's Annual Human Rights Report is filled with similar cases. In the future, the United States will not be able to bring moral pressure to bear on such countries in support of American citizens if the United States, itself, has embraced military commissions that do not provide the same rights as apply in ordinary courts.

In contrast, the ICTY Statute incorporates the rights of the accused required by the International Covenant on Civil and Political Rights. American support for trial of al-Qaeda leaders before the ICTY would therefore reaffirm American commitment to the rule of law, set a positive example for the rebuilding of the Afghan judicial system, and enable the United States to protect its citizens from unfair trial abroad.

President Bush has said that he wants the al-Qaeda and Taliban leaders responsible for the September 11 attacks "dead or alive" and that if they should either be brought to justice

or "justice should be brought to them." Most people assume, therefore, that the highest level perpetrators will be extinguished militarily, and that there will be no need for trials. But it is becoming increasingly clear that Osama bin Laden and several of his lieutenants have escaped through the net American forces cast around Afghanistan, and are likely to surface in other countries. Thus, the debate over where best to try such individuals is not simply an academic exercise.

In the context of the crisis in the Balkans, the ICTY has demonstrated how international tribunals can be a particularly effective foreign policy tool. The indictments and proceedings before the ICTY led to the isolation and removal of rogue leaders like Radovan Karadzic and Slobodan Milosevic, generated international support for economic sanctions and the use of force against Serbia, and have produced an internationally accepted historic record of war crimes and genocide in the former Yugoslavia.

Despite the ICTY's successes, the Bush Administration has not fully considered the comparative advantages of employing the ICTY as a venue for trying the al-Qaeda and Taliban leaders responsible for the September 11 attacks. The Administration appears to have self-consciously shut its eyes to the benefits of the ICTY approach as a consequence of its opposition to the Permanent International Criminal Court. A final argument, which might have currency with the Bush Administration, is that by embracing an expansion of the ICTY's jurisdiction to cover the crimes against humanity committed on September 11, 2001, the Administration could begin the transformation of the ICTY into a permanent Security-Council controlled international criminal tribunal, which the Bush

Administration might consider more useful and less threatening to the United States than the permanent International Criminal Court.

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