Judgment

Prof. Peter ERLINDER, J

I. INTRODUCTION

The International Criminal Tribunal for Afghanistan has been convened pursuant to the Statute of the Tribunal that has been the product of the collective efforts of non-governmental organizations [NGOs] and individuals concerned with peace and the resolution of international disputes consistent with Article 9 of the Japanese Constitution. The Statute reflects procedures and principles of international jurisprudence which are embodied in similar Statutes, enacted by the United Nations Security Council, upon which ad hoc International Criminal Tribunals for Yugoslavia, Rwanda and Sierra Leone have been based.

Pursuant to the Statute, the Office of the Prosecutor has presented an Indictment of George W. Bush, President of the United States and Commander-in-Chief of U.S. Armed Forces, which alleges individual responsibility for a variety of crimes as defined under international treaties and customary law, committed by of United States forces in Afghanistan. The structure of the Indictment of George W. Bush is similar to those filed by the Prosecutor of the International Criminal Tribunal for Yugoslavia [ICTY] against former President of Yugoslavia, Slobodan Milosevich, and against leaders of the former Rwandan government in the International Criminal Tribunal for Rwanda [ICTR].

The Accused has been served with the Indictment and has failed to respond. To provide for a full and fair presentation of the issues raised in the Indictment, the Tribunal has appointed Counsel for the Accused, appearing amicus curiae. The record before the Court includes the pleadings of the parties; documents, films and reports presented compiled by various sources familiar with the conditions in Afghanistan; direct testimony from occurrence witnesses received in hearings conducted in Tokyo in July and December 2003; and, the results of on-scene investigations carried out by the Office of the Prosecutor.

II. JURIDICAL FOUNDATION OF THE TRIBUNAL

A. The development of customary international law with respect to the impunity of national leaders for crimes committed by the governments they lead.

Due in large part to initiatives of the United States of America, national leaders can no longer claim impunity from individual criminal responsibility for crimes committed during the course of armed conflict. Beginning with the U.S.-sponsored Nürnberg and Tokyo War Crimes Tribunals at the close of WWII and extending to the ad hoc Security Council International Criminal Tribunals for Yugoslavia in 1993 and Rwanda in 1994, and most recently Sierra Leone [all of which have been established by the United Nations Security Council at the urging of the U.S. government] have firmly established the principle that national leaders may be held accountable by international Tribunals formed for that purpose, even in the absence of treaties or specific authorization in the United Nations Charter. The principle was famously articulated by United States Supreme Court Justice Robert Jackson, who acted as Lead Prosecutor at the Nürnberg Tribunal:

> If certain acts of violation of treaties are crimes, they are crimes whether the United States does them or whether Germany does them and we are no prepared to lay down a rule of criminal conduct against others, which we would not be willing to have invoked against us…

While these Tribunals lacked the commonly recognized legal foundations at the time they were established [since they were empowered to act in the absence of either a treaty between nations, or any authorizing provisions in the United Nations Charter], the concept of individual responsibility of national leaders for crimes committed by their governments has been firmly established as customary international law.[1] Even more recent examples are the indictment of former President Pinochet of Chile, the establishment of yet another ad hoc Security Council Tribunal for Sierra Leone and the ratification of the Treaty of Rome by more than 120 nations, which has established the International Criminal Court as a forum in which individual liability for war crimes, crimes against humanity and related criminal violations may be heard.[2] There can be little doubt that individual criminal liability for national leaders arising from crimes committed by their governments has been firmly established as customary international law, although the precise features of the application of the principle are still in formation.

B. Applicability of customary international law regarding individual responsibility to the President of the United States, George W. Bush.

There can be no question that most of the World's nations have rejected impunity for crimes committed by national leaders,[3] and that the United States has played a central role in encouraging the wide-spread acceptance of this concept, from Nürnberg to Sierra Leone, including the signing of the Rome Treaty by former President Bill Clinton on the last day of his term.[4] However, the Bush Administration has rejected the U.S. government's previously well-articulated rejection impunity for national leaders, which were exemplified by Justice Jackson's 1945 quotation at Nürnberg, cited above.

Under well-settled principles of international law, "customary law" arises from the practices of states, and is universally binding out of a sense of legal obligation [opinion juris]. At the dawn of the 21st Century, given the jurisprudence that has developed in the years following WWII, there can be little doubt that customary international law has:

> "…embraced the key concepts Jackson and the tribunals stood for: the universal unacceptability of certain crimes and accountability of both individuals and heads of state for the commission of such crimes." H. King and T. Theofrastous, "From Nürnberg to Rome: A Step Backward for U.S. Foreign Policy." 31 Case Western Reserve Journal of International Law 47 (1999).

While it is possible for a party to avoid the universality of customary rule of international law by continuing and consistent rejection of the existence of the rule, it cannot be said that the

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[1] The first United Nations General Assembly unanimously adopted the "Fundamental Principles Recognized by the Nürnberg Tribunal Ordinances" and recognized as an principle of general international law. In addition, the International Law Commission reiterated these principles from the Nürnberg Tribunal in 1950 in Principle II and III.

[2] Art. 28,. Treaty of Rome, *Responsibility of commanders and other superiors*.

[3] More than 120 nations signed the Treaty of Rome and all NATO nations, for example, have ratified or agreed to ratify its provisions. See, N. Deller, et al, Rule of Power or Rule of Law, pp. 113-128.

[4] Id.

government of the United States has consistently made such objections over time. As detailed above, history confirms that the United States has long advocated the principle of individual accountability for heads of state. As a result, the President of the United States may not now argue that the U.S. has consistently objected to the existence of the rule which would also hold him liable under the same standards the U.S. has insisted be applied to other leaders. Moreover, in light of the nearly universal acceptance of the concept of individual accountability of heads of state, as expressed in the Treaty of Rome, the individual accountability of heads of state, itself, has become universal and, like prohibitions against genocide, is no longer subject to objection under the doctrine of jus cogens, and has assumed a universal character.

C. The importance of the Judgment of International Criminal Tribunal for Afghanistan as a contribution to the development of customary international law and the Rule of Law at this time in history.

On May 6, 2002 the Bush Administration notified the UN Secretary General that it renounced the signing of the Rome Treaty,[5] which established the International Criminal Court [ICC]. In addition, the Bush Administration has sponsored domestic laws that exempt the U.S. military from the jurisdiction of the ICC[6], as well as the systematic use bi-lateral status of forces agreements [SOFAs] to circumvent the potential jurisdiction of the ICC[7] raise serious questions regarding the willingness of the World's most powerful military power to accede to legal restraints on the use of that power.[8]

Serious questions regarding the willingness of the United States to be bound by any international legal norms are also posed by: (1) U.S. withdrawal from the general jurisdiction of the International Court of Justice [World Court][9] following the acceptance by that Tribunal of claims by Nicaragua of unlawful use of force by the U.S. against Nicaragua in 1984; (2) U.S. withdrawal from the Anti-ballistic Missile [ABM] Treaty; (3) U.S. rejection of the Kyoto Accord limiting greenhouse emissions; (4) U.S. refusal to ratify the Land Mines Treaty, as well as, failure to ratify or adhere to a number of other treaties and conventions.[10]

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[5] http://untreaty.un.org/ENGLISH/bible/englishinternet/bible/partI/chapterXVIII/treaty10.asp

[6] See, American Serviceman's Protection Act [ASPA] 2002. The exemption of U.S. nationals from the jurisdiction of the ICC has extended to reservations preventing the ICC from assuming jurisdiction over individuals prosecuted under the International Convention for the Suppression of Terrorist Bombings [1998] and the International Convention for the Suppression of Financing of Terrorism [1999] which the U.S. ratified immediately following the 9/11 tragedy.

[7] Status of Forces Agreements have long been used to limit or eliminate jurisdiction over members of U.S. forces based in other nations, such as in Okinawa, for example. See, R. Cornwall and A. Wells, Deploying Insecurity, Peace Review 11:3 (1999), p.410.

[8] That the U.S. has adopted a policy based upon the use of force, rather than reliance on the rule of international law, is not an abstract or merely a rhetorical device. The Project for the New American Century, a non-governmental policy group established by leading members of the administration of the Accused which has been producing policy documents since at least 1997 has clearly set forth a policy strategy which places reliance on U.S. military and economic dominance as the foundation for international relations. See, http://www.newamericancentury.org/

[9] The World Court has jurisdiction over disputes between nations and, unlike the ad hoc Security Council ad hoc Tribunals for Yugoslavia, Rwanda and Sierra Leone, is a formally adopted arm of the United Nations adopted in the UN Charter.

[10] The U.S. is in apparent breach of Art. VI of the 1970 Nuclear Non-proliferation Treaty; has failed to ratify the Comprehensive Test Ban Treaty [CBTB]; has failed to implement or conclude the Strategic Arms Reduction Treaties [START II and START III]; has opposed strengthening verification procedures of Protocol I of the Biological Weapons Convention [BWC]; has reserved significant exceptions to the Chemical Weapons Convention [CWC]. For a more detailed discussion, see, Ed. N. Deller, A. Makhijani, J. Burroughs, *Rule of*

Perhaps the most direct challenge to the concept of the "rule of law" in international affairs posed by the United States has been the adoption of the doctrine of "Pre-emption" in the use of military force, which was announced following most of the events which are the subject of this Indictment, but which clearly describes the intention of the President of the United States to engage in military conflict outside the use of force authorized by the United Nations Charter, or customary concepts of "self defense."[11] The 2002 National Security Strategy of the United States[12] announced that the US will rely on the "pre-emptive" use of force, based on intelligence estimates of the capabilities and intentions of other nations, before a potential threat becomes an actual.[13]

At its core, the "pre-emption" doctrine is a rejection of long-standing and fundamental principles of international law as a restraint on the use of military force by nation-states. A generalized application of this doctrine can only lead to the military dominance of more powerful states, over less powerful states, as the central feature of international relations. Under such a regime, the concept of "collective self-defense" enshrined in the United Nations Charter ceases to have any real meaning.[14] As stated by Secretary-General, Kofi Annan in a speech to the General Assembly:

This logic represents a fundamental challenge to the principles on which, however imperfectly, world peace and stability have rested for the last 58 years. My concern is that if it were to be adopted, it would set precedents that resulted in a proliferation of the unilateral and lawless use of force with or without justification.[15]

Under such conditions, it is incumbent upon people, non-governmental organizations, nations and international bodies at every level to insist that the President of the United States be held accountable for the actions of the United States Government in all forums in which principles of international law, and adherence to the "rule of law", rather than the "rule of power" can be expressed. The judgments of international juridical bodies, including the International Criminal Tribunal for Afghanistan, adds to the growing body of "customary" international law which is reducing the impunity of national leaders, and which is establishing standards for imposing liability as part of the growing phenomenon of "universal jurisdiction" as a foundation for international criminal law.

Thus, the International Criminal Tribunal for Afghanistan is competent, and necessary, to advance the goal articulated by Justice Jackson at Nürnberg, a system of international law which holds accountable national leaders irrespective of the nation in which they exercise their power. At this point in history, it is particularly important that the most important economic and military power which the world has seen NOT be permitted to use that power

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Power or Rule of Law? Inst. For Energy and Env. Research and Lawyers Committee for Nuclear Policy, N.Y. 2003.

[11] The relationship between the doctrine of "pre-emption" and broader policy objectives, including the use of U.S. military and economic power to dominate international affairs, to the exclusion of international bodies are discussed in a book by Chalmers Johnson, "The Sorrows of Empire," 2004.

[12] "Full Text: Bush's National Security Strategy, New York Times, Sept. 20, 2002.

[13]. The United States invasion of Iraq, justified by unsubstantiated claims of Iraq's possession of "Weapons of Mass Destruction" and allegations of a generalized intention to use such weapons at some point in the future is an example of the application of this policy. UN weapons inspector Hans Blix has stated that the war against Iraq was not based upon accurate assessments of Iraq's capabilities. See, H. Blix, "Disarming Iraq" 2004.

[14] According to U.S. presidential historian Arthur Schlesinger, "The President has adopted a policy of anticipatory self defense that is alarmingly similar to the policy that imperial Japan employed at Pearl Harbor…" *Good Foreign Policy a Casualty of War*, Los Angeles Times, March 23, 2003.

[15] Speech to the General Assembly, October 1, 2001.

to carry out its policies outside the framework of international law, or to claim the impunity for its leaders which it would deny the leaders of other nations, with which it has differences.[16]

III. FACTS SUPPORTING THE JUDGMENT

The pleadings submitted by the parties reveal that there exists a significant body of facts with which there is not dispute. Because the factual record is voluminous, and must include evidence that exists in the public domain of which the Tribunal may take judicial notice, the following summary is necessary incomplete and is intended only to provide a necessary foundation for the following legal analysis.

There is no dispute that the Accused, George W. Bush is the President and Commander in Chief of the U.S. armed forces, and that he ordered directly military action against the territory of Afghanistan on October 7, 2001. It is also undisputed that both combatants and civilians have been killed, wounded and imprisoned both in Afghanistan and elsewhere, as a result of the military action ordered by the Accused. The questions before this Tribunal center on whether this military action, which continues in another form today, was initiated and pursued in violation of international law in a manner for which the Accused should be held criminally liable as a head of state.

A. Events leading up to the initiation of military action in Afghanistan by the Accused.

There can be no dispute that the military actions directed at the territory of Afghanistan occurred following September 11 events in the U.S., which resulted in the death of nearly 3,000 civilians, resulting from hi-jacked airliners being flown into the World Trade Center in New York, and the Pentagon in Washington, D.C. constituted a crime on the order of a crime against humanity, however, it was not an act of aggression or war by a sovereign state. It appears that there is no dispute that nineteen individuals who also died in the incident are the probable perpetrators of the hijacking and that none of those individuals were Afghani nationals and has note been alleged to have been agents of the government of the Afghanistan.

Immediately following the tragedy, the Accused and other members of his administration publicly alleged that the nineteen perpetrators were members or agents of Al Qaeda, an international non-governmental organization led by Osama bin-Laden, a Saudi national who had been condemned by the United Nations Security Council in 1998 following bombings at U.S. embassies in Kenya and Tanzania.[17] Although it has never been conclusively established that either Al Qaeda or bin Laden had played a direct role in organizing the September 11 hijacking, this has been asserted as fact by both the governments of the United States and the United Kingdom. Resolution of this matter is beyond the investigative resources of this Tribunal,[18] but is not necessary to the judgment of this Tribunal.

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[16] Another important consideration is referenced in the Judgment of my colleague Nilofer Bhagwat, J. who has observed that, in the last analysis, "sovereignty resides in the people" and to the extent that nations and international bodies are constrained to act, there exists an independent source or juridical legitimacy and responsibility that resides in civil society, and the actions of the World's peoples- with which I completely concur.

[17] This organization had also been the target of cruise missile attacks by the U.S. in Sudan and Afghanistan in 1993 and had been accused of other acts of political violence.

[18] Of course, if the connection with Al-Qaeda cannot be established at some point, *any* military force directed toward Afghanistan would be a clear violation of all international norms, since not even the Accused's doctrine

Giving the Accused the benefit of the doubt on this issue, the Accused that Afghanistan was implicated in the September 11 events because Al Qaeda and bin- Laden operated training and other facilities on the territory of Afghanistan, which had originally been established with U.S. assistance to support the anti-Soviet "mujahideen" with whom bin-Laden was associated at the time. The Taliban government of Afghanistan controlled 90% of Afghan territory, which included the area allegedly utilized by Al Qaeda. However, the Taliban government was engaged in a civil war and had received formal recognition only from Pakistan, the neighboring nation and U.S. ally from which it received political and material support. An opposing group, the Northern Alliance, held Afghanistan's seat at the United Nations.

All parties in Afghanistan, including the Taliban, the Northern Alliance, Al Qaeda and Osama bin-Laden had all received financing, weapons and other support from the United States government during the earlier war against the Soviet Union. After the Soviet defeat the U.S. provided some non-military assistance, as pointed out by amicus, this assistance was far less than required to rebuild an Afghan society devastated by a civil war to oust a Soviet-supported government which the US had supported and encouraged. But, there is substantial evidence that the United States assisted commercial interests, particularly the U.S. oil company, UNOCAL, in negotiating with the Taliban government prior to September 11, 2001.[19] The Prosecutors presented credible evidence that the failure of these negotiations was a precipitating factor that expanded the scope of the Afghan War from attacking Al Qaeda to removing the Taliban government from power.

Between September 12 and October 7, 2001, the Accused and members of his government demanded that the Taliban government extradite bin-Laden, and presumably his followers, from their locations in Afghanistan. The initial response of the Taliban government was to ask for proof of bin-Laden's involvement in the hijackings, before acting to extradite him to the U.S. There is nothing on the public record to indicate that evidence of this involvement was produced by the Accused.

However, the public record does reflect that Taliban government subsequently made a counter-proposal to turn bin-Laden over to a three-nation commission, would have put him in the custody of a third party during an investigative or juridical process.[20] This offer was not accepted by the Accused and denounced as a sham. Since the Accused initiated military action shortly thereafter, it is not possible to determine whether the Taliban government was either willing or capable of actually carrying out this proposal, which would have made the later military action unnecessary. However, the existence of this possible resolution is significant in considering "self-defense" arguments of amicus on behalf of the Accused, as well as the assertion that "just war" concepts justify the war because existing international bodies are incapable of addressing the threat of non-governmental political violence, directed toward civilians.

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of "pre-emption" could justify bombing a nation incapable of mounting a threat to the attacking nation. Also, as pointed out by my colleague, Nilofer Bhagwat, J. there has been no definitive investigation of the Sept. 11 incident carried out by the United States, many of the perpetrators were nationals of nations with close intelligence ties to the U.S. *See*, Judgment, Nilofer, J., sec. 6.

[19] See testimony of John J. Maresca, V.P. UNOCAL Corporation to U.S. House Committee on International Relations, Subcommittee on Asia and the Pacific, Feb. 1998. www.house.gov/internationalrelations

[20] According to the Daily Telegraph, October 4, 2001 the Taliban government proposed: handing bin-Laden to a commission made up of China, Pakistan and Saudi Arabia; giving the case over to an Islamic Council, or asking an international tribunal to try him. According to *The Guardian* of October 4, 2001, and another story published Sept. 6, 2003, it was the U.S. that refused to accept the extradition of bin-Laden.

On September 11, 2001, the United Nations Security Council passed Resolution 1368 and Resolution 1373 on September 28, 2001 which called member States to "fully implement the relevant Anti-Terrorist Conventions."[21] However, the Security Council was not called upon to pass a resolution authorizing the use of force against Afghanistan. Rather, on or about October 7, 2001, U.S. Ambassador to the United Nations John Negroponte delivered a letter to the Secretary-General Kofi Annan, in which he formally asserted that claim that the U.S. intended to use force against Afghanistan in "self-defense":

> …my government has obtained clear and compelling information that the Al Qaeda organization which is supported by the Taliban regime in Afghanistan, and a central role in the attacks…We may find that our self-defense requires further actions with respect to other organizations and States…[and]
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> …In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my government, to report that the United States of America…has initiated actions in the exercise of its inherent right of individual and collective self-defense following armed attacks that were carried out against the United States on September 11.2001. [emphasis added]

B. Events in Afghanistan following the initiation of hostilities by the Accused.

Prior to October 7, 2001 there is some evidence that intelligence and other operatives infiltrated the territory of Afghanistan to prepare for later overt military operations, and contact with the Northern Alliance began a working relationship between the U.S. and the Northern Alliance as part of the military strategy of the forces commanded by the Accused. On October 7, 2001, the armed forces under the command of the Accused began an air campaign with the bombardment of numerous targets in Afghanistan.[22] This bombardment continued throughout the country up to the swearing-in of the U.S. supported Karzai government on December 22, 2001, and continued in eastern Afghanistan at least until March 2002. However, U.S. troops are still stationed in Afghanistan and infrequent air and ground assaults are ongoing, but at a lower level than previously.

In addition to more conventional weapons, the arsenal of the U.S. forces included (1) targetable "smart" munitions [which are less precise than generally understood]; (2) radio-active depleted uranium munitions [DU munitions]; (3) "daisy cutter" fuel-air incendiary bombs; (4) anti-personnel cluster bombs; and (5) anti-personnel mines. While the accused argues that these weapons were direct primarily toward Taliban and Al Qaeda combatants, there is significant evidence that thousands of civilians and other non-combatants have been killed and injured through the use of these munitions. In addition, there is significant evidence that the already fragile infrastructure of Kabul and other cities across Afghanistan has been largely destroyed. In rural areas, continuing military activities and remaining ordinance from the U.S. forces, as well as those remaining from past conflicts

[21] There are a total of 12 treaties or conventions which purport to address the problem of "terrorism" which includes: the Convention for the Suppression of Unlawful Seizure of Aircraft, the Convention for the Suppression of Unlawful Acts Jeopardizing the Safety of Civilian Aircraft and the Convention on the Suppression of Explosives by Terrorists. These conventions provide the basis for seeking international cooperation from UN members states in pursuing and punishing perpetrators of acts similar to those committed on September 11, 2001.

[22] The use of force against Afghanistan was never specifically authorized by the U.S. Congress, which has the exclusive power to declare "war." However, this is a domestic matter of the interpretation of the U.S. Constitution and is not formally before this Tribunal, although it may be considered as an element of mens rea with respect to the defense of the Accused.

continue to injury and kill civilians in the aftermath of the major conflict.

Forces under the command of the Accused, and allies of the Northern Alliance and the current government of Afghanistan have put thousands of persons into detention.[23] There is significant evidence that many of those held in detention in Mazar-e-Sharif, Baghram airbase and other locations died during hostilities. In addition to evidence presented by the Prosecutor, a recent report by Human Rights Watch confirms that there are still thousands of detainees in Afghanistan and third countries.[24] Also, more than 600 detainees, many of who were seized in Afghanistan are being held in Guantanamo Naval Base, a military base on the territory of Cuba which the government of the US occupies over the objection of the Cuban government. Recently, some Guantanamo Naval Base detainees have been released and their reports confirm conditions of detention that are degrading and involve both psychological and physical above.[25] The Accused has claimed that treatment of the Guantanamo detainees is not governed by international law under the Geneva Conventions, or by domestic law, and none have been presented to a tribunal to assess their status as required by those conventions.[26] Significant questions exist regarding the use of force during arrests, arbitrary detentions and mistreatment during detention which cannot be fully answered until the Accused permits independent assessment of detention practices, which has not yet occurred.[27]

IV. CRIMES ALLEGED AGAINST THE ACCUSED:

Crime Against Peace: War of Aggression[28]

The recognition of Wars of Aggression as crimes against peace have been repeatedly re-iterated at least since the Kellogg-Briand pact of 1928. Aggression was recognized as a general principle of international law in the Nürnberg and Tokyo Tribunals; by resolution in the first UN General Assembly which ratified the Nürnberg and Tokyo Tribunals; as part of the Draft Code of Crimes Against the Peace and Security of Mankind and it appears as Article 5(1)(d) of the Statute of the Rome Treaty, although the elements of the offense remain under discussion. For purposes of the ICTA Indictment, "aggression" can be characterized as armed conflict initiated by one state against the territory of another in the absence of elements of self-defense or other justification recognized under international law.

The defenses asserted by amicus for the Accused are derived from the principle of "just war" [Bellum Justum] that was advanced by Hugo Grotius in a civil context, but which also can be found in the Canon Law of the Catholic Church and which pre-exists modern international treaties, must be considered as fundamental customary international law. However, before addressing the particular arguments raised in this context, it is important to note that, even in its historical context, the "just war" principle has embodied certain limitations which have

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[23] See, Human Rights Watch Report, "Enduring Freedom" Abuses by U.S. Forces in Afghanistan, March 2004

[24] Id.

[25] "Prisoners leave behind the razor wire and chains in their 5,000-mile journey from hell," Independent (U.K), March 14, 2004

[26] The jurisdiction of U.S. domestic courts is presently before the United States Supreme Court, which will be argued in March 2004 with a decision anticipated by June 2004.

[27] For a discussion of the difficulty experienced by observers to obtain data regarding detainees held by the US Armed Forces, see *Human Rights Watch Report*, infra.

[28] Wars of Aggression were prohibited as early as 1928 in the Kellogg-Briand pact and have provided the basis for an Advisory Opinion issued by the International Court of Justice regarding the Legality of the Threat and Use of Nuclear Weapons, 1996 which confirms "aggression" as a crime under customary international law.

always restricted its application.[29]

Amicus also suggests that, because the alleged perpetrators of the 9-11 tragedy were apparently non-State actors principles established to regulate the conduct of post-Westphalian nation-States must be reconsidered,[30] and in these terms the "Afghan War is positively the first just war since the Second World War."[31] This principle has also found some support among international law scholars who have suggested that punishment continues to also be a basis for armed conflict, to which other limiting principles must apply.[32] The two limiting principles derived from the Grotius analysis are self-defense and the concept of "reprisal" or "punishment."

A. Self-Defense

Under customary international law, the elements of a claim of self defense has been established in the mid-nineteenth century Caroline case which sets forth a refinement of the "self-defense" rationale under the Bellum Justus principle, and which requires: (1) a necessity of self-defense, which requires a response that is; (2) instant; (3) overwhelming; (4) leaving no choice, and; (5) o moment deliberation. In addition, the response must be: (6) necessary minimum use of force to repel the threat, and: (7) use of force proportional to the level of force used by the perpetrator state.

Of course, the Caroline case pre-existed both the Kellogg-Briand pact, which outlawed wars of aggression, and the self-defense provisions of Article 51 of the United Nations Charter, which were asserted by U.S. Ambassador Negroponte as justification for the Afghan War. The question whether the limitations upon the use of self-defense described in the Caroline case survived in the self-defense principles enunciated in the United Nations Charter was definitively answered by the International Court of Justice in 1984 in Nicaragua v. United States, 1986, International Law Journal Reports. p. 14.

In addition the 1996 advisory opinion regarding the Legality of Nuclear Weapons Case, also issued by the International Court of Justice, reinforced the proportionality requirement, as an element of the claim of self-defense. According to that opinion:

[t]he use of force that is proportionate under the law of self-defense, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law on the proportionality of means.

Thus, the question presented is whether the armed conflict initiated by the accused against the territory of Afghanistan met the standards set forth in the Caroline case, as refined by later opinions of the International Court of Justice.

Since it has not been alleged that the Taliban regime in Afghanistan was directly involved in

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[29] As pointed out by amicus, the Grotius formulation found justification for purposes of self-defense, recovery of property, or punishment, which provides at least two grounds to justify the military actions ordered by the Accused

[30] More recently, John Rawls has expanded the context to include the just use of "power" as part of the concept, which might more appropriately apply to the response to acts committed by non-State actors, as occurred in this case.

[31] Supplementary Brief of Amicus Curiae, para. 1.

[32] Prof. Lehman has characterized the Afghan War as a "war of self-defense" and Prof. Richard Falk has suggested that it was a war of "punishment" that "decreases the threat of another attack, acts as punishment and regains security within and without."

the "unlawful act" which the Accused and amicus allege justify the subsequent armed conflict, it is plain that the factors upon which "self-defense" can be justified cannot be said to exist on these facts. Whatever threat was posed by Al Qaeda, or Bin-Laden, the threat did not come from any direct actions of the Taliban government. While the Accused asserted that "harboring" those who committed the crimes against humanity on September 11,[33] this does not amount to anything like the conditions of "necessity", "instant and overwhelming need" which "leaves no choice or a moment for deliberation" required under customary international law of self-defense. This is all the more the case since there is evidence in the public record that the Taliban government offered to negotiate the extradition of the stated object of the armed conflict, "the capture of bin-Laden and his supporters".

With respect to the requirements of minimum use of force and the requirement of the use of force proportional to that used by the perpetrator, the actions of the Accused fall far short of the use of force which would be appropriate to accomplish the objective of capturing bin-Laden, or even putting an end to the use of camps in Afghanistan by Al Qaeda. The use of massive air-power and bombing of both military and civilian targets far exceeds the response necessary to defend the United States from future attacks of a similar nature, by the same non-State actors.

While there is no doubt that crimes of the magnitude committed on September 11 require a determined and effective response, the Accused has failed to establish that the means employed in making war on Afghanistan were driven by an immediate threat that required a massive military response, under the international law of self- defense.

B. Punishment or Reprisal

As pointed out by my colleague, Dr. Akroyd, the armed response must: (1) relate to an unlawful act by a state OR an informal organization for which it is responsible, causing immediate or overwhelming danger of the state seeking to exercise it; (2) be preceded by a demand for reparation; (3) be necessary to protect against further attack, rather than retaliation, and (4) be proportionate to such necessity in terms of range and focus.[34] However, Judge Akroyd also cites the dissenting opinion by Judge Jennings in the Nicaragua case, which warns that a danger of strict limitations on self-defense may create a legal gap in which a "forcible response to force is forbidden" and "UN employment of force…is absent."[35]

The Accused did not cite these justifications as a basis for armed conflict in the October 7, 2001 letter to the United Nations, and the Caroline case does not refer to these justifications. However, because amicus has submitted the overarching need to vindicate its interests in light of shortcomings of international law that are also considered a justification for armed conflict under the formulations described by Grotius and have recently received attention from some scholars, I join me colleague, Judge Akroyd, in considering their applicability to the facts in this case.

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[33] "…any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime," Address to Congress by George W. Bush, Sept. 20,2001.

[34] Judgment of R. Akroyd, J.

[35] On the facts of this case, this potential "black hole" exists only as a theoretical question since Security Council Resolutions 1368 and 1373, as well as the long-standing demand for bin-Laden's extradition, indicated the intention of the UN to act. When considered along with the offer of the Taliban government to turn bin-Laden over to a third party, pending investigation, the "gap" considered by Judge Jennings cannot be said to exist in this case. Action by the Security Council across a range of options is authorized under Article 39, 40, 41 and 42, which can include military measures.

Unlike the law of self-defense the concept of "punishment" or "reprisal" has not generally found favor either in treaties or as a matter of customary law. While United States has made use of "reprisals" by attacking supposed Al Qaeda targets in Somalia,[36] Afghanistan, Libya, and possibly Panama, but despite these actions, has taken the position that "reprisal" does not support the use of force under international law.[37] The "reprisal" rationale has also been rejected by the UN General Assembly,[38] the International Law Commission,[39] and the International Court of Justice.[40] While I quite agree with his formulation of the four factors to be considered, and the conclusion that the Accused has failed to carry the burden necessary to establish these factors as an affirmative defense, I write only to emphasize the factors which I consider to be missing, on the facts before the Court. First, even the Accused has not asserted that the Taliban government was "responsible" for unlawful acts committed on September 11, but only that Al Qaeda was operating from bases within territory of Afghanistan. Second, the danger to the United States posed by Al Qaeda, but NOT by the Taliban government, was very real and serious, it was not "immediate and overwhelming" as required under the doctrine.

Third, and most importantly, the "demand for reparation" which in this case was the extradition of bin-Laden was actually agreed to by the Taliban government with the offer of several alternatives, which were rejected out of hand by the accused. As a result, I am not able to agree that the demand was sufficient to justify military action under Article 51, as suggested by me learned colleague. However, I quite agree with his analysis regarding the failure of the Accused to establish either the proportionality of force, or prevention of future threat, as opposed to carrying out retaliation.[41]

War Crimes

There is no dispute that the Accused, acting as commander in chief of the Armed Forces of the United States, attacked Afghanistan with the most technologically sophisticated lethal military force that the World has ever seen. From the formal initiation of hostilities on October 7, 2001 until the Karzai government was installed in Kabul at the end of December 2001, the entire territory of Afghanistan was subject to massive bombing utilizing approximately 60% "targeted" munitions, but included tactics of "carpet bombing" which destroyed both military and civilian targets. Although the main conflict was of relatively short duration, the results of the conflict upon the people and territory of Afghanistan were horrific and widespread.

It is not disputed that the munitions employed by the U.S. armed forces under the command of the Accused used a wide range of weapons which the Accused knew, or should have known, had indiscriminate impact and which presented a grave threat to civilians non-combatant. These weapons included: radioactive depleted uranium munitions [DU munitions]; "daisy cutter" fuel-air incendiary bombs; anti-personnel "cluster bombs"; and anti-personnel mines.

[36] The attack on Somalia was found to have destroyed a medical chemical factory, which highlights the reliance of "intelligence" in either the use of "reprisals" or "pre-emptory" use of force.

[37] See, Memorandum on United States Practice Manual with Respect to Reprisals, American Journal of International Law, 1979, p. 489.

[38] See, the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States

[39] Art. 50:1(a) Draft: code of State responsibility.

[40] Unlawfulness of One-sided Use of Armed Forces Against International Terrorism, 137.

[41] Judgment of R. Akroyd, J.

A. Land Mines

Initially, it must be noted that the United States is one of nations which has not ratified the Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and On Their Destruction [Mine Ban Treaty]. As of August 2002, 145 countries have signed or acceded to the Treaty and 125 have ratified.[42] In addition, the U.S. is one of the largest exporters of land mines having exported some 4.4 million anti-personnel mines between 1969 and 1992 to approximately 32 different countries.[43] At the outset, the widespread acceptance of the Mine Ban Treaty raises the presumption that continued use of these weapons is contrary to customary international law, irrespective of the U.S. failure to ratify the Treaty. However, in addition, because these are weapons of indiscriminate impact, their use also violate other principles of international law as discussed below.

B. Other weapons of indiscriminate impact.

The 1996 the opinion of Judge Weeramantry, writing for a majority of the International Court of Justice, the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons sets forth the most comprehensive review of the current status of international law, under both treaties and customary law, regarding the use of weapons with widespread impact on civilian populations:

> The first [principle of humanitarian law] is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; states must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. ICJ Reports 1996 pp. 226, 227

This World Court pinion summarizes the treaty provisions beginning with the Hague Convention of 1899 and 1907, up to and including the aforementioned Mine Ban Treaty of 1997, which establish that the use of weapons which have indiscriminate effect are, by their nature, violative of both treaties and customary international law.

A report entitled, Weapons of Mass Destruction by Laura Flanders which was presented to the Tribunal the effects of the "daisy cutter" fuel-air bomb was described:

> Dropped from a huge transport aircraft "Big Blue" releases a cloud of inflammable ammonium nitrate, aluminum dust, and polystyrene slurry which is then ignited by a detonator. The result is a firestorm that incinerates an area the size of five football fields, consumes oxygen, and creates a shock wave and vacuum pressure that destroys internal organs of anyone in range.

The Tribunal also heard testimony regarding the impact of cluster bombs, which release hundreds of smaller bomblets. According to Human Rights Watch:

The United States dropped about 1,228 cluster bombs containing 248,056 bomblets between October 2001 and March 2002…cluster bombs left unexploded bomblets, or live duds which continue to injure and kill innocent civilians long after the attack…common post-strike victims in Afghanistan include shepherds grazing their flocks, farmers plowing their fields,

[42] Recently the Bush administration has announced it will not sign or ratify the Mine Ban Treaty, but will begin using only mines which de-activate automatically after a fixed period.
[43] N. Deller, Rule of Power or Rule of Law, p. 96, Lawyer Comm. Nuc. Pol. 2003

and children gathering wood.[44]

The Tribunal heard testimony from witnesses A, B and C who suffered directly from the indiscriminate use of munitions against the civilian population. They detailed the deaths of members of their own families and the destruction the villages in which they lived. Japanese Journalist Kenji Katsui produced a videotape which he had filmed in Afghanistan which documented the destruction of lives and livelihood of civilians in many areas of the country. The Tribunal was also presented with documentary evidence that tended to establish that no fewer than 4,000 civilian non-combatants have been killed by the troops under the command of the Accused. And, as recently as December 2003, 15 more children were killed in U.S. bombing of an Afghan village.[45]

C. Depleted Uranium and Future Harm.

Most of the foregoing evidence of the indiscriminate impact of munitions employed by the Armed Forces under the command of the Accused, several witnesses also testified about a completely separate category of harm to civilians, which will only be able to be assessed in the long run. The long-term effects of Depleted Uranium weapons will only be understood as effects of the introduction of long-lasting radioactive toxins can be quantified. However, testimony of Leuren Moret, Environmental Commissioner of the City of Berkeley, Prof. Katsuma Yagasaki of Ryukyu University, Okinawa, Japan and Maj. Douglas Rokke, former Director of the DU Weapons Project of the U.S. Army, and Prof. of Physics all tended to establish that some 500 to 600 tons of DU ordinance was used in Afghanistan, and that the U.S. government and military have been aware since at least 1943 of the extreme danger posed by the introduction of microscopic DU particles into the environment.

These conclusions were supported by memoranda prepared by the U.S. military following the Gulf War and a report of Dr. Asaf Durakovic, Prof. of Nuclear Medicine at Georgetown University detailing the concentration of uranium in Afghan patients; a study prepared by Prof. Marc Herold regarding the extent of DU usage in Afghanistan. These studies, reports and memoranda have all been introduced into evidence and tend to establish that long term negative health effects are likely to be experienced by many thousands of Afghani civilians, resulting from the DU munitions employed troops under the command of the Accused.

War Crimes Involving Detainees and Prisoners of War

Under the 1949 Third Geneva Convention, prisoners of war are defined as:

> 1. Members of the armed forces of a party to the conflict as well as members of militias or volunteer corps forming part of such armed forces…
>
> Should any doubt arise as to whether persons having committed a belligerent act and having fallen into the hands of the enemy, belong to any one of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal…

Further, Article 13 of the Geneva Convention provides:

[44] See, Human Rights Watch Report, "Enduring Freedom" Abuses by U.S. Forces in Afghanistan, March 2004
[45] "U.S.Assault: Children Found Dead" CNN.com, December 10, 2003. http://www.cnn.com/2003/WORLD/asiapcf/central/12/10/afghan.deaths/

> Prisoners of War must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody in prohibited…no prisoner of war must be subjected to physical mutilation…Likewise prisoners of war must at all times be protected, particularly against acts of violence or intimidation.

These are not the only expressions of the prohibitions against the mistreatment of detainees. Article 3 to the 1949 Geneva Conventions prohibits torture, cruel and "humiliating or degrading" treatment. Similarly, Protocol I of the 1977 Geneva Conventions prohibits torture that is either "physical or mental." In addition, both Afghanistan and the United States have ratified the Convention Against Torture which outlaws cruel, inhuman or degrading treatment. Furthermore, these protections which have become embodied in customary international law cannot be derogated during a state of war or emergency.[46]

The Tribunal was presented with Documentary film evidence, "Afghan Massacre: Convoy of Death" by Jamie Doran and reports of a variety organizations including ICRC, Amnesty International, as well as the recent Human Rights Watch Report, "Enduring Freedom: Abuses by U.S. Forces in Afghanistan," March 2004 establish that detainees were bombed by U.S. forces; others have been tortured at Baghram airbase and in other locations in Afghanistan such as Sherbergan Prison and other locations. According to the Human Rights Watch Report there are still thousands of detainees in Afghanistan and third countries.[47]

While there is evidence which establishes that many of these abuses were carried out by troops under the command of the Accused, there are other cases in which responsibility cannot be clearly established either because of a lack of command control, or because of spontaneous acts of combatants which could not have reasonably been predicted by the Accused. Due to the secrecy policies imposed by the Accused and lack of co-operation with investigator, as described in the Human Rights Report cited above, the extent of the liability of the Accused for abuses in Afghanistan cannot be fully assessed. However, it is plain that abuses have occurred with respect to: (1) excessive force during arrest; (2) arbitrary detention; (3) mistreatment during interrogation detention at a level which may be considered torture as described in the Human Rights Watch Report.

However, with respect to detainees and Guantanamo, more than 600 detainees being held under conditions that are the sole responsibility of the Accused, who has claimed that the treatment of the Guantanamo detainees is not governed by international law under the Geneva Conventions, or by domestic law, and none have been presented to a tribunal to assess their status.[48] Significant questions exist regarding the use of force during arrests, arbitrary detentions and mistreatment during detention which cannot be fully answered until the Accused permits independent assessment of detention practices, which has not yet occurred.

However, subject to the above reservations, which will require additional factual development, there is ample evidence to support allegations that the Accused has failed to accord thousands of detainees the conditions mandated by the Geneva Conventions, not the least of which is access to a competent tribunal to determine their status.

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[46] ICCPR, art. 4(2).

[47] See, Human Rights Watch Report, "Enduring Freedom" Abuses by U.S. Forces in Afghanistan, March 2004

[48] Id. p. 49. The US has failed to apply due process principles to detainees held either in Afghanistan, or in other locations. The Human Rights Report concludes that the United States is operating beyond the rule of law.

Crimes against Humanity

The Indictment filed by the Prosecutor asserts that the cumulative effect of the Afghan War on the civilian population caused the destruction of means of support and sustenance and, according to UNHCR the total number of refugees who fled to Pakistan approach a total of one million, in addition several hundreds of thousands have been internally displaced. Numerous reports and warnings from UN and other humanitarian aid agencies made clear that during the winter of October 2001 to March 2002, severe food crises affected more than 2 million people. According to the report of "Doctors without Borders," death rates increased substantially among both children and adults, after the bombing began. The ICRC has reported that sale of children for food in parts of Afghanistan.

In addition to the privation caused by the War, as described above, the ongoing exposure to unexploded mines and ordinance, exposure to depleted uranium and the related health risks, and the continuing threat of death, injury and dislocation caused by continued bombing that continues to this day.

V. VERDICT:

1. Crime Against Peace: War of Aggression

Since the decision to employ U.S. armed forces to attack the territory of Afghanistan resided with the Accused alone, and because there exist none of the mitigating factors which would justify the use of force under either the U.N Charter, or customary international law, George W. Bush is guilty of the crime of aggression.[49]

2. War Crimes: Attacks on Civilians and Indiscriminate Use of Force

Because the Accused knew or should have known that the ordering of massive bombing of the territory of Afghanistan with both targeted and non-targeted munitions would result indiscriminate harm to civilians and civilian facilities; because the Accused intentionally made use of anti-personnel land mines which have been outlawed under international law; because both "daisy cutter" and "cluster" bombs necessary inflict indiscriminate damage upon civilians and present well-established long term threat to the life and limb of civilians long after hostilities have ended, George W. Bush is guilty of the use of indiscriminate munitions and force against the civilian population of Afghanistan, a war crime under international law.

While clear probably cause exists to suggest that the use of Depleted Uranium is also a weapon of indiscriminate impact, given the apparent long-term negative health effects which have been presented to the Tribunal. Based on this evidence, I have no hesitation in finding that the risk of using these weapons is so great that their use should be banned. However,

[49] Because the crime of aggression is not dependent upon a finding that the Accused carried out the acts of aggression for a particular purpose, this Opinion does not specifically address issues such as the previous U.S. support for the Taliban government and Osama bin-Laden. However, the evidence is clear that this previous relationship only increases the moral obligation to take responsibility for the harm caused by a war waged to capture or punish the former allies. Further, there is incontrovertible evidence that the policies enunciated by current members of the Bush Administration as the Project for the New American Century include world domination using military and economic power. *See*, "Rebuilding America's Defenses: Strategy, Forces and Resources for a New Century." 2000 which also advocates military aggression in Iraq and elsewhere, as a means to control worldwide access to oil resources. These policies are also embodied in the National Security Strategy, Sept. 2002 which advocated "pre-emptive" aggression as fundamental foreign policy.

because the most deleterious effects of the low level radiation can only be determined over time, and because the scientific community has not yet established the causal link to the illnesses in the public record, I am unable to decide "beyond a reasonable doubt" [the applicable standard in criminal proceedings] that the use of depleted uranium weapons is clearly in the same category as nuclear weapons, or the other munitions cited above, at this point. However, as stated earlier there is certainly probable cause to conclude that depleted uranium does present serious dangers to civilians and certainly is indiscriminate in its impact. Because I was not present during the ICTA hearings at which this evidence was produced, I yield to my colleague's analysis of the facts on this issue and do not dissent from their judgment.

3. War Crimes: Violations of the Geneva Conventions with Respect to Detainees and Prisoners of War.

The broad rejection of the principles of the Geneva Convention with respect to the detention and treatment of prisoners captured in Afghanistan, which is the stated policy of the Accused, is a violation of international law which applies to detainees both in Afghanistan and without for which the Accused must be held generally accountable for detainees held by the Armed Forces of the United States and its allies. It is also plain that detainees have been killed, detained using excessive force, detained arbitrarily, mistreated and abused to the extent of torture in Afghanistan and other locations to which detainees have been sent, it is also true that direct command responsibility for individual acts which violate international law cannot be clearly established in all cases. Finally, it is plain that the detentions at Guantanamo are the direct responsibility of the Accused.

As a result, George W. Bush is guilty of crimes against the laws of war, consisting of numerous and egregious violations of the Geneva Conventions with respect to the establishing the general policy rejecting the application of the Geneva Convention to all detainees within the control of U.S. forces, their allies and agents. The Accused is also guilty of war crimes arising from the unlawful conditions of detention for all detainees within the direct or indirect control of U.S. Armed Forces, and those transferred to the custody of third parties who the Accused knew, or should have known, would be subjected to unlawful conditions by those over whom he does not have command authority. Finally, with respect to detainees held at the Guantanamo the Accused, George W. Bush, is guilty of continuing crimes based on the continuing failure to adhere to either international or domestic legal norms in a facility which the Accused has claimed is completely within his control, and beyond the reach of any international or domestic juridical body.

4. Crimes Against Humanity: Brutalization of the Civilian Population and Destruction of Their Means of Survival

Even before the Accused initiated the unjustified and excessively violent attack on Afghanistan, the Accused knew or should have known that the condition of the People of Afghanistan was extremely difficult. However, the Accused also received repeated warnings that the effect of the war was: the creation of hundreds of thousands, if not millions, of refugees and internally displaced persons; impoverishment and threatened starvation for millions; massive injuries and other health problems; and, other forms of massive suffering from the destruction of Afghan economic and social life. Because the Accused knowingly and intentionally inflicted massive suffering on millions of innocent Afghani civilians, George W.

Bush is guilty of crimes against humanity.

VI. RECOMMENDATIONS

1. Payment of reparations to the people of Afghanistan and removal of unexploded ordinance and resident of depleted uranium from the territory of Afghanistan.

Both in the international and domestic context, the concept of an injured party being returned to the status quo ante through the payment of damages or reparations is well established. Victims of Nazi atrocities, improper U.S. government detention during wartime, airplane hijacking have all been found worthy of reparations. This principle should be applied to the victims of the Accused in Afghanistan. Furthermore, because the territory of Afghanistan as been made extremely dangerous and uninhabitable in some areas, unexploded ordinance and residue of depleted uranium weapons should be removed from the territory of Afghanistan and the land and infrastructure returned to a safe and habitable condition.

2. Ratification of the Rome Treaty, and acquiescence of the jurisdiction of the International Criminal Court over nationals of the United States.

Consistent with the principle enunciated by United States Supreme Court Justice Robert Jackson at the Nürnberg Tribunal that violations of international law should be applied equally to all nations, the government of the United States must not set itself apart from the legal structures that apply to the leaders of other nations. This and the following recommendations must be considered in light of the overwhelming economic and military power presently possessed by the United States, the doctrine of "pre-emption" which governs current U.S. policy and the clearly expressed intention of current members of the Bush administration, as the Project for a New American Century, to rely on U.S. dominance rather than international law in governing international relations.

3. Renunciation of the "pre-emptive" use of force, "reprisal" and "first strike" use of nuclear weapons by the government of the United States as violative of fundamental precepts of self-defense under international.

As explained by Kofi Annan in his speech to the General Assembly, the doctrine of "pre-emption" threatens the foundations of international law and replaces multi-lateral dispute resolution based on legal norms with the threat of raw power. As the world's most powerful nation with a well-documented adherence to the rule of law, the United States has a special obligation to refrain from the use of force, or the threat of force, as the only way of ensuring that the rule of law prevails in international relations between all nations.

4. Ratification, and/or unreserved adherence, by the United States to the terms of treaties which limit or prohibit all weapons with indiscriminate impact including nuclear, depleted uranium, chemical, biological or conventional, including land mines, cluster and "daisy cutter" bombs.

Under any circumstances, the 1996 Advisory Opinion on Nuclear Weapons by the International Court of Justice makes clear that weapons which have indiscriminate impact violate international law, since there can be no justification for causing harm to a civilian

population, even if the armed conflict itself can be justified.

5. Acceptance of the unreserved jurisdiction of the International Court of Justice by the United States over legal actions brought by other states.

After having accepted the general jurisdiction of the International Court of Justice since its inception, the United States withdrew from the general jurisdiction of the Court in 1984 at the time that the Court ruled against the United States in the Nicaragua case.

6. Development of clear definitions of "terrorism" in its various manifestations, both that perpetrated by governmental and non-governmental parties, to hold all "terrorists" equally liable under international law.

As pointed out by amicus in this case, there is no clearly expressed definition of "terrorism," even though various UN bodies have promulgated 12 Conventions which address the international responses to its commission. While the acts in question in this case did not present particular difficulty, since hijacking of airliners is specifically described as one of the acts which are specifically described in the Conventions, the definitional problems present long-term difficulties in the equal application of justifiable responses. For example, in U.S. domestic law "terrorism" is defined as: [a] "violence or the threat of violence" to accomplish a political objective, [b] committed by non-State parties, [3] which the Secretary of State determines is contrary to U.S. interests. Such definitions of "terrorism" are obviously subject to political manipulation.

Workable definitions of "terrorism" must take into considerations the various circumstances in which politically motivated violence might arise, committed either by State or non-State parties. Such a definition has been suggested by Kalliopi K. Koufa, Special Reporter for the UN Commission on Human Rights and would include:[50] [a] individual or group terrorism, [b] international state terrorism, [c] state regime or government terror, [d] state sponsored or state supported terrorism, and [e] national liberation struggles or self-determination.

In the absence of a universally acceptable definition of "terrorism" its various forms, principled and appropriate responses in either international or domestic laws will not be possible.

VII. CONCLUSION:

The evidence is clear that the attack by US armed forces, under the direct command and control of the Accused, attacked the territory of Afghanistan in violation of both the United Nations Charter and customary international law. The stated justification of "self-defense" asserted by the Accused finds no support in under well-established concepts of customary international law. Further, even if the use of force by the Accused was justified initially, which it was not, the tactics and munitions employed by the Accused were used indiscriminately against the Afghani civilian population in violation of customary international law and the laws of war. The widespread devastation imposed on the territory of Afghanistan and the Afghani people by the Accused also constitute a continuing crime against humanity. Finally,

[50] Kalliopi K. Koufa, Special Reporter, Commission on Human Rights, Terrorism and Human Rights, ECSOC,E/CN.4sub.2/2001/31, 27 June 2001, para. 42, at 12.

the treatment of detainees both in Afghanistan and elsewhere also constitute continuing violations of both the laws of war and international humanitarian law.

There can be little doubt that the Accused, George W. Bush, acting as Commander-in-Chief of the Armed Forces of the United States, is guilty of crimes on the order of those committed by the national leaders who have been prosecuted in ad hoc tribunals initiated and supported by the United States of America. If the principle announced by United States Supreme Court Justice Robert Jackson at Nürnberg, i.e. "If certain acts of violation of treaties are crimes, they are crimes whether the United States does them or whether Germany does them…" were to be applied to the facts presented to this Tribunal, George W. Bush would be subject to the same penalties imposed on other leaders who have been held accountable for massive violations of international law.

However, the evidence presented to the Tribunal has demonstrated that the Accused has not only violated international law, but has established policies which reject the entire concept of the rule of law, in both the domestic and international context. Thus, in addition to the particular violations outlined by the Prosecutors of the Tribunal, George W. Bush is guilty of the most heinous violation possible, the rejection of the rule of law as a limitation upon the use of US military and economic power it its relations with other nations.

As a result, he has thrown into doubt the practical relevance of 400 years of carefully constructed international legal norms. As Secretary General Kofi Annan observed, "…if [the pre-emption doctrine] were to be adopted, it would set precedents that resulted in a proliferation of the unilateral and lawless use of force with or without justification.[51] Should the Accused succeed in this project, his crimes at the dawn of the 21st Century would far exceed those of leaders of nations whose power was far less fearful, such as those of Germany or Japan during the mid-20th Century.

The people of all nations have a collective interest in preventing this eventuality and an urgent responsibility to reinforce international legal norms with the power of worldwide public opinion and non-violent resistance as a means of preventing the project of world domination upon which George W. Bush has embarked. This Tribunal is part of that necessary resistance.

[51] Speech to the General Assembly, October 1, 2001.