

Spring 4-1-2003

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Recommended Citation

Ahmed S. Younis, *IMPUTING WAR CRIMES IN THE WAR ON TERRORISM: THE U.S., NORTHERN ALLIANCE, AND 'CONTAINER CRIMES'*, 9 Wash. & Lee Race & Ethnic Anc. L. J. 109 (2003).

Available at: <https://scholarlycommons.law.wlu.edu/crsj/vol9/iss1/9>

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IMPUTING WAR CRIMES IN THE WAR ON TERRORISM: THE U.S., NORTHERN ALLIANCE, AND 'CONTAINER CRIMES'

Ahmed S. Younis*

THE BIG PICTURE

In a post September 11th world, the foreign relations of the United States have become much more deliberate and premeditated in the quest to erode the dangers of global terrorism. In this effort we have seen a rapid increase in dependence on international alliances with states and non-state actors in diplomatic and sometimes military situations. An example of such agreements was that between the United States and the Northern Alliance of Afghanistan for the purpose of overthrowing the Taliban government to implement another under the leadership of Hamid Karzai. This bilateral coalition is the focus of this paper. Although these alliances help maintain the United States' national security, their existence has, and will continue to, raise serious questions about both criminal and civil liability when international law is transgressed.

The existing legal regimes governing international criminal liability should be on the mind of state and non-state actors when making decisions that bring about armed conflict. Treaties, customary international law, and case law are clear on the basic framework of interaction between states and non-state actors. Like other areas of the law, however, there are certain aspects of international law that are grey and require a concentrated analysis of the various sources that co-exist to make law.

To tackle the problem of assessing the criminal responsibility of the U.S. brought upon by its relationship to the Northern Alliance, we must first turn to case law arising from both the International Court of Justice (ICJ) and the International Criminal Tribunal for the Former Yugoslavia. After laying out the alleged facts of the 'container crimes' of the Northern Alliance, they must be applied to the law that is synthesized from the cases and elements of customary international law as codified in the Draft Articles of State Responsibility to assess the liability of the U.S.

* Candidate for Juris Doctor May 2004, Washington & Lee University School of Law. Special thanks to Professor Mark A. Drumbl for guidance, helpful comments, and encouragement. I would also like to acknowledge the support of Nicholas Bonarrigo and the Executive Board of the Race & Ethnic Ancestry Law Journal.

I. A DIVERGENCE IN JURISPRUDENCE

A. The Case Concerning Military and Paramilitary Activities In and Against Nicaragua

On April 9, 1984, the government of Nicaragua instituted proceedings against the United States "in respect of a dispute concerning responsibility for military and paramilitary activities in and against Nicaragua."¹ Nicaragua's complaint alleged that the United States was responsible "for the military capacity, if not the very existence, of the contra forces, as well as a series of acts by U.S. personnel or persons of the nationality of unidentified Latin American Countries, paid by, and acting on the direct instructions of, U.S. military or intelligence personnel," also known as UCLAs (Unilaterally Controlled Latino Assets).² The facts characterizing the relationship of the U.S. to both the contra forces and the UCLAs were critical to the court's determination of legal significance of the conduct of the United States with respect to each group separately.³

1. The United States and the UCLAs

Nicaragua alleged that speedboat 'mine laying' operations were only one of the ways that the U.S. has attacked Nicaragua through use of UCLAs. Other alleged activities included, but were not limited to: a 1983 explosion of underwater oil pipeline at Puerto Sandino, the destruction of five oil tanks leading to a loss of millions of gallons of fuel and the evacuation of large numbers of locals, and joint helicopter/speedboat attacks on oil storage facilities.⁴ Evidence presented by Nicaragua, including press reports quoting U.S. administration sources, was sufficient for the ICJ to impute to the United States liability for participating in the planning, direction, support, and execution of operations, although it was not proven that U.S. military personnel took direct part in the attacks.⁵ Thus, for the court, the U.S.

¹ *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 1 (June 27).

² *Id.* ¶ 75.

³ *Id.* ¶¶ 84, 93.

⁴ *Id.* ¶ 81. Three of the ten operations Nicaragua alleged in this paragraph were subsequently rejected by the court as attributable to the United States, specifically (i) a 1983 Cessna attack on Sandino international airport, (iii) a 1983 attack at the Benjamin Zeledon oil storage facilities, and (vii) a 1984 mine explosion at El Bluff alleged here a second time. *Id.* ¶ 85.

⁵ *Id.* ¶ 86. Evidence against the U.S. included a "mothership" leased by the CIA to the UCLAs, speedboats, guns, and ammunition supplied by the U.S. administration, and the involvement of pilots that were Nicaraguan or U.S. nationals. *Id.*

administration had effective control over the UCLAs during their commission of violations of international law.

2. The United States and the Contra Forces

The ICJ then turned to the question of the scope of control that the U.S. had over the contras to decide Nicaragua's claim attributing responsibility to the U.S. for the activities of the contras. Nicaragua claimed that the U.S. violated an obligation of international law not to kill, wound, or kidnap citizens of Nicaragua. For the conduct of the contras to give rise to legal responsibility of the U.S., it would in principle have to be proven that the U.S. had effective control of the military or paramilitary operations in the course of which the alleged violations were committed by the contras.

In an attempt to meet the high standard of the "effective control" test, Nicaragua presented evidence of two publications which it claimed were prepared by the CIA and supplied to the contras in 1983.⁶ The first was "*Operaciones sociológicas en guerra de guerrillas*" (Psychological Operations in Guerilla Warfare), and the second, in English and Spanish, was *Freedom Fighters' Manual: Practical guide to liberating Nicaragua from oppression and misery by paralyzing the military-industrial complex of the traitorous Marxist state without having to use tools and with minimal risk for the combatant.*⁷

The court established that the support of the United States authorities for the activities of the contras took various forms over the years, including logistical support, the supply of information on the location and movements of the Sandinistas [in El Salvador], the use of sophisticated methods of communication, the deployment of field broadcasting networks, and radar coverage.⁸ In fact, Nicaragua was even able to convince the court to recognize that the contra forces had, at least at one period, been so dependant on the United States "that it could not conduct its crucial or most significant military and paramilitary activities without the multi-faceted support of the united States."⁹

⁶ *Id.* ¶ 117.

⁷ *Id.* ("Since the evidence linking the *Freedom Fighter's Manual* to the CIA is no more than newspaper reports the court will not treat its publication as an act imputable to the United States Government for the purposes of the present case.")

⁸ *Id.* ¶ 106. ("The court finds it clear that a number of military and paramilitary operations by this force were decided and planned, if not actually by the United States advisers, then at least in close collaboration with them.")

⁹ *Id.* ¶ 111.

The International Court of Justice did not consider that the assistance given by the United States to the contras warranted the conclusion that these forces were subject to the United States to such an extent that violations of international humanitarian law by the contras were imputable to the U.S.¹⁰ The court made clear that for state responsibility generated by acts performed by private individuals acting as de facto State organs, the court required that the State should issue specific instructions concerning the commission of the unlawful acts in question.¹¹ In fact, the court noted that,

even the general control by the respondent State over a force with a high degree of dependency on it, would not in itself conclude imputability of the U.S., rather, direction or enforcement in the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant are required.¹²

In this case, the ICJ clearly distinguished between the activities and relationship of the UCLAs with the U.S. to be stronger than that of the contras to the extent that UCLA actions can be imputed to the U.S. and those of the contras could not.

B. The Tadic decision

The decision of the International Criminal Tribunal for Former Yugoslavia (ICTY) in its first case has caused a wide array of discourse within international law.¹³ Acting upon authority granted by the Security Council,¹⁴ the ICTY deviated from a holding of the ICJ in the *Case*

¹⁰ *Id.* ¶ 116.

¹¹ *Id.*

¹² *Id.* ¶ 115.

¹³ Shane Spelliscy, *The Proliferation of International Tribunals: A Chink in the Armor*, 40 COLUM. J. TRANSNAT'L L. 143, 152-59 (2001) ("Inconsistency in case law can be disastrous for law, yet all scholars seem to recognize that in the absence of any sort of structural relationship between tribunals charged with interpreting international law, such clashes of jurisprudence become possible, and perhaps even probable").

¹⁴ See *Prosecutor v. Dusko Tadic*, Appeal Judgment, Case No. IT-94-1-A ¶ 32 (Int'l Crim. Trib. for Former Yugoslavia App. Chamber July 15, 1999), available at <http://www.un.org/icty/tadic/appeal/judgment/tad-aj990715e.htm> (last visited Dec. 20, 2002). The Appeals Chamber held that upon "the determination of the existence of a threat to the peace, a breach of the peace or an act of aggression, the Security Council has a very wide margin of discretion" under Article 39, within the limits of Articles 41 and 42, to choose the appropriate course of action. *Id.* The ICTY concluded that although the establishment of international tribunals is not expressly mentioned in Articles 41 and 42, they are fully legal under Chapter VII of the U.N. Charter. *Id.*; see also *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. Doc. S/2504 (1993) ¶ 50 (recognizing the decision of the Security Council to establish an international tribunal for prosecution

Concerning Military and Paramilitary Activities in and Against Nicaragua, finding the test of ‘effective control’ unconvincing.¹⁵ Dusko Tadic, a Serb café owner, was the first person prosecuted for the war crimes committed during a series of atrocities in war-torn former Yugoslavia.¹⁶ “Tadic was formally charged by the ICTY prosecutors with 132 separate counts involving crimes against humanity, violations of the laws and customs of war, and grave breaches of the 1949 Geneva Conventions.”¹⁷ The Appeals Chamber of the ICTY reversed the decision of the Trial Chamber¹⁸ by narrowing it inquiry to the question “of establishing the criteria for the legal imputability to a State of acts performed by individuals not having the status of State officials.”¹⁹ It concluded that that the Trial Chamber applied an incorrect standard in evaluating the legal consequences of the relationship between the Federal Republic of Yugoslavia and the Bosnian Serb forces, finding the overall control test to be more fitting.²⁰ It found that, for the

of persons responsible for violations of international law committed in the territory of the former Yugoslavia since 1991).

¹⁵ Prosecutor v. Dusko Tadic, Appeal Judgment, Case No. IT-94-1-A ¶ 115 (Int’l Crim. Trib. for Former Yugoslavia App. Chamber July 15, 1999), available at <http://www.un.org/city/tadic/appeal/judgment/tad-aj990715e.htm>. (last visited Dec. 20, 2002).

¹⁶ HOWARD BALL, PROSECUTING WAR CRIMES AND GENOCIDE: THE TWENTIETH CENTURY EXPERIENCE 137 (University Press of Kansas 1999) (1937). Between 1991 and 1995, over 300,000 people were slaughtered in the former Yugoslavia, and the UN High Commissioner for Refugees estimated more than 3.9 million displaced persons, with more than 2.7 million in Bosnia-Herzegovina. *Id.* One of the most gruesome examples of Genocide includes the ethnic cleansing of 30,000 Bosnian Muslims during the month of July 1995 in Srebrenica. *Id.* at 136. The 1995 Dayton, Ohio, Peace Treaty was brokered between President Rudjman of Croatia, Izetbegovic of Bosnia-Herzegovina, and Milosevic representing the Bosnian Serbs, a main agreement of which was cooperation of all parties with the ICTY. *Id.* at 137-38.

¹⁷ *Id.* at 146. The most notorious of the four Serb-controlled prison camps in the region was Omarska where systematic abuse included beatings that led to death, sexual mutilations (such as the biting off of prisoner’s testicles upon orders from Tadic), and mass summary executions. *Id.*

¹⁸ See Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, 30 N.Y.U. J. INT’L L. & POL. 167, 195 (1997) (noting that although the majority acknowledged that Serbia supplied the Bosnian Serbs’ salaries, weapons, and communications, the Trial Chamber concluded that it was not enough to prove that the Bosnian-Serb forces were under the effective control of Belgrade). The Trial Chamber applied the ‘effective control’ test derived from its *Nicaragua* decision. *Id.* It found that Republic Srpska and its forces, the Vojaska Republika Srpska, had merely coordinated with the Federal Republic of Yugoslavia (FRY) and its army, the Jugoslavenska Narodna Armija (JNA). *Id.*; see also Dayna L. Kaufman, *Don’t Do What I Say, Do What I Mean: Assessing a State’s Responsibility for the Exploits of Individuals Acting in Conformity with a Statement from a Head of State*, 70 FORDHAM L. REV. 2603, 2634 (2002) (explaining that the VRS forces and the Republika Srpska would have acted with or without the support of the FRY; FRY’s aid merely supported and did not override VRS’s aims).

¹⁹ Prosecutor v. Dusko Tadic, Appeal Judgment, Case No. IT-94-1-A ¶ 104 (Int’l Crim. Trib. for Former Yugoslavia App. Chamber July 15, 1999), available at <http://www.un.org/city/tadic/appeal/judgment/tad-aj990715e.htm>. (last visited Dec. 20, 2002).

²⁰ *Id.* ¶ 149. See Spelliscy, *supra* note 13, at 159 (arguing that until *Tadic*, the ICJ decision in *Nicaragua* had been particularly influential, citing the case of *Nazari v. Iran* in the Iran-U.S. Claims Tribunal as well as both Trial Chambers of the ICTY in the *Rajic* and *Tadic* cases).

period material to the case in 1992, the armed forces of the Republika Srpska were to be regarded as acting under the overall control of and on behalf of the Federal Republic of Yugoslavia.²¹

The Appeals Chamber cited two grounds on which it found the *Nicaragua* test to be unpersuasive: first, “the *Nicaragua* test would not seem to be consonant with the logic of the Law of State Responsibility,²² and second, “the *Nicaragua* test is at variance with judicial and State practice.”²³ It held that the degree of control that a state has over the actions of a person or group of persons will vary according to the factual circumstances of every case, thus “failing to see why international law should require a high threshold for the test of control.”²⁴ Among other possible fact patterns, the Appeals Chamber distinguished the situation of individuals acting on behalf of a State without specific instructions, “from that of individuals making up *an organized and hierarchically structured group*, such as a military unit or, in case of war or civil strife, armed bands of irregulars or rebels.”²⁵ Since a member of the latter acts in conformity with the standards prevailing in the group and is subject to the authority of the head, it is sufficient to require that the group as a whole be under the overall control of the State.²⁶ “Under international law it is by no means necessary that the controlling authorities should plan all the operation of the units dependant on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law.”²⁷

The decision of the Appeals Chamber to carve out the caveat of overall control for cases involving organized armed forces or organized paramilitary forces is a significant prong in the movement of the effective control test to a lower threshold.²⁸ Another significant factor in the shift of

²¹ *Tadic*, Appeal Judgment, Case No. IT-94-1-A ¶ 162 (“Hence . . . the armed conflict in Bosnia and Herzegovina between the Bosnian Serbs and the central authorities of Bosnia and Herzegovina must be classified as an international armed conflict.”).

²² *Id.* ¶ 116.

²³ *Id.* ¶ 123.

²⁴ *Id.* ¶ 117.

²⁵ *Id.* ¶ 120 (“Plainly, an organized group differs from an individual in that the former normally has a structure, a chain of command and a set of rules as well as the outward symbols of authority.”).

²⁶ *Id.*

²⁷ *Id.* ¶ 137.

²⁸ Mark A. Drumbl, *Victimhood In Our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 N.C. L. REV. 1, 36-37 (2002) (arguing that September 11th diluted the effective control test due to “state and international organization responses, together with Security Council Resolution 1378, scholarly writing, and the work of eminent jurists”); see also *id.* at 37 n.125 (“Whereas the provisional text [Draft Articles] entering the 2001 sessions of the International Law Commission established a fairly high nexus between the state and the individual or non-state actor in order for the state actor to be responsible for the acts in order for the state actor to be responsible for the

the test is the applicable customary international law evinced in the progression of drafts by the International Law Commission's Articles on Responsibility of States for internationally wrongful acts.²⁹ The 2001 version of the Commission's Articles, for example, omit equivalent language to that of Article 11 of that included in 1996. Article 11 of the 1996 version provides: "The conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law."³⁰ By removing this language from Article 11, "which affirmatively stated that there was certain conduct that was not attributable to the State; the Articles now focus entirely on standards for holding the State responsible for certain activity."³¹

*C. Case Concerning United States Diplomatic and Consular Staff in Tehran
(United States of America v. Iran)*

In November of 1979, during the course of a demonstration led by a group named "Muslim Student Followers of the Imam's Policy," the United States Embassy compound in Tehran was overrun by several hundred demonstrators and all persons on its premises were taken as hostages.³² Within a few days of the violent takeover of the Embassy, the U.S. instituted proceedings in the International Court of Justice for provisional measures (preliminary injunction) against the new revolutionary government of Ayatollah Khomeini for the hostages to be freed.³³ The government of Iran

acts of the non-state actor, the draft finally presented to the Sixth Committee of the U.N. General Assembly in November 2001, where it was favorably received, lowered this threshold.".)

²⁹ Kaufman, *supra* note 18, at 2607.

³⁰ *Draft Articles on State Responsibility*, U.N. GAOR Int'l Law Comm'n, 48th Sess., at art. 11, U.N. Doc. A/51/10 (1996), available at <http://www.un.org/law/ilc/archives/statfra.htm> (last visited Dec. 20, 2002). Compare with *Draft Articles on State Responsibility for Internationally Wrongful Acts*, U.N. GAOR Int'l Law Comm'n, 53d Sess., Supp. No. 10, at art. 11, U.N. Doc. A/56/10 (2001), available at http://www.un.org/law/ilc/texts/State_responsibility/responsibilityfra.htm (last visited Dec. 20, 2002).

³¹ Kaufman, *supra* note 18, at 2612 ("The Articles on State Responsibility, as adopted, therefore, show that, in writing the Articles, the ILC sought to enumerate the circumstances under which states could be held responsible, expanding possible sources for such liability.".)

³² *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3, 17 (May 24). In *Diplomatic and Consular Staff*, the ICJ considered allegations of the U.S. that the government of Iran violated many international obligations it owed the U.S. in adherence to treaties such as the Vienna Convention on Diplomatic Relations (1961) and the Vienna Convention on Consular Relations (1963). *Id.* at 5. The court found that Iran violated obligations it owed the U.S. under conventions in force between the two nations and general rules of international law. *Id.* at 44. The court ordered Iran to take all steps to redress the hostage situation and take measures to protect the premises of the U.S. embassy as it had done previously. *Id.* at 45.

³³ *Id.* at 6. The U.S. requested that the Court declare the Government of Iran under an obligation immediately to secure the release of all U.S. nationals detained in the Embassy. *Id.* ¶ 8(b). The U.S. also requested that Iran pay reparations for violations of international legal obligations owed to it, as well as submit persons responsible for the crimes committed on Embassy premises for prosecution. *Id.* ¶ 8(c)-(d).

vehemently objected to the jurisdiction of the court and its unwillingness to assess the hostage situation in light of other historical experiences between the two nations such as the CIA sponsored removal of President Mossadegh and replacement of the Shah's regime.³⁴

The court held that the actions of the militants were not imputable to the revolutionary government based on official status of the students as agents of Iran, nor were they found to be acting on behalf of the government in a non-official capacity.³⁵ Responsibility was, however, attributed to the government of Khomeini through another avenue, namely, "once . . . Iran approved the militants' seizure of the embassy and detention of the U.S. personnel, [the students'] illegal acts became its own."³⁶ The court found that Iran, through public acts, approved of the actions by the students and in fact perpetuated them by failing to "take appropriate steps" such as incursion upon the premises by force as it had done in the past many times.³⁷ The analysis of the court was consistent with Article 11 of the Draft Articles on State Responsibility (2001), which provides that "conduct which is not attributable to a state . . . shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own."³⁸ "The terms acknowledgement and adoption are used to distinguish from cases of mere support."³⁹ Again, it must be clear that the approval of Khomeini of the takeover of the U.S. embassy translated the continuing occupation of the embassy and detention

³⁴ HOWARD MEYER, *THE WORLD COURT IN ACTION* 128 (Rowman & Littlefield 2002).

³⁵ See *id.* at 29 ¶ 58.

³⁶ See Yutaka Arai-Takahashi, *Shifting Boundaries of the Right of Self-Defense: Appraising the Impact of the September 11 Attacks on Jus Ad Bellum*, 36 INT'L LAW. 1081 (2002) (arguing that it is difficult and only faintly possible to consider the September 11th attacks per se to be the act of the Taliban government). "While the government's endorsement was given the prospective effect, the responsibility for private conduct in the earlier period was assumed through its failure to take necessary action to prevent and halt the illegal act." *Id.* at 1098 n.108.

³⁷ See Davis Brown, *Use of Force Against Terrorism After September 11th: State Responsibility, Self Defense and Other Responses*, 11 CARDOZO J. INT'L & COMP. L. 1, 11 (2003). In fact the "result of officially adopting the actions of private persons was to convert all their actions from that point forward into acts of state." *Id.* In addition to Iran's inaction and a mysterious absence of the embassy guards that night, Khomeini made it clear that no one was to engage in diplomatic negotiations with the U.S. and that the hostage taking would not end until the Shah was handed over to Iran for trial. *Id.*

³⁸ *Draft Articles on State Responsibility*, U.N. GAOR Int'l Law Comm'n, 48th Sess., at art.11, U.N. Doc. A/51/10 (1996), available at <http://www.un.org/law/ilc/archives/statfra.htm> (last visited Dec. 20, 2002).

³⁹ *Id.*; MEYER *supra* note 34 ¶ 59. The ICJ made it clear that mere congratulations after the event and subsequent comments of approval do not change the initially independent and unofficial character of the attack.

of hostages into an act of state, but did not impute the attack itself to the state.⁴⁰

This case is critical to our analysis of the relationship between the Northern Alliance and the U.S. because it evinces a situation in which a State incurs liability after the crime is carried out.

II. ALLEGED "CONTAINER" CRIMES IN AFGHANISTAN

A. The Facts

Instead of war at the Taliban's last stronghold in Konduz during the final days of November 2001, the Northern Alliance forces headed by General Rashid Dostum and remaining Taliban fighters agreed to a compromise and surrender.⁴¹ On November 23, 2001, in Yerganak, a desert outside of Konduz, General Dostum, General Ostadh Atta Mohamed (another Northern Alliance Commander), and dozens of American Special Forces troops monitored the event.⁴² After the surrender, the Taliban prisoners were taken from Konduz to Qaala Zeini and then transported to Dostum's prison in Sheberghan, which was then under the control of the United States.⁴³

According to *Massacre in Mazar*, a documentary film by Irish director Jamie Doran, "[the Taliban prisoners] were shipped . . . in closed containers, local Afghan truck drivers were commandeered to transport between 200 and 300 prisoners in each container."⁴⁴ Containers have been a

⁴⁰ See *Draft Articles on State Responsibility*, U.N. GAOR Int'l Law Comm'n, 48th Sess., at arts.11-12, U.N. Doc. A/51/10 (1996), available at <http://www.un.org/law/ilc/archives/statfra.htm> (last visited Dec. 20, 2002).

⁴¹ See Babak Dehghanpisheh et al., *The Death Convoy of Afghanistan*, NEWSWEEK, Aug. 26, 2002 at 5 ("Dostum agreed to relatively generous conditions Afghan fighters would be allowed to return home Pakistanis also could return home after the Americans picked out suspected Al Qaeda operatives.").

⁴² *Id.* "Some of the Special Forces teams were zipping around the area on four-wheeler motorcycles; Dostum was filmed at the time enjoying a ride on the back of one." *Id.* The Americans were at the scene of the surrender primarily "to provide credible muscle, a message reinforced by the frequent streaking of U.S. bomber up ahead." *Id.*

⁴³ Rory McCarthy, *U.S. Afghan Ally Tortured Witnesses to his War Crimes*, THE GUARDIAN, Nov. 18, 2002, at 19.

⁴⁴ Stefan Steinberg, *Afghan War Documentary Charges U.S. with Mass Killings of POWs*, WORLD SOCIALIST WEB SITE, June 17, 2002, available at <http://www.wsws.org>; see also *Did the U.S. Massacre Taliban*, SUNDAY HERALD, June 16, 2002, available at <http://www.sundayherald.com/print25520> (reporting that when the Taliban soldiers screamed for water and air, Northern Alliance guards were ordered to shoot holes through the containers for ventilation, killing some prisoners in the process) [hereinafter *Massacre*].

“cheap means of mass murder” of war lords in Afghanistan since 1997.⁴⁵ In fact, American Taliban fighter John Walker Lindh and 85 other survivors from the Qala-i-Jhangi prison in Mazar-i-Sharif were also transported to Sheberghan by forces under the command of General Dostum in containers on December 1, 2001.⁴⁶ What makes these container crimes distinguishable from others in Afghan history is the presence of U.S. Special Forces in the areas at the loading site of the prisoners in Yerganak and Sheberghan, the point of arrival.⁴⁷ Upon arrival of the containers from Qaala Zeini at Sheberghan prison, “they were greeted by American forces who had established a command post there to interrogate prisoners, some 150 U.S. soldiers and CIA officers were at the site.”⁴⁸ Several reports, including the Doran documentary, indicate that in Sheberghan, U.S. forces encouraged Dostum’s soldiers to take the containers away from the prison site to avoid being filmed from a satellite.⁴⁹ General Dostum’s soldiers forbade nearby villagers to leave their homes and “no cars, donkey carts, or pedestrians were allowed to go down the road running past Dasht-e-Leili for several days in the early days of December.”⁵⁰ According to the second truck driver interviewed in the documentary, there were between 30 and 40 American soldiers present at Dasht-e-Leili where an estimated 3000 Taliban were shot, to ensure death, and then buried in mass graves.⁵¹

The fears of mass graves of Taliban have been confirmed by a number of unrelated investigations. Under mandate approved by the Security Council, a team from the United Nations Assistance Mission in Afghanistan visited the grave sites of Dasht-e-Leili in the week of May 1, 2002.⁵² U.N. officials learned that the site at Dasht-e-Leili is large as a result

⁴⁵ Dehghanpisheh et al., *supra* note 41, at 6 (reporting the account of survivors saying that after 24 hours the prisoners start going crazy and biting each other’s fingertips, arms, and legs for moisture, and that upon arrival only about twenty to forty were alive in each container).

⁴⁶ Luke Harding, *Afghan Massacre Puts Pentagon on the Spot*, THE GUARDIAN, Sep. 14, 2002, at 17 (reporting that John Walker Lindh was plucked by U.S. agents from the Sheberghan prison); Mathew Engel, *U.S. Taliban Fighter Claims Ill-Treatment*, THE GUARDIAN, Feb. 7, 2002, at 17.

⁴⁷ Harding, *supra* note 46, at 17.

⁴⁸ *Massacre*, *supra* note 44. See also Dehghanpisheh et al., *supra* note 41, at 11. “Over the three days that the first convoys of dead were arriving at Sheberghan, Special Forces troops were in the area [and] also a four man U.S. intelligence team, in combat gear, at the prison doing first selections for Qaeda suspects.” *Id.* A truck driver stated that “they opened the doors and the dead bodies spilled like fish.” *Id.* at 8.

⁴⁹ *Massacre*, *supra* note 44 (quoting an Afghan soldier in the Doran documentary, “Everything was under the control of the American commander”); see also Steinberg, *supra* note 44 (“American officers demanded the drivers take their containers full of dead and living victims to a spot in the desert and dump them.”).

⁵⁰ Dehghanpisheh et al., *supra* note 41.

⁵¹ Steinberg, *supra* note 44.

⁵² Carlotta Gall, *Study Hints at Mass Killing of the Taliban*, N.Y. TIMES, May 1, 2002, at 8.

of a high density of bodies in the trial trench, ultimately in agreement with other sources that have investigated the site such as the Afghan Organization of Human Rights, which estimates the number of buried at over one thousand.⁵³ Stories of the container crimes have also been corroborated from prisoners at the Sheberghan during interviews with members of Physicians for Human Rights (PHR).⁵⁴ According to a confidential U.N. memorandum, findings of investigations into the Dasht-e-Leili massacre have confirmed that the site “contains bodies of Taliban POW’s who died of suffocation during transfer from Konduz to Sheberghan.”⁵⁵ A Physicians for Human Rights report, entitled *Preliminary Assessment of Alleged Mass Gravesites in the Area of Mazar-i-Sharif, Afghanistan*, details a forensic investigation led by Dr. Bill Haglund.⁵⁶ During the investigation, Dr. Haglund and his team visited “site # 8” at Dasht-e-Leyli on January 20 and February 10, 2002; according to witness statements in the report, the site includes the disposal ground of some of the Taliban fighters who surrendered to the Northern Alliance in late November and Early December (the end of Ramadan) of 2001.⁵⁷ PHR’s investigations found evidence of heavy machinery movement such as track and blade marks, human bones so recent that they still had flesh and apparel on them, and scavenged skeletal material dispersed throughout the general area.⁵⁸ All the studies and investigations into the graves have corroborated the reports and speculations of the container crimes carried out by the Northern Alliance.

B. Is There a Legally Relevant Factually Link with the United States?

On a number of occasions, the U.S. government has given varying responses to reports of the container crimes and questions about U.S.

⁵³ Dehghanpisheh et al., *supra* note 41.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Press Release, Physicians for Human Rights, Physicians for Human Rights Welcomes U.N. Announcement of Afghan Graves Investigation; Forensic Team Stands Ready to Assist (Sept. 19, 2002), available at http://www.phrusa.org/research/afghanistan/report_graves_091902 (last visited Jan. 31, 2003).

⁵⁷ Press Release, Physicians for Human Rights, PHR Calls Upon Interim Administration of Afghanistan, International Community to Protect Alleged Mass Gravesites in Afghanistan (May 2, 2002), available at http://www.phrusa.org/research/afghanistan/report_graves_release.html (last visited Jan. 31, 2003) (“The examination of bodies and dignified burial of remains will contribute to the truth and accountability process, which is essential for future peace and stability in Afghanistan.”).

⁵⁸ Dehghanpisheh et al., *supra* note 41 (“Haglund and local laborers later dug down; at five feet, they came upon a layer of decomposing corpses, lying pressed together in a row. They dug a trial trench about six yards long, and in that short length found 15 corpses ‘They were scantily clad which was consistent with reports that [before they died] they had been in a very hot place.’”).

complicity.⁵⁹ According to Newsweek, the 595 A-team, part of the Fifth Special Forces Group based at Fort Campbell, Kentucky, was the shock group of the assault on the Taliban.⁶⁰ “They were the crucial link between the Northern Alliance militia on the ground and U.S. firepower in the air It was air strikes called in by Combat air controllers on the ground that destroyed the Taliban forces.”⁶¹ The 595’s assignment in Afghanistan was to work with General Dostum.⁶² At times its military coordination against the Taliban was significantly intricate in aiding Northern Alliance forces at various stages of the war.⁶³

The role of General Dostum is particularly important in the analysis of international criminal responsibility for the transgressions of criminal and human rights law in Afghanistan and its attribution to the United States government. Crimes committed by Dostum and fellow Northern Alliance members as well as United States officials can be tried in a national court under the doctrine of universal jurisdiction.⁶⁴

On December 25, 2001, weeks after the surrender at Konduz and subsequent transport of Taliban POWs, interim leader of Afghanistan Hamid

⁵⁹ See *U.S. Pushes for Taliban Graves Probe*, BBC NEWS, Aug. 19, 2002, available at http://news.bbc.co.uk/2/hi/south_asia/2204149.stm (last visited Jan. 26, 2003) (reporting that State Department spokesman Philip Reeker states that the U.S. is looking into the circumstances surrounding the events that are reported . . . as well as other allegations of human rights abuses and war crimes through our embassy in Kabul”); see also Marianne Bray, *U.S. Probe Mass Taliban Suffocations*, CNN, Aug. 21, 2002, at <http://europe.cnn.com/2002/WORLD/asiapcf/central/08/20/afghanistan.graves/?related> (last visited Jan. 3, 2003); see also *U.S. General Backs Probe of Reported Afghan Mass Graves*, CNN, Aug. 25, 2002, at <http://www.cnn.com/2002/WORLD/asiapcf/central/08/25/afghanistan.franks> (last visited Jan. 27, 2003) (quoting General Tommy Franks, “I think in each case the right thing to do is for people to go take a look . . . and then we’ll take the action that’s appropriate after that”).

⁶⁰ Dehghanpisheh et al., *supra* note 41.

⁶¹ *Id.*

⁶² *Id.* (“Invigorated by American air power and lubricated by the money distributed lavishly to wavering locals by the CIA paramilitaries-Dostum and his fellow Northern Alliance commanders swept north out of the mountains.”); see also Harding, *supra* note 46 (“The General [Dostum] has been on the U.S. payroll for nearly a year.”); Mathew Engel, *U.S., Iran Accused of Buying Warlord Support*, THE AGE, Feb. 9, 2002, available at <http://www.theage.com.au/news/world/2002/02/09/ffxe68vuexc.html> (last visited Jan. 27, 2003) (“The U.S. has spent at least \$7 million rewarding Afghan commanders for their support against the Taliban, according to a report in the Washington Times.”).

⁶³ Terry McCarthy, *Eyewitness to a Northern Alliance Assault*, TIME, Nov. 19, 2001, at 54 (“U.S. fighters have been hitting Taliban targets along the ridgeline [T]hat morning General Hassan told Time that a team of U.S. special forces had come in the night before to coordinate the bombing.”). “Over the radio Alliance commanders ask the American to give coordinates to the jets circling overhead.” *Id.*

⁶⁴ Slaughter, Burke-White, *An International Constitutional Moment*, 43 HARV. INT’L L. J. 1, 9 (2002) (“National courts have joined international tribunals in prosecuting individuals for violations of civilian protection law under the principle of universal jurisdiction. Belgium has convicted individuals of war crimes against civilian populations in Rwanda, Germany prosecuted war crimes against civilians in Bosnia.”).

Karzai appointed Dostum as deputy defense minister of the government.⁶⁵ Just prior to the appointment, the cabinet of the Karzai government took power from Northern Alliance troops.⁶⁶ Thus, although Dostum was not a member of the interim government during the period of the alleged container crimes, it seems as though the Northern Alliance forces were at the time, through incomparable military power, constructively the authorities of the state of Afghanistan before the transfer of power to the cabinet of the Karzai government.⁶⁷ In fact, for a period of time, Burhanuddin Rabbani, a commander of the Northern Alliance, was the internationally recognized President of Afghanistan.⁶⁸ This, however, does not impute liability in any way to the U.S. because being in constructive power of a land mass or region is certainly not the same as statehood.

The specific status of General Dostum during the period of time that the container crimes were committed can be couched in a number of ways. The first and most obvious scenario was as a commander of the Northern Alliance, which is not in control of Afghanistan, rendering him to the being a warlord that made decisions in a vacuum of government.⁶⁹ An argument can be made that Dostum qualifies under Article 9 of the Articles as exercising elements of governmental authority, specifically military deployment and combat, making his actions that of the government of Afghanistan. Assuming *arguendo* that Dostum's situation provides such a relationship,

⁶⁵ Carol Williams, *Afghan Leader Names Warlord to Defense Job to Avert Trouble*, L.A. TIMES, Dec. 25, 2001, available at <http://www.newsday.com/news/nationworld/nation/la-122501afghan.story> (last visited Feb. 1, 2002). General Dostum is deputy to Defense Minister Mohammed Qasim Fahim, also a Northern Alliance Commander who hailed Dostum's appointment as the first step toward a national Afghan army.

⁶⁶ *Id.*

⁶⁷ *Distantly, the Shape of Peace-Fighting Terrorism*, THE ECONOMIST, Nov. 24, 2001 ("The Northern Alliance has sometimes sounded like a government, for example in rejecting the deployment of thousands of troops that Britain had wanted to send."). "The Northern Alliance, the main victors in Afghanistan and the new masters of Kabul." *Id.*

⁶⁸ *Id.*

⁶⁹ Under this scenario, Article 8 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) becomes highly relevant. It states, "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct." *Draft Articles on State Responsibility for Internationally Wrongful Acts*, U.N. GAOR Int'l Law Comm'n, 53d Sess., Supp. No. 10, at art. 11, U.N. Doc. A/56/10 (2001), available at http://www.un.org/law/ilc/texts/State_responsibility/responsibilityfra.htm (last visited Dec. 20, 2002). Also relevant is Article 9, which provides,

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

Id. at art. 9.

query what the relationship of the Afghan government is to the U.S. forces. Article 16 of the 2001 Draft Articles provides,

A state which aids or assists another State in the commission of an internationally wrongful act by the latter is international responsible for doing so if: (a) that state does so with knowledge of the circumstances of the internationally wrongful acts; and (b) the act would be internationally wrongful if committed by that State.⁷⁰

Article 16 offers the ‘container crimes’ fact pattern a seemingly applicable rule because of the war crimes committed against the Taliban soldiers by the Northern Alliance under the direct leadership of Dostum assisted by the calls of the U.S. soldiers to leave the prison to avoid photographs by hovering satellites that witnessed the living shot in the graves prior to burial outside of Shreberghan.

An application of the rule in *Tehran Hostages* is a stronger finding of responsibility but not dispositive of the overall question of imputing their criminality. U.S. military personnel (Special Forces) were present at all points of movement of the Taliban prisoners who later became victims of war crimes. *Tehran* would require that they adopt the actions of the Northern Alliance as their own, and not merely congratulate them on their achievements. The case draws important lessons for future alliances of the United States, such as her relationship with the Kurdish forces in the war on Iraq.

The most persuasive basis for the U.S. to incur liability for the war crimes of the Northern Alliance is based on the analysis of the *Tadic* decision. *Tadic* involves accountability for international individual criminal liability for war crimes, the perfect staple for the prosecution of Rashid Dostum. The question of the problem thus becomes: Did the U.S. have overall control of the forces of Dostum?⁷¹

III. CONCLUSION

In the War on Terrorism, the United States must be clear in its relationships with States and non-State actors in the arena of military engagement. As the U.S. continues to lean on “allies,” it must ensure that it is not aiding or directing the commission of war crimes against any persons,

⁷⁰ *Id.*

⁷¹ Slaughter, *supra* note 64 (“The traditional effective control test for attributing an act to a state seems insufficient to address the threats posed by global criminals.”).

both civilian and military. In Afghanistan, the U.S. decided to fight alongside the Northern Alliance, at least those factions lead by General Rashid Dostum, to utilize their expertise in the fight against the Taliban.

In a land where war crimes have been rampant since the war against the Soviets by the Mujahideen, the U.S. did not choose a partner that set a significantly higher standard for human rights from that of the Taliban. It might be that strategic necessities carry the day in such conflicts, but international law does not recognize the situations that bring about a bond between a state and non-state actors who are violating humanitarian and human rights law as well as committing war crimes. The law only asks if the relationship existed, and to what extent it did.

The U.S. does not need any more rumors around the Middle East about its cooperation with war criminals. In the Occupied Territories of the Palestinians, the U.S. is accused of funding and aiding in the ethnic cleansing of the Palestinian people. In Iran, victims of chemical weapons attacks during the Iran-Iraq War blame the U.S. for aiding its then-ally Saddam Hussein and his brutal regime in developing those weapons and carrying out their delivery.

Although the Taliban soldiers are not a sympathetic bunch for the articulation of the laws of war, the framework of public international law has it that they too are entitled to its adherence. International standards of human rights must be brought to the dynamics of this area of the world. One would hope that the actions of the U.S. do not exacerbate a history of injustices against innocents and soldiers alike.

