

## **BOMBING OF AFGHANISTAN IS ILLEGAL AND MUST BE STOPPED**

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In a patently illegal use of armed force, United States and British bombs are falling on the people of Afghanistan. There are already reports of thousands of dead and wounded civilians from the same kind of American "smart bombs" used in Vietnam and Yugoslavia, with the promise of myriad casualties from unexploded cluster bombs.<sup>1</sup> Yet while the media bombards us with details about the tragic but few deaths from anthrax, we are shielded from photographs of the dead and injured in Afghanistan.

Jan Ziegler, Special Rapporteur on the Right to Food to the United Nations High Commissioner for Human Rights, warned on October 15, that "The bombing has to stop right now. There is a humanitarian emergency." Relief agencies left Afghanistan in the wake of the bombing. The arrival of winter is imminent, when up to 7.5 million Afghans internally displaced by the bombing will be beyond the reach of humanitarian aid.<sup>2</sup> Routing chief suspect Osama bin Laden from his cave with bombs is like finding a needle in a haystack, while mass starvation is inevitable.

The media has created a tidal wave of support in the United States for attacking the country that harbors bin Laden. In a

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recent Gallup/CNN/USA Today poll, 45 percent of Americans said they were willing to "torture known terrorists if they knew details about future terrorist attacks in the United States,"<sup>3</sup> notwithstanding the United States' ratification and implementation of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>4</sup>, and the fact that the prohibition against torture is considered to be *jus cogens*, a preemptory or inviolable norm of international law.<sup>5</sup>

Yet in spite of nearly universal global condemnation of the September 11 attacks, the bombardment of Afghanistan does not sit well in the Arab world, which is faced with pictures of wounded Afghan children and Israeli tanks rolling into Palestinian villages. *Akhbar el Yom*, one of the biggest newspapers in Egypt, featured a photograph of an Afghan child orphaned by the bombs. It sported the caption, "Is this baby a Taliban fighter?"<sup>6</sup> And the recent killings of rebel Northern Alliance supporters by misguided American bombs, has backfired and helped build support for the Taliban. European countries are also beginning to question the wisdom of the sustained bombing campaign, which is killing civilians and failing to accomplish its goal of making the world a safer place.<sup>7</sup>

Although the horror of the mass tragedy inflicted on September 11 is indisputable, the bombings of Afghanistan by the United States and the United Kingdom are illegal. This bombardment violates both international law and United States law, set forth in the United Nations Charter,<sup>8</sup> a treaty ratified by the U.S. and therefore part of the supreme law of the land under the U.S. Constitution.<sup>9</sup>

The U.N. Charter provides that all member states must settle their international disputes by peaceful means<sup>10</sup>, and no nation can use military force except in self-defense.<sup>11</sup>

The Security Council, made up of representatives from 15 countries from each region of the world<sup>12</sup>, is the only body that can authorize the use of force.<sup>13</sup> Only the Security Council

can decide what action can be taken to maintain or restore international peace and security.<sup>14</sup>

The Security Council has a series of options under the U.N. Charter: (1) it can suggest that the United States sue Afghanistan in the International Court of Justice (World Court), for harboring Osama bin Laden and others, if the evidence supports their involvement in these attacks, and seek their immediate arrests;<sup>15</sup> (2) it can order interruption of economic relations, rail, sea, air, postal, telegraphic, radio communications and the severance of diplomatic relations<sup>16</sup>; (3) it can establish an international tribunal to try those suspected of perpetrating the September 11<sup>th</sup> attack; (4) it can establish a U.N. force to make arrests, prevent attacks or counter aggression;<sup>17</sup> and (5) as a last resort, it can authorize the application of armed force with the Military Staff Committee.<sup>18</sup>

The United States has gone to the Security Council twice since the September 11 attack. The Security Council passed two resolutions, neither of which authorize the use of force. Resolutions 1368<sup>19</sup> and 1373<sup>20</sup> condemn the September 11 attacks, and order the freezing of assets; the criminalizing of terrorist activity; the prevention of the commission of and support for terrorist attacks; the taking of necessary steps to prevent the commission of terrorist activity, including the sharing of information; and urging the ratification and enforcement of the international conventions against terrorism (which the U.S. has not ratified).

Although the United States has reported its bombing to the Security Council as required by article 51 of the U.N. Charter, the Security Council has not authorized and could not authorize the use of unilateral military force by the United States and the United Kingdom, or NATO, which is not a U.N. body.

The bombing of Afghanistan is not legitimate self-defense under article 51<sup>21</sup> of the Charter because: 1) the attacks in New York and Washington D.C. were criminal attacks, not "armed

attacks” by another state, and 2) there was not an imminent threat of an armed attack on the U.S. after September 11, or the U.S. would not have waited three weeks before initiating its bombing campaign. The necessity for self-defense must be “instant, overwhelming, leaving no choice of means, and no moment for deliberation.”<sup>22</sup> This classic principle of self-defense in international law has been affirmed by the Nuremberg Tribunal and the U.N. General Assembly.

Even if the U.S. was authorized on September 11 to use military force under article 51, that license ended once the Security Council became “seized” of the matter, which indeed it did on September 12, by passing Resolution 1368, and reaffirming in Resolution 1373 on September 28 that it “remains seized” of the matter. By bombing Afghanistan, the United States and the United Kingdom are committing acts of aggression, which is prohibited by the U.N. Charter.

The universal desire is to feel safe and secure. The only path to safety and security is through international law, not vengeance and retaliation. George W. Bush and the U.S. Congress must take the following steps: (1) immediately stop the bombing of Afghanistan and Iraq, remove all ground forces, and refrain from illegally bombing or invading any other country; (2) contribute money and people power to the U.N. peacekeeping forces; (3) refuse to further eviscerate the U.S. Bill of Rights, in the name of national security;<sup>23</sup> (4) not repeat the actions of the U.S. government when it interned Japanese-Americans during World War II, and targeted suspected communists during the McCarthy era; (5) refuse to allow the racial profiling, and INS and FBI intimidation, of Arabs, Muslims and South Asians;<sup>24</sup> and (6) submit this matter to appropriate international bodies, including the United Nations and the World Court.

Since no state has executed an armed attack against the United States, this is a criminal matter that can be prosecuted in a number of possible venues. First, the United States could

bring criminal prosecutions in its domestic courts for crimes against humanity and for violations for international conventions<sup>25</sup> under the principle of *universal jurisdiction*, as Israel did when it prosecuted Adolph Eichmann for his role in the Holocaust.

Second, the Security Council could establish a special criminal tribunal for the September 11 attacks, as it did in Yugoslavia and Rwanda. The Montreal Sabotage Convention, which criminalizes the destruction of civilian aircraft while in service, is directly on point and should be used here.<sup>26</sup> It was invoked during the resolution of the dispute between the United States, the United Kingdom and Libya over the handling of the Libyan suspects in the Lockerbie bombing cases. Both the United States and Afghanistan are parties to that convention.

The International Criminal Court would not be an available forum, because 1) it has not yet come into force, as it has not yet received the 60 requisite ratifications; 2) its jurisdiction is limited to crimes occurring after it comes into force; and 3) the United States refuses to ratify the ICC statute, because it is afraid its leaders may become defendants in war crimes prosecutions.<sup>27</sup>

Former Soviet President Mikhail S. Gorbachev wrote in a recent op-ed in *The New York Times*, "it is now the responsibility of the world community to transform the coalition against terrorism into a coalition for a peaceful world order." He advocates leadership by the Security Council to take concrete steps such as accelerated nuclear and chemical disarmament, and urges United States ratification of the verification protocol of the convention banning biological weapons, as well as the treaty to prohibit all nuclear testing. Gorbachev also opposes the use of the battle against terrorism "to establish control over countries or regions," which, he maintains, would not only discredit the coalition; it would prevent its potential for building a peaceful world<sup>28</sup>.

On September 29, the day originally set for anti-

globalization protests, thousands marched in the streets demanding peace. Students on campuses across the country are mobilizing to oppose the bombing. Our anti-terrorism coalition must be true to its name, and aim its energy not at the innocent people of Afghanistan, but at building global peace.

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9. U.S. CONST., art. 6, par. 2.
10. *Id.*, art. 2.
11. *Id.*, art. 51.
12. *Id.*, art. 23 (1).
13. *Id.*, Chap. VII; art. 24.
14. *Id.*, art. 39.
15. *Id.*, art. 36 (3).
16. *Id.*, art. 41.
17. *Id.*, art. 42.
18. *Id.*, art. 46.
19. S/RES 1368 (2001), adopted 12 Sept. 2001.
20. S/RES 1373 (2001), adopted 28 Sept. 2001.
21. Article 51 of the U.N Charter provides: Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations.
22. *Caroline Case*, 29 BFSP 1137-8; 30 BFSP 19-6 (1837).
23. The Uniting and Strengthening America By Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT Act), rushed through Congress in the wake of September 11, vastly expands the government's ability to place wiretaps, invade e-mails, and hold immigrants in indefinite detention.
24. Hundreds of people, mostly of Middle Eastern descent, are being detained indefinitely in the United States, without charges or suspicion of connection to the September 11 attacks. Christopher Drew with Judith Miller, *Though Not Linked to Terrorism, Many Detainees Cannot Go Home*, N.Y. TIMES, Feb. 18, 2002, at A1.
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