

Report of the Committee of Experts on Nation Rebuilding in Afghanistan

December 10, 2001

INTRODUCTION

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

While many groups and organizations were working within the shadow of the Bonn Conference to rapidly consider how best to accomplish a myriad of important objectives, such as reinstating the rule of law, promoting economic development, designing a program of agricultural reform, and creating a transparent form of democratic government, on November 30th, 2001 the Public International Law and Policy Group and the New England Center for International Law and Policy convened a Committee of Experts to consider broader questions which might properly shape the international community's response to nation rebuilding in Afghanistan. In particular, the Committee of Experts examined the opportunity for constructive international community involvement arising from the recent development of contemporary norms of intermediate and evolving sovereignty developed from the recent precedents of Haiti, Bosnia, Kosovo, Sierra Leone, and East Timor, and the utility of creating a framework of conditionality to guide international involvement in Afghan nation rebuilding.

The November 30 meeting of twenty-five prominent foreign policy, military, and international legal experts was held as part of the "Intermediate Sovereignty" Project, which is described at www.intermediatesovereignty.org, and is funded by a grant from the Carnegie Corporation of New York. Participants at the meeting included the former Deputy Assistant Secretary of State for South Asian Affairs, President Clinton's Special Envoy to Yugoslavia, the former Deputy Legal

Counsel at the United Nations, a former legal adviser to the National Security Council, a former Ambassador, the Chairman of the American Bar Association's Section of International Law and Practice, and five former members of the Office of the Legal Adviser of the U.S. Department of State. Also participating were several leading academics, journalists, and experts from the U.S. Institute of Peace, the International Peace Academy, the Coalition for International Justice, the Public International Law and Policy Group, and the American Foreign Policy Council.

This report, written by Professors Michael Scharf and Paul Williams, is the product of the November 30 Meeting of Experts. The report should not be taken to reflect the view of any particular participant on the Committee, all of whom served in their individual capacity.

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

I. RELEVANT FACTS

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

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

Compounding the problems created by the sheer destruction of nearly a quarter-century of war, are unique internal and external economic and political factors. Unless the internal and external complications are addressed in tandem, it is unlikely that the primary strategic objectives of the United States and its allies can be achieved.

The internal factors include Afghanistan's lucrative trade in poppies, and the de facto ethnic and political partition of much of the country. Afghanistan currently produces eighty percent of the world's supply of pop-

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pies, which bring a profit up to 250 times greater than the profit generated by other crops. The organized crimes and social destruction associated with the poppy export enterprise will challenge even the most basic objectives of nation rebuilding in Afghanistan.

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

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

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

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

II. THE U.S. INTEREST IN AFGHAN NATION REBUILDING

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

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

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

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

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leadership, and a commitment to non-intervention by neighboring states, there is a real possibility that the unstable situation in Afghanistan will spawn the creation of new terrorists or other destabilizing networks.

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

III. GENERAL GOALS FOR NATION REBUILDING

Establish Non-Chaotic (neutralized) State

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

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

Identify Appropriate Governing Structures

The second general objective must be to adequately consider how best to facilitate the Afghan peoples' ability to establish the most appropriate form of government. While America's European allies will be quick to

push for a form of government similar to a West European democracy, a process must be created whereby the Afghan people are able to craft their own form of government. The difficult task will of course be to determine which entities legitimately express the will of the Afghan people.

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

Implement Intermediate Sovereignty

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

IV. SPECIFIC OBJECTIVES FOR NATION REBUILDING

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

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1. Establishment of a neutral, peaceful, transitional government that does not threaten the States in the region. Nineteenth Century Belgium or 1955 Austria would be good historical analogies of what the international community should press for. This is the main objective of the Bonn process, which may unfortunately have begun too late to be entirely successful in its implementation given that events on the ground, rather than rational policy, are largely dictating the make-up of the transitional government. Attaining this goal will also require the negotiation of an agreement of non-interference by all of Afghanistan's neighbors, including a pledge not to provide backing to any Afghan faction or to aspire for predominate influence in Afghanistan.
2. The destruction of al-Qaeda and end of Afghan support for terrorist organizations. In addition to a continuing U.S. military presence actively engaged in the search for al-Qaeda members, this will require ongoing efforts of the new Afghan government since many subversive elements have temporarily gone underground. Members of al-Qaeda that are taken into custody will have to be prosecuted according to international standards of justice. Amnesty for those responsible for war crimes, crimes against humanity, or the September 11 attack against the United States must be strongly opposed. In the long term it may be possible to expand the jurisdiction of the existing international criminal tribunal at The Hague to cover the leading members of al-Qaeda and the Taliban. Importantly, any peacekeeping or policing operation, headed preferably by Turkey or Great Britain, should not have as its mandate the destruction of al-Qaeda. This task should remain within the purview of those forces currently engaged in the combat operation.
3. Suppression of poppy production. Eighty percent of the world's heroin comes from Afghanistan. More American deaths are attributable to Afghan heroin than to the September 11 attacks. Thus, the U.S. has a significant interest in doing whatever is necessary to extinguish the Afghan narcotics trade. This will be extremely difficult, however, as seventy percent of the population of Afghanistan are farmers, and the leading cash crop is poppy production. Unless farmers are adequately compensated to substitute other crops for poppies or presented with other economic opportunities, pursuing this objective through strictly military means will almost certainly undermine support for the fragile transitional government.
4. Establishment of a secure environment, including demilitarization of Kabul and other major cities. Convincing the Afghan people to disarm may prove particularly difficult, but de-mining and de-

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

5. Peaceful and safe return of refugees. Over two million Afghan refugees are currently in camps in Pakistan and Iran. As in Bosnia, this raises difficult questions about where they should be returned. Obviously moving them into camps in Afghanistan is not the answer, as refugee camps are notorious for producing radicals, revolutionaries, and terrorists. Efforts must be undertaken to rebuild existing communities and restart local economies.
6. Establishment of accountable and transparent governmental institutions and a workable justice system. There is no existing legal framework in Afghanistan. The challenge of creating one from scratch will be even greater than that faced in Rwanda after the 1994 Genocide. But this is an area in which international organizations have a great deal of experience and a fairly good track record, provided adequate financial support of this effort is available. While the United States should play an active role in the development of a strategy and in the funding for a transparent government, it should not divert significant military or civilian personnel into the operation.
7. Recognition and enforcement of human rights and protection of minority rights, including in particular basic rights of women. Since 1995, the Taliban was identified as the worst human rights-violating regime in the world. Women in Afghanistan, who held the majority of professional positions (lawyers and doctors) during the conflict with the Soviet Union, were stripped of their rights under the Taliban regime. Although pursuing this objective may come at the expense of popular support of the new government, the reintegration of women professionals and the protection of women's rights serves the strategic (and moral) interests of the United States; in large part because they have not taken part in the widespread human rights violations attributable to most of the leadership structures of many of the parties represented in the interim government.
8. Institution of anti-corruption procedures and an accountability process, such as establishment of a truth commission and the "lustration" of culpable war lords. As in the case of Bosnia, the

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

V. THE ROLE OF THE CONCEPTS OF INTERMEDIATE
SOVEREIGNTY AND PHASED

Recognition in Achieving these Goals and Objectives

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

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

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

Taken together, intermediate sovereignty and phased recognition amount to a form of “soft international trusteeship.” Despite its colonial connotations, the term soft international trusteeship adequately describes many contemporary state building enterprises and forms a useful paradigm for understanding the future role of the international community in Af-

ghanistan. Most importantly it also helps to define the limits of international involvement and the notion that such involvement must work toward an end state of full sovereignty for Afghanistan.

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

Consistent with the concepts of intermediate sovereignty and phased recognition, the carrots and sticks which the international community can employ to induce the transitional Afghan government's adherence to the objectives set forth above include:

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

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

(3) Provision of IMF/World Bank loans and reconstruction assistance by donor countries. The threatened withholding of large IMF/World Bank loans ultimately induced Croatia to cooperate fully with the Security Council established International Criminal Tribunal for the Former Yugo-

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slavia. Similarly, the offer of \$1.3 billion in foreign assistance to Serbia conditioned on its surrender of Slobodan Milosevic to the Tribunal proved effective in inducing Serbia's cooperation. Rather than a grand lump sum payment, a series of large loans and foreign assistance grants for Afghanistan, each tied to the attainment of one of the objectives set forth above, would be the most powerful mechanism of attaining the full cooperation of the national and local Afghan authorities. Politically, however, the United States and other major powers are likely to lose interest in Afghanistan before all of the goals have been attained as the war against terrorism turns to other countries. To ensure that adequate financial resources are available, a trust fund could be created for Afghanistan, with release of money over time pegged to attainment of the stated objectives.

CONCLUSION

The lesson to be learned from previous attempts at nation building is not that all such efforts should be eschewed, but that they must be well-funded, subject to enforceable objectives via conditionality of aid and sanctions, and subject to strong and focused leadership. There is no question that rebuilding failed states such as Afghanistan is politically and economically costly and fraught with unforeseen peril. However, if the United States fails to assume a leading role in such a mission it runs the risk of winning the military conflict, but failing to secure a meaningful or lasting peace.

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