



Remarks by

John B. Bellinger
Legal Adviser, U.S. Department of State

XXIX th Round Table on Current Problems of International Humanitarian Law

San Remo, Italy
September 8, 2006

Mr. Bellinger: Thank you very much, Professor Patrnoic. It's wonderful for me to be here again with so many friends.

I had not intended to become a regular at this event, as much as I had enjoyed being with you last year, but as you know, Professor Patrnoic is a very persuasive individual and it's really a great tribute to him and to the work of the Institute that all of you are here tonight.

I had a tremendous visit with you all last year, and have enjoyed getting to know many of you through this and other contacts. One of the main priorities given to me by Secretary Rice is to be engaged more in a dialogue with the international community on international humanitarian law issues, so it was wonderful to be able to come back again.

I am going to try to give a broad tour d'horizon of the United States approach to international criminal justice, to how we deal with issues of justice and accountability around the world from local tribunals to international tribunals, and then end with the difficult issue that you all know we have been grappling with of justice for international terrorists. I will talk about our military commissions, including the President's big announcement earlier in the week.

Before I get started, very quickly I wanted to just note a couple of things that have happened since I was here last year.

First, of course, is our new Ambassador replacing Kevin Moley: Warren Tichenor from the U.S. Mission to the United Nations in Geneva. I hope you all have had a chance to meet him because he is very committed to these issues as well. So I think you have had a chance to see him.

[Applause].

Also, Clint Williamson who replaced Pierre Prosper as our Ambassador for War Crimes is here. I know you saw him on the panel yesterday, but again, Clint's background demonstrates just how seriously both President Bush and Secretary Rice take these issues. Many of you know Clint from his past work in the ICTY. He was at our Justice Department. He handled international criminal justice issues at the White House. He's a wonderful choice and really will be working very hard on these issues around the world. So I know many of you know him, but if you have not had a chance I hope you will get a chance to see him during the course of this conference.

[Applause].

Finally, I see so many people here who participated in both the diplomatic conference in December and then the Federation conference in June that adopted the Third Additional Protocol to the Geneva Conventions and the new emblem. I recall so vividly being on the panel here last year and ending my remarks by saying that it was important to move forward. At that point we did not even know that we would be able to have the conference. I just want to say thank you to the International Committee of the Red Cross, to the Swiss Government, and to the Federation. I see many people here who were instrumental in getting both of those conferences done.

All of us were disappointed that ultimately there could not be consensus, but these are difficult political issues, which is why it could not get done for 50 years. I think all of us are simply pleased that at the very end, as a result of very very hard, committed work and a real desire for a humanitarian outcome, those two conferences were finished successfully. So my particular gratitude goes out to all who made it possible.

THE BROAD U.S. APPROACH TO INTERNATIONAL CRIMINAL JUSTICE

The United States under any administration is absolutely firmly committed to accountability for those who have committed war crimes, genocide, or crimes against humanity anywhere in the world, and for achieving a robust system of international criminal justice.

I will frankly say I don't think the United States gets enough credit for all of the work that we do around the world to advance the cause of international justice, in terms of the financial contributions, the political work, the technical work, and the intelligence support. The issues surrounding the ICC sometimes over-shadow the work that the United States does to achieve international criminal justice and accountability around the world. These are matters in which Secretary Rice is particularly interested and has been very supportive, and I will mention a couple of the examples that have interested her.

When it comes to accountability and international criminal justice, one size does not fit all. We take a pragmatic approach that there is a spectrum of different options for achieving justice. We don't, for example, think that an international approach is always best.

In general, the first choice of the U.S. government is that justice should be done locally. Justice should be achieved by those people who are most directly affected, who can do prosecutions in their country using their criminal laws and using their own courts and individuals. That is, for example, why we have strongly supported the trials of Saddam Hussein and Iraqi officials in Iraq. I know that there was some controversy as to whether that should be left to the Iraqis or whether it should be moved out of Iraq to somewhere else in the world.

But there was a robust Iraqi justice system beneath the surface, with outstanding Iraqi judges. The capacity was there, and certainly the political will to investigate and prosecute the terrible crimes that had been committed by Saddam.

The United States has strongly supported those efforts. As you know, we have also encouraged the rest of the international community to lend a hand because the Iraqis themselves have asked for that support. While some of the initial trials were a little bit rocky, they have had a positive effect. The Iraqi people are absolutely riveted to see them on television, watching as the evidence is produced.

In other situations there is not the capacity, there is not the political will, or trials can't be done fairly. In those cases justice cannot be done locally. In those cases the United States supports an array of international tribunals. As you know, we were instrumental in the creation of both the ICTY and the ICTR. We have over the last decade provided half a billion dollars, far more than any country in the world, for the creation and maintenance of those organizations. And beyond that, we have provided the technical support, the intelligence support, the military capacity to really ensure that those tribunals are a success, and we continue to be extremely supportive of them. I know Clint talked earlier about our desire that the two tribunals move forward robustly with their work and cases be moved back locally when possible. But we continue to strongly support that work.

There is also the case of the Special Court for Sierra Leone, where we have been extremely supportive of the Special Court's efforts -- again, financially and politically. In Sierra Leone we had the conundrum with what to do with Charles Taylor. We had strongly supported bringing Taylor to justice. Secretary Rice was personally instrumental in making phone calls and pushing all of the leaders around the world who had different parts of this: with President Abasanjo to turn him over; with the Dutch to find a place for him to be tried using the facilities of the ICC and the Hague; and also to secure a place for him to serve his sentence if he is convicted. We have been involved in every step of the way to ensure that justice will be done in that case.

Our preference would have been that Charles Taylor be tried locally, as with the other cases before the Special Court for Sierra Leone. But for Taylor our feeling was that it would be potentially destabilizing because he is such a well-known individual with such support in different areas. Hence we had the unique situation of having the Special Court for Sierra Leone relocated to the ICC facilities in the Hague. Some wondered at the time if we would have concerns about this link to the ICC. We didn't have the slightest hesitation about using the ICC facilities for the Special Court. This was not the ICC trying Charles Taylor, but the Special Court for Sierra Leone.

But even with respect to the ICC, we have been pragmatic. Our concerns about the ICC are well known and don't need to be rehashed here. Obviously we share the goals of the International Criminal Court for international criminal justice and accountability. We have concern only about how the Rome statute was ultimately set up.

In the case of Sudan, where we would have also preferred justice for the genocide that occurred there to be done locally, there was not a local option that could ultimately be worked out quickly. So we supported the use of the ICC for the trials for those responsible for atrocities in Darfur. We worked on UN Security Council Resolution 1593 and did not block it despite our concerns about the ICC.

JUSTICE FOR INTERNATIONAL TERRORISM

So that's our overall approach to international criminal justice in a nutshell. What I want to spend the remainder of my time talking about are the special problems that the United States and other countries in the international community faced in meting out justice for international terrorist groups.

All of our countries historically have been able to deal with domestic terrorism or even a limited amount of international terrorism in our domestic systems. Many countries here such as Italy, Germany, the UK, others, even the United States, both historically and even since September

11th, have used our domestic criminal justice systems in appropriate cases where the groups are there, the individuals are there, the witnesses are there, and the evidence is all there. But what to do when one has a case like al-Qaida which is essentially like a nation state projecting force and committing acts of terrorism with the capacity and sophistication that only a nation state could previously muster from afar? So what to do with those sorts of individuals when they have committed crimes like what happened on 9/11, and where should they be tried?

An initial question is simply, what is the legal status of members of al-Qaida? Everybody here, and particularly the lawyers in the room know that this has been a vexing issue for all of us for the last five years, and one in which both the United States and particularly Europeans have disagreed. But what's interesting is despite some disagreement with the U.S. approach, there does not seem to be any other clear option.

One group of people says that members of al-Qaida should be treated under human rights law. They should be investigated, tried for their crimes, or released.

There are many others who say, no, those captured on the battlefield, having trained in al-Qaida training camps, who were captured by coalition forces acting pursuant to a UN Security Council Resolution, were part of an armed conflict. They should be treated under international humanitarian law.

What's interesting is that there really is no agreement amongst all of the different critics of U.S. policy on this issue on what exactly is the law that should apply.

One thing I have noticed in the last six to nine months as the United States engages in a more candid, direct dialogue with interested countries around the world is that people are beginning to recognize that there really is not a clear legal framework that applies to a group like al-Qaida.

So you'll see the studies that have been coming out in the last six months or so are beginning to say that. Without a doubt the legal framework applicable to al-Qaida is hazy and we all need to do more work on what the legal framework ought to be to apply.

That brings me to the approach that the United States has taken. After September 11th the President set up a structure of military commissions to try members of al-Qaida or other members of the Taliban who had committed war crimes. There had been a long history of the use of military commissions in the United States going back at least to the Civil War if not to our Revolutionary War, and it was recognized in our statutes.

Let me explain a little bit as to why we took the decisions that we did and then how we got to where we are now.

Of course the first question that I get is why don't you just use your own domestic justice system? Why do you have to have military commissions?

In the first place virtually none of the individuals captured, on the battlefield in Afghanistan or elsewhere, had ever set foot in the United States. Generally, although they had engaged in terrorist training and acts of terrorism, they had never done so in the United States. As a result, they had not committed violations of U.S. law on our books on September 11th.

Very few countries in the world on September 11th had extraterritorial criminal laws that reached activities outside their countries because we had not envisioned that there would be people who would be training in terrorist training camps halfway across the world who would come and

attack us.

So the first answer is that in most of these cases there were simply no domestic criminal laws that had been violated.

Does that mean that these people had done nothing wrong and that they should simply be released? I don't think so. I think it means there was a societal problem for which our societies together were not well equipped to respond. But more than that, practically speaking it would be virtually impossible to try someone captured on the battlefield pursuant to our criminal laws in the United States or elsewhere, because our systems work in the same way.

The first thing, when someone would be captured, is that under U.S. law you would have to read them their rights. We would have to have one of our soldiers capturing the person immediately slap handcuffs on them, say you're under arrest, you have a right to remain silent, let me give you a lawyer, and you should not speak until you have consulted with your counsel. That's not the way things work when you are on a battlefield.

Secondarily, as many of you know who are involved in criminal justice issues, you have questions of evidence and the chain of custody. So I think it would be very difficult if we had asked our soldiers to say, let me have your AK-47 and I will slip it into this plastic bag so that it can be marked for evidence and we will record the chain of custody and send it back to the United States.

Critics simply don't think about these practical realities that would be involved in these cases. All of us have the ideal of how a case ought to work, but in dealing with the problem of international terrorism it does not work very well.

We looked closely at our existing system of courts martial, which is the military system that we use to try our own soldiers if they have committed crimes -- everyday, ordinary crimes. But again, the same problems attach. There are immediate rights to counsel, speedy trial rights, evidentiary concerns, and in fact in many cases our courts martial simply didn't have the jurisdiction because they are focused on our own soldiers over international terrorists who are captured outside the United States.

Hence, because our legal system was not prepared to respond to having to deal with large numbers of people like this, we had to set up a system that would work. As we have in past wars -- in World War II, in the Civil War and other wars. So that explains why we set up military commissions.

Now as you well know the military commissions have been caught up in litigation in the United States for more than five years. This was not our objective. Our objective had been as we captured people who had been responsible for the terrible crimes on 9/11 -- whose anniversary we will observe on Monday -- that we would dispense timely and fair justice for the world to see. It has been, in fact, frustrating and disappointing for all of us in the United States, from the President on down, that this has been caught up in so much litigation in our country.

As you know, the case that ultimately went up to the Supreme Court and was decided in June had been wending its way through the court system for quite a while, and even then there was a lack of clarity. These cases are so difficult that even our judges could not agree. The trial court initially acknowledged the habeas corpus rights of Mr. Hamdan, who was a body guard for bin Laden. The trial court was reversed by the Court of Appeals, which said the President had

properly set up the military commissions. That decision was reversed again by our Supreme Court by a closely divided vote. There was a plurality opinion since Chief Justice Roberts could not participate.

Again, the law is unclear to all who look at it.

Let me explain the Supreme Court decision and what we have done in response.

The Supreme Court did not decide that the President may not have military commissions or that they are unconstitutional or that the President lacks the power to have them. In fact, the Supreme Court said that Presidents have long had military commissions, retracing the history of them through previous wars. The Court simply said the President had not set them up in the right way. The Court noted that U.S. military statutes acknowledge the President may set up military commissions but state that if there are deviations from the normal court martial structure the President has to justify those modifications. And in addition, if the commissions are to try crimes recognizable under the laws of war, international war crimes, they have to be consistent with the laws of war.

So the Supreme Court said the President had not adequately explained the deviations from our normal court martial system, why changes were necessary; nor had the commissions complied with the requirements of the Geneva Convention for a duly constituted court.

By duly constituted court, the Supreme Court was not saying it has to be a federal civilian court. It simply meant for the commissions to be duly constituted the President had to have followed Congress' specific procedures.

So they essentially said you need to go back and set them up the right way, then you may have military commissions.

They also made a very important decision that is well known to the people in this room, and that is that Common Article 3 of the Geneva Conventions applies to the conflict with al-Qaida.

Again, interestingly on the point of what body of law applies, the Supreme Court accepted that international humanitarian law, the law of war, applies to these individuals. They did not say you're in the wrong ball park, the wrong body of law; that you need to go back and try them under your domestic laws, as some people have suggested we need to do. They said yes, the laws of war, international humanitarian law, apply. They acknowledge in fact that al-Qaida was not a party to the Geneva Conventions and could therefore not be treated as prisoners of war or protected persons. But they did conclude that Common Article 3 applies.

What's interesting for the lawyers in the room is they did not conclude that Common Article 3 applies as a matter of customary international law. They said it applies as a matter of treaty law, that the conflict with al-Qaida is a conflict not of an international character because it is a conflict with a group that's not a nation. So I think this is an interpretation that none of us had foreseen, but that was the Supreme Court's interpretation, in concluding that Common Article 3 applies.

So that left us at the end of June with the need to come back with new legislation in order to move forward. And that brings me to the last part of my remarks: the President's big announcement on Wednesday.

THE PRESIDENT'S ANNOUNCEMENT

On Wednesday the President gave a major address covering all aspects of U.S. detainee policy and to try to address the many issues that are out there.

As you well know, of course, the headline was the President said that all of the individuals who have been held and are being questioned without public communication through ICRC access have been moved from those locations. There are none left. These individuals, who are the highest level al-Qaida planners and people who have personally conducted terrible acts of terrorism, have been moved to Guantanamo where they will have ICRC access. We have been working out the modalities of ICRC access this very week.

The President also said he wants these individuals to be tried for their crimes. He wants them to be brought to justice for the things that they have done.

When these individuals were first apprehended, the most important thing was to find out from them where additional attacks might occur. That was why they were being questioned, so that additional attacks could be prevented. After that it was important to be able to try them for their crimes.

In order to do that, the President wanted to be able to move forward on the military commission legislation, and on Wednesday he put forward a whole new package of legislation designed to address all of the concerns of the Supreme Court. We think this package will strike a middle road and be acceptable to our Congress. It's essentially a hybrid system between the commission rules that we had originally set up and our court martial rules to try to address as many of the concerns as possible that the court had raised.

I will not get into the details this evening. I'm happy on the margins tomorrow to chat with you about some of these.

I will simply say this. Many of you have heard through characterizations in the newspaper things that are just simply inaccurate, and some people have already come to believe they are not going to like these military commissions because they seem to be unfair.

I will tell you, with the changes that have now been made, the procedures are so similar to our court martials that I think it is hard to criticize. The President has provided clear explanations of the need for the relatively minor deviations necessary to meet the unique concerns of prosecuting terrorists captured around the world. People no doubt will still criticize, but I would just ask you, look closely at what the rules actually are.

One reason the President made that speech on Wednesday is our Congress will be in session for only a few short weeks and then will go out for as much as four months. The President was anxious that these individuals be tried. We are, as I said, frustrated that we have not been able to move forward with trials to see that justice is done, and the President is anxious for Congress to pass legislation so that we can move forward with those trials.

I want to end by reading you a little piece of the President's speech that you may not have seen because the press was largely focused on the domestic aspects of the speech. But at the end of the speech the President spoke directly to the international community. Let me read to you what he said:

We're engaged in a global struggle and the entire civilized world has a stake in its outcome. America is a nation of law and as I work with Congress to strengthen and clarify our laws here at home I will continue to work with members of the international community who have been our partners in this struggle. I've spoken with leaders of foreign governments and worked with them to address their concerns about Guantanamo and our detention policies and I'll continue to work with the international community to construct a common foundation to defend our nations and protect our freedoms.

So I want to end with that, to reiterate what the President said. The United States is a nation of law. We are absolutely committed to justice and accountability both internationally and nationally. When we need to hold our own people accountable, we do. There have been very clear abuses and we have held our people accountable, including our own intelligence officials, which is something I think you rarely see anywhere in the world. We support international justice and accountability in all of the forms that I have described to you. Right now we are determined to ensure that there is justice for the people who lost their lives, not only Americans, but the whole international community, on September 11th. And we are working to design a system that will ensure justice is done.

So thanks very much. I'm happy to take a few questions, but I want to let you get to your dinner.

[Applause].

###

Source: <http://geneva.usmission.gov/Press2006/0908BellingerSanRemo.html>