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Negotiating in the Shadow of Outlaws:* A Problem-Solving Paradigm for Unconventional Opponents

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Cover Page Footnote

This title derives from the phrase "negotiating in the shadow of the law," coined in Robert IL Mnookin & Lewis Kornhauser's *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950 (1979). When parties "bargain in the shadow of the law," they negotiate for outcomes that approximate what they perceive a court would determine. In contrast to these situations where parties share a common law which influences how they negotiate, this paper addresses situations where negotiators deal with people who do not share their laws, values, and traditions-individuals who would be considered "outlaws" by Western standards and beliefs. I B.A., Brown University, 1994; J.D., Georgetown University Law Center, Magna Cum Laude, 1999. Many thanks to Professor Carrie Menkel-Meadow for all of her helpful comments, questions, and suggestions.

NEGOTIATING IN THE SHADOW OF OUTLAWS:* A PROBLEM-SOLVING PARADIGM FOR UNCONVENTIONAL OPPONENTS

STEPHANIE R. NICOLAS**

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INTRODUCTION

International dispute resolution and global negotiations are on the rise.¹ With this increase, however, comes the increased likelihood that United States policy makers and negotiators will face “unconventional” opponents – opponents whose ideological, political, and social backgrounds are alien to Western culture and tradition. Far too often, United States policy makers and negotiators rely on adversarial, zero-sum models of dispute resolution in these situations.² They make assumptions about the opponent’s underlying needs, interests, and motives because these needs are often inaccessible or difficult to ascertain. But as history shows, such assumptions and strategies rarely produce effective long-term solutions, and often place the parties in a worse position.³

This paper contends that problem-solving models of negotiation are optimal in dealing with unconventional opponents.⁴ Unlike adversarial models, which ignore the needs and interests of the opponent, problem-solving paradigms assess an opponent’s underlying needs, interests, and cultural perspective. This analysis is critical when an opponent is unconventional because, for better or worse, culture will influence the way in which individuals perceive and approach critical elements in the negotiation process.⁵

To demonstrate the necessity of problem-solving principles when negotiating with unconventional opponents, this paper analyzes the United States’ negotiations and dealings with the Taliban for the extradition of Osama Bin Laden. United States officials have

1. See ROY J. LEWICKI ET AL., *ESSENTIALS OF NEGOTIATION* 233 (1997).

2. In adversarial bargaining, also called “win-lose bargaining,” “zero-sum bargaining,” or “competitive bargaining,” negotiators seek to maximize the value of a single deal, typically in a contest of wills. Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 *UCLA L. REV.* 754, 756 (1984). Adversarial negotiators perceive their opponents as adversaries, and they will use threats, pressure, and bluffing to achieve their single goal of victory. See ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 9-14 (2d ed. 1991).

3. The Vietnam War provides a compelling example of how U.S. policy makers unsuccessfully used an adversarial model of dispute resolution, and as a result underestimated their opponent’s resolve.

4. Professor Carrie Menkel-Meadow advocates the use of problem-solving models. See *supra* note 2 at 754. Problem solving is distinguishable from Fisher & Ury’s “principled negotiation” model in that it recognizes that “people” cannot always be separated from the problem. See FISHER & URY, *supra* note 2. Professor Menkel-Meadow contends that “[t]he personality of the other party or other negotiator itself may become a problem to be solved.” Menkel-Meadow, *supra* note 2 at 837. In these cases, then, understanding the other side’s personality and psychological perspective is an essential step in achieving a solution.

5. See Jeswald W. Salacuse, *Ten Ways that Culture Affects Negotiating Style: Some Survey Results*, *NEGOTIATION J.* 221, 237 (1998).

targeted Bin Laden as "the number one terrorist," and have stated that his capture and trial is critical to United States interests and national security.⁶ On August 7, 1998, the United States went so far as to bomb terrorist camps in Afghanistan where United States policy makers believed that Bin Laden was hiding. The Taliban, a fundamentalist Islamic group in Afghanistan, currently harbors Bin Laden. Some United States policy makers have suggested negotiating with the Taliban as an alternative for capturing this terrorist.

Part I provides a brief background of the Taliban movement and the United States' prior course of dealing with the Taliban leaders. Part II discusses the adversarial strategy that U.S. policy makers utilized to try to convince the Taliban to extradite Bin Laden, leading up to the August 7, 1998 bombings. Part III applies a problem-solving paradigm to the United States-Taliban negotiations to determine the Taliban's underlying needs, interests, and cultural perspective. Part IV argues that based on these underlying interests, U.S. policy makers should have adopted a problem-solving strategy. This part also suggests possible solutions that would have been apparent to problem-solving negotiators, but not to adversarial strategists.

I. THE ORIGINS OF THE TALIBAN MOVEMENT AND UNITED STATES INVOLVEMENT

Afghanistan has been a battleground for foreign domination since the nineteenth century. First, Britain controlled Afghanistan, and then in 1979, Soviet Communists invaded the country.⁷ During the Soviet occupation, the United States provided weapons, money

6. Bill Richardson, United States Ambassador to the U.N. has stated that "it's critically important that Bin Laden be stopped, that we will support any means for that to happen. He'd be brought to justice. He's an international criminal." Daryn Kagan & Leon Harris, *CNN Early Edition: Bill Richardson Discusses U.S. Missile Strikes in Sudan and Afghanistan*, (CNN television broadcast August 24, 1998), available in LEXIS, News Library, Curnws File; see also Steve LeVine & Raymond Bonner, *After the Attacks: Doubts Grow That the Taliban Would Give Up Terrorist Mastermind to the U.S.*, N.Y. TIMES, Aug. 25, 1998, at A6. In June, 1998, a federal grand jury in New York indicted Bin Laden for terrorist attacks against the United States. The indictment gives U.S. authorities the right to capture him and bring him to the United States to stand trial. See Gary Younge, *Bin Laden Allegedly Planned to Kill Clinton*, GUARDIAN (London), Aug. 26, 1998, at 10.

7. See Holger Jensen, *Slaughter of Diplomats Inflames Islamic Rivalry*, ROCKY MOUNTAIN NEWS (Denver, CO), Sept. 17, 1998, at 2A.

and logistical support to "freedom fighters," or Mujahideens, who wanted to expel the Soviets.⁸

When the Soviets finally left Afghanistan in 1989, the various Mujahideen factions turned on each other in an internecine war.⁹ During this time, anarchy prevailed: young girls were taken out of their homes and randomly raped, people were executed, and innocent civilians were brutalized. Afghanistan's civil war lasted for five years before the Taliban entered in 1994. Initially the United States supported the Taliban because it seemed that the Taliban could bring stability to the area.¹⁰ It took several months before United States policy makers realized the Taliban's approach to human rights.¹¹

The Taliban practice an extreme version of Islam. Their spiritual home is in the religious schools run by the Jamiat e Ulema, an Islamic party that rejects democracy and advocates religious revolution.¹² They have banned many activities that are permitted in other Islamic countries, including kite flying, chess, soccer, and music.¹³ They have also banned education for women and forbid women to work outside the home. Many countries in the international community have condemned the Taliban's approach to human rights, including the United States.¹⁴

Currently the Taliban control almost all of Afghanistan. They are still opposed, however, by anti-Taliban forces in the North who resist the strict Islamic law imposed by Taliban leaders. Like the resistance fighters in the North, most Islamic countries reject the Taliban's extreme version of law. Indeed, many of Afghanistan's neighbors are wary of the Taliban's advances because they do not want this extreme version of Islamic law to spread over their borders.¹⁵

8. Melinda Penkava, *NPR Talk of the Nation: Taliban*, (NPR radio broadcast, Aug. 24, 1998), available in LEXIS, News Library, Curnws File.

9. See Jensen, *supra* note 7.

10. See *id.*

11. See *id.*

12. See *id.*

13. See *id.*

14. See *id.*

15. See *Hearing of the Senate Foreign Relations Subcommittee on Near Eastern and South Asian Affairs*, FED. NEWS SERVICE, Oct. 8, 1998, at 1, available in LEXIS News Library, Curnws File [hereinafter *Hearings*].

II. THE UNITED STATES STRATEGY TO DATE: RELIANCE ON AN ADVERSARIAL STRATEGY

From a western perspective, the Taliban leaders represent unconventional opponents. In negotiating with these opponents, United States policy makers utilized an adversarial strategy. However, as discussed more fully below, there are many drawbacks to employing an adversarial strategy when negotiating with unconventional opponents.

A. *The Adversarial Model of Dispute Resolution*

The United States has adopted an adversarial model of dispute resolution in dealing with the Taliban for Bin Laden's extradition. An "adversarial," or "zero-sum" strategy is essentially a competition over who will get the most of a limited resource.¹⁶ Adversarial negotiators seek to maximize victory and do not attempt to understand an opponent's real needs and cultural perspective.¹⁷ They are more concerned with trying to influence and manipulate the opponent's needs and interests to achieve a desired outcome.¹⁸ Professors Roger Fisher and William Ury identify some common tactics used by hard bargainers in the context of an adversarial strategy including psychological warfare, allying with outsiders, seeking extreme demands, and employing lock-in tactics.¹⁹ The United States has employed each of these tactics at some point in its negotiations with the Taliban.

First, United States policy makers have employed an adversarial tactic that Professors Fisher and Ury describe as "psychological warfare." According to Fisher and Ury, "psychological warfare" is designed to make opponents feel uncomfortable, so they will have "a subconscious desire to end the negotiations as soon as possible."²⁰ An example of psychological warfare is a personal attack on an opponent, such as insults or name-calling. United States Secretary of State Madeline Albright used this technique when she publicly attacked the Taliban leaders, calling their practices "abominable" and

16. LEWICKI, *supra* note 1, at 30-62 (discussing adversarial strategies and hardball tactics); FISHER & URY, *supra* note 2, at 195 (discussing common tricky tactics that adversarial negotiators utilize).

17. Menkel-Meadow, *supra* note 2, at 764-66.

18. See LEWICKI, *supra* note 1, at 36

19. See FISHER & URY, *supra* note 2, at 129-40.

20. *Id.* at 135.

in violation of international law.²¹ Since then, other United States officials have denounced the Taliban leadership in public forums.²²

A second adversarial tactic that United States policy makers have used is allying with outsiders that are the Taliban's enemy.²³ For example, the United States has joined Iran and Russia, traditional adversaries of the Taliban, in calling for the Taliban to cease-fire in Afghanistan and release Bin Laden.²⁴ In addition, United States policy makers have garnished the support of the international community to denounce the Taliban. At a recent meeting of the United Nations, U.N. Secretary Kofi Annan announced that "the Taliban need to be told what the international community expect of them by way of minimum standards of behavior."²⁵

Third, United States policy makers have made many demands on the Taliban and have adopted a hard-line, "take it or leave it" approach.²⁶ This adversarial tactic, also described as "Boulwarism," creates little room for negotiation and compromise because it leaves the other side with only two options: completely capitulate or reject settlement altogether.²⁷ For example, policy makers have demanded that the Taliban release Bin Laden, cease-fire in Afghanistan, establish a broad-based government, stop drug trafficking, allow schooling for women, and radically change their human rights policies. On August 18, 1998, Secretary Albright declared that the Taliban had a "zero chance of entering the world community of civilized nations" unless they met these demands.²⁸

Fourth, United States officials have locked themselves into a position where compromise is difficult, if not impossible, by making demands and publicly adopting hard-line positions.²⁹ Advocates of adversarial strategies suggest that this "lock-in" technique is effective because it entrenches negotiators in a position so that they cannot compromise; if they do compromise, they will lose credibility.³⁰ On August 18, 1998, Secretary Albright employed this

21. Penkava, *supra* note 8.

22. *See id.*

23. *See* LEWICKI, *supra* note 1, at 155.

24. *See id.* at 30-62 (discussing adversarial strategies)

25. *Hearings, supra* note 15.

26. FISHER & URY, *supra* note 2, at 47.

27. *See id.*

28. *News Briefing on the U.S. Military Strikes in Afghanistan and Sudan, Washington, D.C., FDCH POL. TRANSCRIPTS, Aug. 21, 1998, available in LEXIS, News Library, Curmws File [hereinafter News Briefing].*

29. *See Hearings, supra* note 15.

30. *See generally*, Michael Meltsner & Phillip Schrag, *Negotiation*, IN PUBLIC INTEREST AND ADVOCACY: MATERIALS FOR CLINICAL LEGAL EDUCATION ch. 13 (1974) (suggesting the use of

technique by declaring an outright “war on terrorism;” she suggested that United States officials would rather fight than compromise with terrorists or individuals who harbored terrorists.³¹ By making these bold statements, Albright essentially locked policy makers into a position where any attempts to compromise would contradict her earlier statements, making it appear that United States leaders had backed down.

It is noteworthy that while United States policy makers have boldly demanded Bin Laden’s release in an open forum, they have not made significant attempts to negotiate privately with the Taliban for his release. When then United States Ambassador to the United Nations, Bill Richardson, spoke with Taliban leaders in April 1998, the meeting lasted less than one day. Ambassador Richardson’s main focus was the women’s rights issue, and he left the negotiations satisfied with a noncommittal response from the Taliban that they would control Bin Laden.³² United States policy makers failed to follow up with meaningful negotiations on the issue of Bin Laden’s extradition until they started making statements in public.³³

Finally, the United States used threats and force to pressure the Taliban leaders, exploiting the United States’ superior military capabilities.³⁴ On August 7, 1998, the United States bombed targets in Afghanistan and the Sudan, alleging that these targets were part of Bin Laden’s terrorist network and a threat to U.S. security.³⁵ This strike was a unilateral action by the United States, and no other foreign leaders were informed in advance.³⁶

In the aftermath of the bombing, U.S. policy makers offered no apology for their hardball tactics. In fact, Ambassador Richardson blamed the Taliban leaders for the strikes, stating that “[t]he important signal from the bombings is that, number one, the United States is not going to harbor terrorists – any country that harbors

both an adversarial model, and backing yourself in a corner, in order to become entrenched in a position that allows for no compromise).

31. *News Briefing*, *supra* note 28.

32. See Jensen, *supra* note 7; see also, Abid Aslam, *Limited Options in “War of the Future”*, INTER PRESS SERVICE, Aug. 25, 1998, available in LEXIS, News Library, Curnws File.

33. See *id.*; see also, *Islamic Groups Threaten New Attacks Against United States*, PLAIN DEALER, Aug. 20, 1998, at 7A, available in LEXIS, News Library, Curnws File [hereinafter *Islamic Groups*]; Sayad Salahuddin, *United States Envoy Richardson in Taliban’s Kabul*, AAP NEWSFED, Apr. 17, 1998, at 1, available in LEXIS, News Library, Curnws File.

34. See LEWICKI, *supra* note 1, at 179 (discussing sources of power in negotiations).

35. See generally, *News Briefing*, *supra* note 28.

36. See Jane Robelot, *CBS This Morning: Terrorism Expert Brian Jenkins Discusses Yesterday’s United States Missile Strikes and What It Will Take to Quell Terrorism*, (CBS television broadcast, Aug. 21, 1998), available in LEXIS, News Library, Curnws File.

terrorists, and secondly, that we will do whatever it takes to defend our people and our interests."³⁷ U.S. officials also hinted that a repeat attack would occur if the Taliban did not comply with their demands. One official warned that "countries like Afghanistan must know that if they harbor terrorists they cannot complain if we bomb..."³⁸

While U.S. policy makers justified the bombing as an act of self-defense under Article 51 of the United Nations Charter (which permits self-defense) they refused to provide credible evidence to support this claim.³⁹ When asked whether U.S. officials would share with Arab leaders any of the information that convinced them that the bombings were necessary, Ambassador Richardson responded "that's a decision the [P]resident has got to make."⁴⁰ To date, no evidence has been provided to the Taliban or other Arab leaders.

B. Deficiencies of the Adversarial Model

One of the biggest deficiencies of the adversarial model is that negotiators marginalize their opponent's personality, culture, and underlying needs.⁴¹ This danger is even greater where an opponent is "unconventional." Because unconventional opponents' belief systems and preferences are often inaccessible, negotiators are more likely to rely on stereotypes in determining how opponents will behave, or they may assume that opponents will share their own values.⁴² Professor Roy Lewicki describes this phenomenon as "perceptual distortion in negotiation."⁴³ According to Lewicki, such distortions impede an effective communications process and are typically at the heart of negotiation breakdowns.⁴⁴

In the case of the United States, policy makers misinterpreted how the Taliban leadership would react to their tactics and, as a result, the communications process broke down. They believed that the Taliban would yield to an adversarial model. They perceived the strike as "sending a powerful message" to Bin Laden and the Taliban

37. Kagan & Harris, *supra* note 6.

38. *Hearings, supra* note 15.

39. Policy makers insisted that the strikes were for reasons of self-defense, and not for retaliation. *See id.*; *News Briefing, supra* note 28.

40. Kagan & Harris, *supra* note 6.

41. *See* LEWICKI, *supra* note 1, at 235.

42. *See id.* at 135-36.

43. *Id.*

44. *See id.* at 138.

leaders that terrorists "cannot find safe haven ... in countries that harbor them ... "45

However, the results of the United States' adversarial strategy were inconclusive at best, and not what the United States expected. Instead of capitulating to pressure from the United States, Taliban leaders responded negatively, declaring that "[w]e will protect [Bin Laden] with our blood at all cost."⁴⁶ In addition, the strikes caused an immediate chill in the negotiation process. Mohammad Omar, the "supreme leader" of the Taliban told U.S. officials that, "after the missile attacks, there was nothing to discuss... [t]he missiles finished everything."⁴⁷ Perhaps part of the problem with the United States' strategy was that the Taliban leaders misinterpreted the United States' motives for the strike. Instead of feeling pressured to release Bin Laden, Taliban officials believed that, "the strikes were nothing more than a convenient diversion" for the U.S. President, "who has been stung by a sex scandal ..."⁴⁸

In addition to chilling the negotiation process, the air strikes communicated the wrong message to third parties, resulting in other unintended consequences that were harmful to United States' interests. Specifically, the air strikes damaged the international community's perception of the United States, increased the risk of retaliation by Bin Laden's supporters, and established a dangerous precedent for other nations to emulate.

1. *International Outrage*

Most of the international community was outraged by the United States' unilateral decision to bomb Afghanistan and the Sudan. Many nations regarded this decision as both arrogant and bullying.⁴⁹ Indeed, the United States had chosen troubling targets for the raid. One of the targets, the El Shifa pharmaceutical plant in Khartoum, had "accounted for [sixty] percent of Sudan's supply of medicines, including anti-malarial drugs"⁵⁰ As in other countries, the strikes

45. *Hearings, supra* note 15.

46. LeVine & Bonner, *supra* note 6, at A6.

47. *Taliban Rejects United States Offer of Talks, Demands Apology*, ASIAN POL. NEWS, Aug. 31, 1998, available in LEXIS, News Library, Curnws File.

48. See Luke Hunt, *Western Missions Mark Friday Prayers As Sign-post for Security*, AGENCE FRANCE PRESSE, Aug. 27, 1998, available in LEXIS, News Library, Curnws File.

49. See Bashir Maan, *Missiles Will Only Make Matters Worse*, HERALD (Glasgow), Aug. 24, 1998, at 13, available in LEXIS, News Library, Curnws File.

50. Aslam, *supra* note 32.

yielded a fierce anti-American sentiment in Pakistan.⁵¹ Sartaz Aziz, a Pakistan official, declared that the United States strikes were a violation of the sovereignty and territorial integrity of Islamic countries and a matter of grave concern for the people of Pakistan.⁵² Pakistan also filed a complaint with the U.N. Security Council after the attack, offering the discovery of an unexploded cruise missile on its territory as proof that the United States had violated its airspace during the attack on Afghanistan.⁵³ Moreover, the Taliban leaders, many international leaders interpreted the United States strikes in Afghanistan and the Sudan as motivated by U.S. President William Jefferson Clinton's need to create a distraction.⁵⁴ One international leader stated that U.S. policy makers were "being pressured to find a 'smoking gun' which Clinton could use to divert attention from his Grand Jury ordeal."⁵⁵

In addition to causing international outrage, the strikes provided the Taliban leadership with moral authority. After the strikes, Taliban leaders demanded evidence and apologies from the United States. In an ironic twist, they accused the United States of violating international law and norms.⁵⁶ Taliban leaders also accused President Clinton of "being a gangster" and wanting to conceal his "own dirty deeds."⁵⁷ Countries that had publicly condemned the Taliban leaders were forced to side with them. Two days before the strikes, Iran's supreme leader, Ayatollah Ali Khameni had described the Taliban as "a lowly and worthless group which has no understanding of Islam ..." ⁵⁸ After the attacks, however, Iran was forced to speak out in defense of the Taliban against the United States. As one Afghanistan citizen noted, "[i]t was really stupid for the Americans to attack Afghanistan ... [t]hey have boosted the image of the Taliban."⁵⁹

51. See Manoj Joshi, *Indo-U.S. Ties: Steeped in Duality*, INDIA TODAY, Sept. 7, 1998, available in LEXIS, News Library, Curnws File.

52. See *Pakistan May Sign CTBT*, THE STATESMAN (India), Aug. 21, 1998, available in LEXIS, News Library, Curnws File.

53. See Joshi, *supra* note 51.

54. See Maan, *supra* note 49, at 13.

55. *Id.*

56. See Taliban, *supra* note 47.

57. Jane Perlez, *After the Attacks, In Sudan: A Moderate Thinks U.S. Shot Itself in the Foot*, N.Y. TIMES, Aug. 25, 1998, at A6.

58. Dilip Hiro, *U.S. Missiles Upset the Regional Chessboard*, INTER PRESS SERVICE, Aug. 24, 1998, available in LEXIS, News Library, Curnws File.

59. John Sweeney, *From the Bazaars to the Hillside, They See a Long War Looming*, OBSERVER (London), Aug. 30, 1998, at 18, available in LEXIS, News Library, Curnws File.

2. *Emboldened Bin Laden's Supporters*

In addition to alienating the international community, the strikes emboldened Bin Laden's supporters and increased the likelihood of retaliation against the United States. According to one Muslim living in Pakistan, "[a] week ago no one had heard of Osama [B]in Laden ... [n]ow someone in the bazaar has two posters of him for sale."⁶⁰ One scholar of Islam, Abdulrahman Abuzayd, stated that the Americans have "created a Muslim hero" out of Bin Laden, "whereas last week he was considered a fanatic nut."⁶¹ Indeed, past efforts by the United States to combat terrorists by air strikes and military raids have resulted in subsequent retaliation against the United States. For example, when the United States bombed Libya in 1986, after terrorists linked to the Libyan government killed an American soldier, Libyan agents responded two years later by blowing up an American Pan Am jumbo jet.

3. *A Dangerous Precedent Established*

Finally, the United States air strikes established a dangerous precedent for other countries to engage in preemptive bombing in the name of self-defense. For example, following the logic of U.S. officials, "Iran could claim the right to retaliate against U.S. factories that supplied precursor chemicals used by Iraq in bombing Iran during the 1980s."⁶² Indeed, after the strikes, United States Undersecretary of State Tom Pickering had to caution India against emulating the American strategy by engaging in preemptive air strikes against Pakistan.⁶³

60. *Id.*

61. See Perlez, *supra* note 57, at A6.

62. Aslam, *supra* note 32.

63. See Joshi, *supra* note 51.

III. APPLYING A PROBLEM-SOLVING PARADIGM TO THE UNITED STATES-TALIBAN NEGOTIATIONS

Negotiation scholars define problem solving as "an orientation to negotiation which focuses on finding solutions to the parties' sets of underlying needs and objectives."⁶⁴ Instead of focusing on techniques to manipulate an opponent's needs and interests, problem solvers attempt to understand an adversary's real needs and objectives, and focus on solutions based on common interests.⁶⁵ When negotiating with an unconventional opponent, such as the Taliban, it is critical to understand the other side's perspective. The greatest dangers are to judge an opponent based on false stereotypes and make generalizations about an opponent's values and interests that prove to be untrue. As discussed in part II above, U.S. policy makers made certain assumptions about the Taliban – including assumptions that they would respond to force. Had they more thoroughly considered the Taliban's interests and cultural perspective, however, they may have adopted a different strategy.

In applying a problem-solving model to the United States-Taliban negotiations, it is critical to first assess the underlying needs and goals of the parties. To this end, exploring the United States' interests, needs and objectives is crucial. In addition, it is necessary to analyze the Taliban's cultural perspective, needs and interests.

A. *The United States' Interests, Needs, and Objectives*

The United States wants to extradite Bin Laden with the lowest possible long and short term costs. Specifically, policy makers want to: 1) capture and try Bin Laden, 2) minimize the danger of empowering an extreme Taliban regime, and 3) save face among constituents, both at home and abroad.

On a more fundamental level, policy makers want to ensure that any agreement they reach with the Taliban is enforceable. Enforceability is critical because U.S. officials are skeptical about the Taliban's willingness to negotiate for Bin Laden's release. Diplomats who have dealt with the Taliban have expressed doubts that such negotiations could succeed.⁶⁶ The Taliban leaders "have repeatedly failed to keep promises to [U.N.] agencies and Western governments," including "promises to stop the opium trade, to form

64. Menkel-Meadow, *supra* note 2, at 794.

65. See LEWICKI, *supra* note 1, at 64.

66. See LeVine & Bonner, *supra* note 6, at A6.

a broad-based government and to ease its restrictions on women ..."⁶⁷ U.S. experts also believe that the Taliban will not relinquish Bin Laden largely because of his relationship to Mohammad Omar.⁶⁸ Bin Laden has provided the Taliban movement with substantial financial resources and is one of the few individuals whom Omar has brought into his inner circle.⁶⁹

B. The Taliban's Perspective: Culture, Needs, and Interests

When considering the Taliban's perspective, the Taliban's cultural perspective should first be assessed, specifically the United States needs to analyze how the Taliban leaders perceive themselves, and how they perceive the United States and U.S. policy makers. Second, the Taliban's underlying needs and interests must be fully understood and explored. Finally, it is critical for the U.S. negotiators to determine the Taliban's risk-aversion, or their willingness to even negotiate with the United States for Bin Laden's extradition.

1. The Taliban's Cultural Perspective

Professor Lewicki defines "culture" as the shared values and beliefs held by members of a group over time.⁷⁰ Research suggests that the culture of a negotiator affects critical aspects of the negotiation process, such as how negotiators perceive themselves, and how they perceive and respond to their opponents.⁷¹ In order to understand what influences the Taliban's behavior and actions, U.S. policy makers need to understand the Taliban's cultural perspective.

a. The Taliban's Perception of Themselves: Their Culture and Divine Mission

The Taliban's ultimate mission is to defeat the resistance movement in North Afghanistan and to unify Afghanistan under a single regime.⁷² The Taliban leaders believe they have a divine calling for what they have done and for what they have yet to

67. *Id.*

68. As stated *supra*, page 11, Omar is considered the "supreme leader" of the Taliban movement.

69. *See id.*

70. LEWICKI, *supra* note 1, at 238.

71. *See id.* at 235.

72. *See* Pamela Constable, *The Taliban vs. the Rest of the World*, WASH. POST, Sept. 25, 1998, at A1.

accomplish.⁷³ Because they are unrelenting in their goal to fulfill this mission, they will not be dissuaded by threats of force from foreign nations. As one expert on Muslim culture noted, "[t]he tenacity of the Afghan fighter is renown ... whether it be days or years, the persistence to defend is there ... the long history of conflict, war in Afghanistan, does not suggest that any foreign interference will be ultimately successful."⁷⁴

The Taliban leaders do not understand the Western world's condemnation of their regime. They believe that the people of Afghanistan have greatly benefited from their rise to power, and they credit their strict interpretation of Islamic law for bringing peace and stability to Afghanistan.⁷⁵ Prior to the Taliban's arrival, women were raped randomly, villages were plundered, and anarchy prevailed.⁷⁶ When they came to power, the Taliban leaders put an end to this lawlessness, instilling a system of order. In addition, the Taliban leaders do not understand the United States emphasis on their treatment of women. Taliban leaders contend that they seek to "dignify women by sheltering them from men - in contrast to the 'degradation' of women in modern Western life."⁷⁷ Mauwi Qaalmuddin, the Taliban's Deputy Minister for Enforcement of Islamic Virtues argues that "[t]he countries that shout about freedom for women want to use them only for prostitution and entertainment until they get old and useless."⁷⁸ Taliban leaders regard the United States' demands for women's rights especially outrageous because they believe that the United States degrades women more than any other nation. Indeed, the President of the United States, William Jefferson Clinton, has committed crimes against women that are punishable by being "stoned to death" in the Taliban's culture.⁷⁹

The Taliban's reluctance to release Bin Laden also stems from their culture. The Taliban leaders follow a simple code of honor, the Code of the Pathan Warriors: "if someone knocks at your door, even your own worst enemy or a murderer, it's your duty to give him sanctuary from his pursuers."⁸⁰ In fact, Taliban leaders frequently

73. See *Hearings*, *supra* note 15.

74. *Id.*

75. *Afghan-Iran Standoff Serious, Says Pakistan*, INDEPENDENT, Oct. 6, 1998, available in LEXIS, News Library, Curnws File [hereinafter *Standoff Serious*].

76. See Penkava, *supra* note 8.

77. Constable, *supra* note 72, at A1.

78. *Id.*

79. See *Hearings*, *supra* note 15.

80. Tim McGirk, *Pakistan Seizes a Suspect in the U.S. Embassy Bombings*, TIME (Magazine), Aug. 31, 1998, at 34.

invoke this Code when they are asked why they shelter Bin Laden.⁸¹ A second reason why the Taliban may be unwilling to release Bin Laden is their fear that this action could trigger protest and outrage. Many individuals in the Muslim world believe that Bin Laden is a hero. Some of his supporters have warned that “[i]f any government tries to hand him over to the Americans, all good Muslims will rise and overthrow it.”⁸² This warning stems from another Pathan Warrior Code, “if someone mistreats your houseguest, it’s your duty to take revenge.”⁸³

b. How the Taliban Leaders Perceive the United States

In examining the Taliban's perception of the United States and U.S. policy makers, three conclusions emerge. First, the Taliban leaders resent U.S. ethnocentrism and bias. Second, the Taliban leaders fear and distrust the United States. Finally, the Taliban leaders do not categorically reject Westerns, but rather they reject Western values. These conclusions are discussed below.

The Taliban leaders resent Western ethnocentrism and the United States' public disdain for their values and culture. When Western relief organizations visited Afghanistan to provide aid in 1998, these groups immediately clashed with the local Taliban leadership. Openly rejecting the Taliban's authority and questioning their religious beliefs, the relief organizations “assumed some kind of moral superiority.”⁸⁴ Taliban leaders, used to having their authority respected in their communities, were outraged by the Westerners' open disregard of their laws and customs.⁸⁵

In addition, Taliban leaders resent the American “bias” against the Arab world. As one expert of Muslim culture noted, “[b]eneath much of the Taliban's animosity lies a deep-seated insecurity among Muslims toward Western powers, something the United States has often overlooked in discussing the Islamic terrorist threat.”⁸⁶ This perception is exacerbated by what the Taliban and the rest of the Arab world regard as the United States' “blatantly pro-Israel” bias.⁸⁷

81. *See id.*

82. *Id.*

83. *Id.*

84. Barry Bearak, *Afghans Ruled by Taliban: Poor, Isolated, but Secure*, N.Y. TIMES, Oct. 12, 1998, at 1.

85. *See id.*

86. Marion Lloyd, *Islamic Seminary Breeding Hatred for U.S. and Its Culture*, HOUSTON CHRON., Sept. 1, 1998, at A7.

87. *Id.*

The Taliban leaders and the Arab world resent the United States for supporting the Israeli military occupation of Palestinian and Arab lands.⁸⁸ They argue that Israel has defied every U.N. resolution on Palestine since 1948, but nobody challenges them because the United States is "always there to use its veto and to back and defend Israel in any confrontation, military or diplomatic."⁸⁹ The Taliban and other Muslim leaders also complain that Israel can produce nuclear bombs with total immunity while no other country dares do that and "escape the wrath of the [United States]."⁹⁰ Indeed, some Arabs contend that this "blatant partiality" of the United States "is the root cause of the growing extremism" among Muslims.⁹¹ Some Western diplomats recognize the American bias against the Arab world. These diplomats, for example, have argued that the United States should have offered the Sudan some reward for its attempts to change, and its expulsion of Bin Laden.⁹² The lack of response by the West, coupled with the 1998 attack on the pharmaceutical plant in the Sudan, only increases resentment in Muslim nations and does not provide any incentives for other Muslims, such as the Taliban, to comply with United States' demands.⁹³

The reasons for the violence of Bin Laden and the Taliban's anti-foreign attitudes harken back to the eighteenth century - when Western powers first occupied the Muslim world.⁹⁴ Like many Muslims, the Taliban leaders fear United States occupation and domination, because they believe that the United States wants to take over the world and impose Western values on all cultures.⁹⁵ "People in the underdeveloped world and especially the Islamic world have now become convinced that with the death of the Soviet Union the Americans are seeking world domination, particularly of those countries with natural resources that can be exploited to their advantage."⁹⁶ Taliban leaders point to the example of Saudi Arabia to illustrate this point. They contend that "the Saudi foreign minister has repeatedly told [American troops] to leave but they have

88. See Aslam, *supra* note 32.

89. Maan, *supra* note 49, at 13.

90. *Id.*

91. *Id.*

92. See Aslam, *supra* note 32.

93. See Perlez, *supra* note 57, at A6.

94. See *id.*

95. See Lloyd, *supra* note 86, at A7 ("Americans want to dominate the whole world because the U.S. is an aggressor," says Qari Shabir Ahmad, director of the Marqaz Uloom I Islamia school").

96. Maan, *supra* note 49, at 13.

arrogantly ignored his demands."⁹⁷ Saudi Arabia contains the "holiest places" of the Islamic world, and many Muslims believe that the presence of American forces pollutes the atmosphere there, "desecrating their holy places."⁹⁸

In addition to fearing United States domination, Taliban leaders distrust U.S. leaders and question their sincerity. Omar, the Taliban leader, has publicly expressed this opinion, stating that President Clinton is not someone with whom he can negotiate. He believes that Clinton "should be removed from power and stoned to death because he is a confessed sinner and a person of bad character."⁹⁹ Also, the Taliban leaders doubt the sincerity of the American leaders, believing that they are only interested in Afghanistan so that they can exploit its oil-rich land, and are not really concerned about the welfare of the Afghan people.¹⁰⁰ Indeed, the United States Central Intelligence Agency spent three billion dollars in Afghanistan's war to expel the Soviets, but abandoned the country to anarchy once the Soviets left.¹⁰¹

Finally, the Taliban leaders perceive the United States leaders as hypocritical. One U.S. official has stated that "the United States would be the first country in the world, given our traditions of political tolerance and freedom of thought and expression, to acknowledge the right of peoples all over the world to hold their views."¹⁰² By the same token, however, U.S. policy makers are unwilling to acknowledge the Taliban's rights to their belief systems because these beliefs contrast sharply with Western culture.

Despite the Taliban's resentment and fear of the United States, it is important to emphasize that the Taliban does *not* reject Westerners - just Western values.¹⁰³ Indeed, Taliban leaders "remember with gratitude" the United States' efforts to help expel the Soviets in the 1980s.¹⁰⁴ The first U.S. official to meet with Taliban leaders was Senator Hank Brown of Colorado in 1996.¹⁰⁵ Since then, United States State Department officials and other officials have met regularly with the Taliban, and the Taliban leaders have expressed

97. *Id.*

98. *Id.*

99. Jensen, *supra* note 7, at 2A.

100. See Penkava, *supra* note 8.

101. See *id.*

102. *News Briefing*, *supra* note 28.

103. See *id.*

104. See *Taliban Supremo Asks Osama Bin Laden Not to Harm Saudi Interests*, AGENCE FRANCE PRESSE, Mar. 26, 1998, available in LEXIS, News Library, Curnws File.

105. See Penkava, *supra* note 8.

an eagerness to continue engaging in an open dialogue with the United States.¹⁰⁶ Omar has stated that, “[o]nce we can establish a real government to work for the nation, we hope the Americans and the world will come through our door, not through the window. If they come through the door, we will offer them tea.”¹⁰⁷

In addition, Taliban leaders have proven their willingness to negotiate and work with U.S. businessmen. After the Soviets left Afghanistan in 1989, the U.S. oil firm, Unocal, approached Taliban leaders regarding the creation of a 1.9 billion dollar pipeline that would run through Afghanistan.¹⁰⁸ Unocal was able to secure the contract with the leaders by exhibiting good “hospitality,” putting the Taliban delegation in five-star Houston hotels and granting them every wish.¹⁰⁹ Thus, it is evident that Taliban leaders do not hate all Westerners, and are able to work with them toward mutually rewarding ventures.

2. *The Taliban's Needs and Interests*

a. *Recognition and Legitimacy*

The Taliban desperately want to be recognized as a legitimate Islamic state. In fact, some experts attribute their extremism to the need to prove that they are a bona fide Islamic regime.¹¹⁰ A second possible reason for this extreme, also stemming from a need for legitimacy, is their desire to satisfy the sponsors of the Taliban movement, the Saudi Wahabis.¹¹¹ The Saudi Wahabis is one of the most extreme sects and believes in very conservative views regarding women. They are also influenced by other conservative elements from Pakistan.¹¹²

In addition, the Taliban leaders want recognition from the international community, and are concerned about how other nations perceive them.¹¹³ Taliban officials repeatedly say they want

106. *See id.*

107. Constable, *supra* note 72, at A1.

108. *See* Joyce M. Davis, *Iran-Afghan Trouble Could Favor U.S.*, PITTSBURGH POST GAZETTE, Sept. 27, 1998, at A10.

109. Jensen, *supra* note 7, at 2A.

110. *See* Penkava, *supra* note 8.

111. *See id.*

112. *See id.*

113. T. Kumar, Advocacy Director for Amnesty International Asia, said that every time the Taliban comes to meet with US officials, they also come to Amnesty to talk to them because they can explain their form of human rights. The Taliban has made threats to Amnesty and other human rights organizations. Omar issued a warning in May to Amnesty that they should

'positive' relations with other nations, and express disappointment that they have not been recognized as the controlling party in Afghanistan.¹¹⁴ On many occasions, Taliban leaders have stated that they do not want other nations to regard them as terrorists, or as a nation that harbors terrorists. Following the U.N. Security Council's call to Afghan groups to stop protecting terrorists, Omar publicly stated that "[t]here is no terrorist in our country, nor will we offer shelter to any terrorist."¹¹⁵

b. Security

The Taliban are in the middle of a civil war and are insecure about their control inside Afghanistan. They are also wary that foreign aggressors, such as the United States, will interfere in this civil war. In addition to national security, the Taliban leaders are concerned about the movement's financial security. Bin Laden has supplied the Taliban with significant funding, which the Taliban leaders need to fulfill their mission of uniting and rebuilding Afghanistan.¹¹⁶

3. Risk-aversion and Willingness to Negotiate

Despite the initial hard-line statements by Omar to defend Bin Laden, there are signs that the Taliban are willing to negotiate with the United States for the extradition of Bin Laden.¹¹⁷ According to Professors Fisher and Ury, where a party refuses to negotiate, it may be because of another reason, and a negotiator should examine this underlying reason to overcome an opponent's resistance.¹¹⁸ In the Taliban's case, this underlying reason may be based on their fear of appearing weak in the eyes of the Muslim world. If they turn over a former "freedom fighter" and Islamic hero to the United States without protest, their credibility as a legitimate Muslim regime may be undermined.

Significantly, Taliban leaders have said that they will discuss extraditing Bin Laden to U.S. officials if the United States presents credible evidence that he is involved in terrorist activity. Wakil

"expect serious consequences for the reports" they are publishing about the Taliban's human rights practices. *Id.*

114. See Constable, *supra* note 72, at A1.

115. *Taliban Chief Rejects Harboring Terrorists in Afghanistan*, AGENCE FRANCE PRESSE, Aug. 29, 1998, available in LEXIS, News Library, Curnws File.

116. See *Hearings*, *supra* note 15.

117. See LeVine & Bonner, *supra* note 6, at A6.

118. See FISHER & URY, *supra* note 2.

Ahmed Mutawakil, the second-ranking official in the Taliban's Supreme Council, told U.S. officials that "[i]f you call someone a terrorist, you must have proof. If there is proof, we will certainly sit down and talk to the [United States]."¹¹⁹ Taliban leaders have also "offered to try Bin Laden in an Islamic Sharia court if the US provided credible evidence against him."¹²⁰ In addition, the Taliban leaders are not irrationally committed to Bin Laden. Their priority, after all, is to unify Afghanistan, and they will not risk this goal to protect Bin Laden. Some Taliban leaders clearly perceive Bin Laden as a liability inherited from the previous Afghan government and are eager to dispose of him.¹²¹

Omar also has proven his willingness to side with the United States against Bin Laden. After Bin Laden's threat to the United States following the air strike, Omar harshly rebuked Bin Laden, stating that this threat was a "violation" of Bin Laden's commitment not to engage in any political or military activities while on Afghan soil.¹²² He warned Bin Laden that "[t]here cannot be two different and parallel emirates in Afghanistan. We have a central Taliban-led authority ruling the country and it ought to be obeyed."¹²³

IV. WHY A PROBLEM-SOLVING PARADIGM IS OPTIMAL

In adopting an adversarial model of dispute resolution, U.S. policy makers made certain assumptions about the Taliban's underlying needs and interests, and determined that the Taliban would respond to the use of force and threats. As discussed above, however, these assumptions were erroneous. The problem-solving model would have been optimal in this situation for three reasons. First, by analyzing the above-discussed needs, interests, and cultural perspective of the Taliban, U.S. officials could have realized that an adversarial strategy would chill the negotiation process. Second, by addressing these concerns, a problem-solving model would have increased the likelihood that U.S. policy makers could reach their objective by generating more solutions that were satisfactory to both parties. Third, problem-solving models create better long-term

119. *Taliban Willing to Discuss What to Do With Osama Bin Laden*, AGENCE FRANCE PRESSE, Aug. 20, 1998, available in LEXIS, News Library, Curnws File.

120. *Shah Alam, Bin Laden Revenge Vow Over U.S. Missile Raid Irks Taliban Chief*, AGENCE FRANCE PRESSE, Aug. 24, 1998, available in LEXIS, News Library, Curnws File.

121. *See id.*

122. *Bin Laden Pledges Not to Threaten U.S. from Afghan Soil*, AGENCE FRANCE PRESSE, Aug. 24, 1998, available in LEXIS, News Library, Curnws File.

123. Alam, *supra* note 120.

solutions – an outcome that is critical in situations such as this one where the parties will likely have repeat encounters.

A. Problem Solving Minimizes the Danger of Chilling Negotiations

Based on the analysis of the Taliban's needs, interests, and cultural perspective, U.S. policy makers should have realized that an adversarial strategy of dispute resolution would chill the negotiation process. Specifically, they would have realized that this strategy would negatively affect the negotiation process because it would: (1) exacerbate the Taliban's fears that the United States is power hungry and cannot be trusted and (2) increase the Taliban's resolve to resist outside forces.

With regard to the first effect, exacerbating the Taliban's fears, policy makers failed to realize that tactics and strategies only work if an opponent understands the intended message. In this case, the Taliban leaders did not understand the intended message. As one Afghanistan citizen living in Pakistan noted, "the Taliban and their friends across the Arab world, do not speak the same language as the United States. Instead of the intended message of the United States missiles, they see it as the act of a corrupt and depraved President" and "[t]hey see the corrupt and depraved culture of the West seeking to destroy Islam."¹²⁴ As discussed above, the Taliban leaders already fear that the United States wants to dominate the Muslim world. By attacking Afghanistan and the Sudan on August 7, 1998 without any warning, U.S. policy makers exacerbated the Taliban's fear that the United States real motive was to wage a war on Islam, starting with Afghanistan. Indeed, after the attacks, U.S. policy makers refused to provide Taliban leaders or the Sudan officials with evidence to prove that the attacks were justified for reasons of self-defense. Taliban leaders interpreted this refusal to mean that no such evidence existed.

The use of an adversarial strategy also increased the Taliban's distrust of U.S. officials, making it more difficult for successful negotiations. According to Professors Fisher and Ury, once negotiators "lose their tempers" and create an atmosphere of distrust, it is more difficult for them to later appeal to reason and argue their position on the merits.¹²⁵ Indeed, after the air strikes, Omar stated, "[a]s further evidence that you can't trust the United

124. Sweeney, *supra* note 59, at 18. One Afghanistan living in Peshawar summed it up, "The attack shows that the Americans do not understand the way Afghanistan works." *Id.*

125. FISHER & URY, *supra* note 2, at 120.

States ... [t]he President, in the same week as he launched the missiles, has publicly admitted telling lies to cover his sexual aberrations. He has cheated on his wife, deceived the nation, and is now deceiving the world."¹²⁶

In addition, the air strikes and the killing of innocent civilians as a result of these strikes made it more difficult for ordinary Afghans to trust the United States.¹²⁷ Many Afghans felt betrayed by the United States' attack. One Afghan stated that the people of Afghanistan are basically on the side of the United States, but cannot understand why the United States punishes them by bombing their country.¹²⁸ This Afghan further noted that it was very sad, "after 20 years of bombardment by the Soviet Union, [Afghanistan] is [now] being bombed by the United States."¹²⁹

In addition to exacerbating the Taliban's fears, the adversarial strategy that U.S. policy makers adopted increased the Taliban's resolve to resist coercion and outside forces. Based on the Taliban's cultural perspective, U.S. policy makers should have realized that Taliban leaders would not readily capitulate to the use of force. As discussed above, the tenacity of the Afghan fighter is renown, and the Taliban leaders are unrelenting in their ability to resist their opposition.¹³⁰ According to Mutakawakkal, "we want good relations with all countries ... but the Taliban will never bow down in the face of any coercion or use of force by any outside power."¹³¹

Indeed, the Taliban leaders are willing to sacrifice the people of Afghanistan for their religious ideals. When Western relief organizations came to Afghanistan to provide aid and help rebuild the country, the organizations refused to accept the Taliban's leadership and rejected their strict rule of law.¹³² Unwilling to tolerate this rejection of their rule, Taliban leaders sent the relief workers home, despite the desperately-needed assistance that they had been providing to the people of Afghanistan.¹³³

In addition, the air strikes and other adversarial U.S. tactics will not resolve the conflict with the Taliban and the underlying problem

126. Maan, *supra* note 49, at 13.

127. See *News Briefing*, *supra* note 28.

128. See James Steinberg, *Local Afghans Say Attack "Not Right"*, SAN DIEGO TRIBUNE, Aug. 21, 1998, at B1.

129. *Id.*

130. See *Hearings*, *supra* note 15.

131. S. Zulfikar, *Thousands March in Taliban Base to Protest U.S. Missile Attacks*, AGENCE FRANCE PRESSE, Aug. 21, 1998, available in LEXIS, News Library, Curmws File.

132. See Bearak, *supra* note 84, at 1.

133. See *id.*

of Bin Laden and his supporters. Rather, these tactics will exacerbate the problem by stirring up more hatred against America and increasing sympathy and support for the radicals. As one expert of Muslim culture noted, “[b]y its strikes in Afghanistan [and the Sudan], America did not eliminate terrorism ... this is not terrorism – this is a resurgent Muslim world. You don’t deal with it with cruise missiles, you discuss it. You don’t rub the entire Muslim world’s nose in the dirt and make it kneel.”¹³⁴ This expert further noted that adversarial U.S. tactics would only reinforce anti-Western sentiment everywhere, making it more difficult for the United States to find allies to assist in fighting terrorists.¹³⁵

B. Problem Solving Maximizes the Likelihood of a Successful Negotiation Outcome

Problem-solving strategies maximize the likelihood of a successful negotiation outcome by generating more solutions that are meaningful to both sides. Had U.S. policy makers considered the above-discussed needs, interests, and cultural perspectives of the Taliban, they would have maximized the likelihood of achieving their ultimate goal: Bin Laden’s extradition at the lowest possible short and long term costs.¹³⁶

Using the above described cultural understanding coupled with a problem-solving strategy of negotiation would have likely yielded all together different results for all the countries involved. First, by using a problem-solving paradigm, the United States had several options it could have considered in its negotiations, based on points of common understanding and goals. Also, the U.S. policy makers may have employed several different tactics to facilitate a successful negotiation process based on the parties’ needs, interests, and cultural framework. Finally, there are also a few competitive tactics within an overall problem-solving strategy that U.S. policy makers might have used to maximize their gains.

1. Meaningful Solutions Based On Common Interests

Initially, U.S. policy makers could have framed their objective and the issues to be resolved, based on the Taliban’s underlying needs, interests, and cultural perspective. For example, policy

134. Perlez, *supra* note 57, at A6.

135. *See id.*

136. *See supra* Parts III A & B.

makers may have reduced and re-prioritized their demands, realizing that it is not realistic to expect the Taliban to immediately and radically change their human rights record, stop drug trafficking, agree to a broad-based government, and extradite Bin Laden.¹³⁷ When Ambassador Richardson visited the Taliban in April 1998, he did not prioritize the Bin Laden issue, and spent less than one day meeting with Taliban leaders. Richardson ended the negotiations satisfied with a noncommittal response by the Taliban leaders that they would control Bin Laden.¹³⁸

Next, U.S. policy makers could have focused on common interests instead of emphasizing differences, by linking United States and Taliban goals to a common objective that the parties could work toward achieving. An assessment of the parties' needs would have shown policy makers that many commonalities exist. For example, both parties have a common interest in the regional and internal stability of Afghanistan. The Taliban leaders realize that the longer Afghanistan is torn apart by civil war, the more difficult it will be to rebuild the nation, and they would prefer to bring peace to Afghanistan sooner than later. Similarly, the United States wants peace in Afghanistan; the longer that Afghanistan's civil war continues, the greater the likelihood that Afghan refugees will spill over Afghanistan's borders, causing destabilization in the region.

In addition to their interests in peace and stability, the United States and the Taliban have common economic interests. The United States has always been interested in exploiting the vast gas and oil deposits in Central Asia, and after the Cold War, Afghanistan was regarded as critical to this effort. Until recently, there was a proposal by the United States firm Unocal to create a dual pipeline that would run through Afghanistan and deliver oil and natural gas from Central Asia to Western markets.¹³⁹ Specifically, Unocal would form a consortium, along with a Saudi Arabian firm, two Japanese companies, a Pakistan conglomerate, and the Turkmenistan government, to create a two billion dollar, 1,400 kilometer pipeline.¹⁴⁰ Indeed, many western oil companies are eager to establish a presence in this region, and have lobbied Washington to support their efforts.¹⁴¹ However, until stability is established in Afghanistan, the Unocal venture will remain unfulfilled.

137. See Jensen, *supra* note 7, at 2A.

138. See *id.*; see also, Aslam, *supra* note 32.

139. See Davis, *supra* note 108, at A10.

140. See Jensen, *supra* note 7, at 2A.

141. See *id.*

A third interest that the United States and the Taliban share is their desire to please like constituents. Both the Taliban and the United States are concerned about how the Muslim community and the international community in general perceive them. The United States wants the Muslim community to regard its treatment of the Taliban as fair, but firm. While U.S. policy makers do not want to alienate the Islamic world, they want to convey the message that they will not tolerate threats to United States security. Similarly, the Taliban leaders want to be regarded as having dealt fairly with Bin Laden, an Islamic hero, but firmly, because they do not want to be regarded as a terrorist state by the international community.

Based on these common interests, a positive bargaining range exists in which the United States and the Taliban could have reached an agreement. Each of the parties, however, has clear limits in what they are willing to concede: U.S. officials have stated that they will not trade Bin Laden's capture for United States recognition of the Taliban's de facto government because of the Taliban's human rights record.¹⁴² But U.S. policy makers have stated that they are willing to trade for other incentives.¹⁴³ In turn, Taliban leaders have unequivocally stated that they will not extradite Bin Laden without any evidence that he has committed the crimes that the United States alleges.¹⁴⁴ Within this bargaining range, the following solutions may have been reached.

Realizing that the Taliban desperately wants recognition and legitimacy, U.S. officials may have offered contingent or limited recognition for Bin Laden's release if the Taliban agreed to moderate their human rights policies. United States National Security Advisor Sandy Berger has suggested this possibility, stating that "if there was some government ... even a government that we weren't very happy with - if the Taliban moderated some of its positions and was a stable government," at least less people would be dying.¹⁴⁵

For example, the Taliban may have agreed to adopt a plan of more moderate policies, such as home schooling for girls, which would be more palatable to Western policy makers. These reforms could mirror the policies of other Islamic countries, such as Pakistan, which have a more liberal approach toward human rights than the Taliban, but are not as liberal as Western nations. In return, the

142. See Salahuddin, *supra* note 33 at 1.

143. See *id.*

144. See *id.*

145. Penkava, *supra* note 8.

United States could promise the Taliban leaders international recognition, contingent upon implementation of these reforms. This solution is advantageous from the United States' perspective because it allows policy makers to save face among constituents – they will only recognize the Taliban if the Taliban leaders moderate their policies. From the Taliban's perspective, this solution provides them with the international recognition that they desperately seek.

Alternatively, U.S. officials may have considered immediate, but limited recognition for the release of Bin Laden. For example, they could have created a transnational panel consisting of representatives from Muslim nations neighboring Afghanistan and Western nations to discuss issues of common concern such as Afghanistan's internecine war, drug trafficking in the region, and the proliferation of terrorist groups. As discussed in part I, Afghanistan's neighbors are concerned about the war in Afghanistan, and they have a lot to gain if a stable and peaceful regime is established in Afghanistan.¹⁴⁶ Taliban leaders could participate on this panel, offering their views and perspectives. This alternative has the benefit of providing the Taliban with the recognition that they seek, but on a limited basis, thus avoiding full recognition of the Taliban as the legitimate ruling government of Afghanistan. By the same token, this solution recognizes the need to engage the Taliban in a dialogue (because whether the international community likes it or not, Taliban leaders currently control most of Afghanistan, and any decisions regarding Afghanistan will necessarily involve them).

As a third option, U.S. policy makers may have offered the Taliban immediate, full recognition and access to a seat at the United Nations for the release of Bin Laden, if they agreed to establish a broad-based government in Afghanistan, whereby all ethnic and religious groups are represented. The elected leaders of this representative government may appear at the United Nations. This solution is advantageous from the United States' perspective because it achieves policy maker's objective of establishing stability and peace in Afghanistan. Also, it allows policy makers to save face among constituents, by ensuring that the people of Afghanistan choose their own destiny and do not have an extreme set of values imposed on them. From the Taliban's perspective, this solution achieves stability in Afghanistan, and allows the Taliban leaders to

146. See *Hearings*, *supra* note 15.

participate in a government that is fully recognized by the international community.

In addition, policy makers may have offered non-recognition-based incentives. As one expert in foreign relations noted, U.S. policy makers "clearly could have done more. They've argued Bin Laden is such a great threat to the United States, and such a financial asset to the Taliban. They could have spent the equivalent of the cost of the cruise missiles to have Bin Laden handed over."¹⁴⁷ Indeed, it is estimated that the cost of the Tomahawk missiles used in the bombings was seventy-nine million dollars.¹⁴⁸ As the Taliban has few sources of income outside of Bin Laden, economic incentives may have been a necessary condition to his release. U.S. officials could have provided these incentives by offering to help rebuild roads and buildings in Afghanistan that have been destroyed by the fighting. Because the Taliban is concerned about rebuilding Afghanistan, this option would have been attractive. From the United States' perspective, economic aid through rebuilding Afghanistan makes the United States appear humanitarian, boosting its image in the eyes of the Muslim world and allaying the Taliban's fears of U.S. domination. Also, this solution allows policy makers to save face among constituents because it does not look like they are bribing Taliban leaders for Bin Laden's release.

Also, U.S. policy makers could have provided the Taliban with evidence that Bin Laden actually committed terrorist offenses. After assessing the Taliban's needs and cultural perspective, policy makers would have realized that sharing this evidence with Taliban leaders was critical to their ability to extradite Bin Laden. As discussed above, the Taliban's Code of honor mandates that if someone knocks at their door, even their worst enemy, it is their duty to give him sanctuary from his pursuers.¹⁴⁹ However, under this same Code, if the United States provided evidence that Bin Laden had violated his responsibility as a guest, Taliban leaders would have to release him.¹⁵⁰ Indeed, by not producing evidence that Bin Laden broke rules as a guest, U.S. policy makers provided the Taliban leaders with no alternative but to refuse extradition. The Taliban leaders want to be recognized as a legitimate Islamic state; the demands by U.S. officials to hand over Bin Laden, an Islamic hero, without proof

147. Aslam, *supra* note 32.

148. *See id.*

149. *See* McGirk, *supra* note 80, at 34.

150. *See id.*

of his guilt, appear unreasonable. In addition, Taliban leaders might fear retaliation by Bin Laden's supporters if they release him without protest. As discussed above, the Taliban leaders are concerned about their security, and do not want to risk attacks that could jeopardize their current position of control.¹⁵¹

Finally, U.S. policy makers could have suggested options short of Bin Laden's release to the United States. For example, they may have suggested the creation of an international tribunal to try Bin Laden. This is a logical solution because Bin Laden's terrorist attacks have harmed many nations – not just the United States. Alternatively, U.S. officials may have suggested releasing Bin Laden to a third, independent country that both the United States and the Taliban trust. It is likely that Taliban leaders would have been open to these suggestions. Indeed, the Taliban leaders have offered to try Bin Laden in an Islamic Sharia court, provided that the United States provides credible evidence against him.¹⁵² From the perspective of the United States, these options are advantageous because they shift the focus from the United States' pursuit of Bin Laden to the international community's pursuit of this terrorist. Since Bin Laden's trial would not be a unilateral action by the United States, this alternative would minimize potential retaliation against the United States by Bin Laden supporters.

2. Tactics for Facilitating A Successful Outcome in the Context of a Problem-solving Paradigm

One of the best methods for facilitating successful negotiations is to emphasize criteria that is objective and meaningful to the other side.¹⁵³ Arguments are only good if they are credible to the adversary.¹⁵⁴ This proposition is especially important in the context of international dispute resolution, where an opponent's cultural perspective and norms may be different. Because problem-solving strategies analyze the other side's underlying needs and interests, this method enables negotiators to target criteria that is meaningful.

In the case of the United States and the Taliban, U.S. policy makers could have reasoned with the Taliban based on criteria that was meaningful to them, instead of demanding his release based

151. See *supra*, Part III.B.2.b.

152. See Aslam, *supra* note 32.

153. See FISHER & URY, *supra* note 2.

154. See generally Robert Condlin, *Cases on Both Sides: Patterns of Argument in Legal Dispute Negotiation*, 44 MD. L. REV. 65 (1985).

solely on the claim that he was a terrorist. For example, policy makers could have explained to the Taliban leaders that other Muslim states regarded Bin Laden as a terrorist, and that the Taliban's support of him made them look like terrorists. Indeed, even the Taliban's scarce foreign allies are turning against them because of their support for Bin Laden. Saudi Arabia, one of three countries that had recognized the Taliban as Afghanistan's legitimate government, broke diplomatic ties with Afghanistan by downgrading its diplomatic representation in Kabul.¹⁵⁵ Initially Pakistan supported the Taliban leaders, but now even Pakistan perceives the Taliban's extreme version of Islam as a threat.¹⁵⁶ Like Pakistan, the Taliban's other neighbors disapprove of their extremism and are wary of this extremism spreading to their borders.¹⁵⁷ Because the Taliban is concerned with appearing as a legitimate Islamic state in the eyes of the Muslim world, this criterion would have been meaningful to them.

In order to convince the Taliban to modify their human rights policies, U.S. officials may have reasoned with the Taliban that their policies were not just extreme by Western standards, but were also rejected by Muslim nations. Ironically, the Taliban's version of Islam conflicts with the Koran. Under the Koran, it is anti-Islamic to withhold education and health care from women because this denial deprives them of rights guaranteed by Islamic law in the Koran.¹⁵⁸ In addition, the Taliban leaders' efforts to force Afghanistan citizens to observe strict religious practices violates the spirit of the Koran because there is no compulsion in Islamic religion.¹⁵⁹ Indeed, at a secret meeting between the Taliban's Foreign Minister, Maulana Muhammad Jalil and Pakistan's Foreign Minister, Sartaj Aziz, Aziz told Jalil that the Taliban leaders had to improve their human rights record if they wanted international recognition.¹⁶⁰

In addition to emphasizing meaningful criteria, U.S. policy makers could consider engaging a third party to present their proposals to the Taliban. According to negotiation scholars, the individual or entity that presents a proposal affects how receptive

155. See Constable, *supra* note 72.

156. See *Hearings*, *supra* note 15.

157. See Penkava, *supra* note 8.

158. See *id.*

159. See *id.*

160. See *id.*

parties are to that proposal.¹⁶¹ U.S. policy makers might consider Pakistan an effective third party for presenting their proposals to the Taliban.

Pakistan is a good choice because the Taliban leaders trust Pakistan. Pakistan has helped out the Taliban in the past and is one of three nations that have recognized the Taliban as Afghanistan's legitimate government.¹⁶² In addition, Pakistan is a fellow Muslim state, so any proposal that it presents to the Taliban should satisfy the Taliban's concern about appeasing Muslim constituents. From the perspective of U.S. policy makers, Pakistan is an optimal third-party mediator because peace and stability in Afghanistan are in Pakistan's best interests. All countries in this area, including Pakistan, will remain economically disadvantaged if fighting in Afghanistan continues. Before the fighting, Afghanistan had played a vital role as a trade route between Central and South Asia, allowing surrounding nations an outlet to the sea.¹⁶³ Until a peaceful resolution of the fighting occurs, however, Afghanistan will be unable to resume its prior role.¹⁶⁴ As such, Pakistan will likely pressure the Taliban to comply with United States requests to release Bin Laden, a source of further destabilization in that region, and move toward the establishment of a more moderate, broad-based government that will bring peace to Afghanistan.

3. *Problem-solving Is Not Compromising: Competitive Tactics Within A Problem-solving Strategy*

Understanding the other side's real needs does *not* mean that negotiators must put the other side's interests before theirs or compromise their objectives to achieve an "equal" or "fair" outcome. In fact, problem-solving paradigms are optimal because they allow negotiators to identify the needs of an adversary, and exploit these needs to their advantage. Thus, the problem-solving negotiator has leverage that the adversarial negotiator does not. In the case of the United States and the Taliban, if the United States had been more sensitive to the Taliban's needs, they could have exploited these needs by the tactics discussed below and maximized their gains in the negotiation process.

161. See, e.g., Robert H. Mnookin, *Why Negotiations Fail: An Explanation of Barrier to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235, 235 (1993).

162. See Lloyd, *supra* note 86, at A2; see also, Penkava, *supra* note 8.

163. See *Hearings*, *supra* note 15.

164. See *id.*

First, policy makers could have exploited the timing to their advantage, using the Taliban's fear of foreign intervention in Afghanistan. At the time of the August 7, 1998 bombing, the Taliban was especially vulnerable because it was desperate to maintain its control over Afghanistan despite dwindling financial resources and a general feeling that the military movement had peaked and stalled.¹⁶⁵ Russia had been funding anti-Taliban forces in the North, and the Taliban leaders were anxious that the United States might follow Russia's lead.¹⁶⁶ Because of the Taliban's vulnerability to external forces, it would have been an optimal time for U.S. negotiators to make overtures to the Taliban leaders, engaging them in private dialogue. Based on the analysis in part IV, it would have been obvious to U.S. officials that while the Taliban leaders are loyal to Bin Laden, they will not harbor him at the expense of jeopardizing their ultimate goal - the unification of Afghanistan. It is likely, then, that the Taliban leaders would have been more willing to cooperate with United States' requests. Also, just before the air strikes, the Taliban had nearly defeated their internal opposition and were desperate for international recognition and economic support. Again, U.S. policy makers could have obtained significant concessions from the Taliban by offering them economic and recognition-based incentives.

Second, policy makers could have exploited Omar's personal insecurity about appearing as a legitimate leader in the eyes of the Muslim world and the international community. Omar does not want to be equated with Bin Laden but wants to be recognized in his own right. When Bin Laden threatened the United States following the air strikes, Omar was outraged because it undercut his authority as the supreme leader of the Taliban.¹⁶⁷ By manipulating Omar's fragile ego to drive a wedge between him and Bin Laden, policy makers may have maximized their gains in the negotiation process.

Finally, policy makers could have exploited certain power imbalances to their advantage. Both the Taliban's leaders and U.S. policy makers know that the United States is the superior military and economic power. As such, U.S. officials might have used this power base to influence the Taliban through praise or reinforcement. According to Professor Lewicki, negotiators with a superior power base can effectively influence the other side by the use of verbal

165. See LeVine & Bonner, *supra* note 6, at A6.

166. See *id*; see also, Hiro, *supra* note 58.

167. See Alam, *supra* note 120.

reinforcement, approval, and praise.¹⁶⁸ Research shows that these tactics are highly effective in shaping behavior.¹⁶⁹ In the Taliban's case, this reinforcement may have taken the form of praising the Taliban leaders, in a public forum, for their willingness to discuss the extradition of Bin Laden and their desire to engage in open dialogue. This reinforcement has the advantage of rewarding Taliban leaders for actions that are consistent with United States' expectations and of providing them with the public recognition that they desperately seek.

As Professor Lewicki notes, however, negotiators fail to use positive reinforcement and praise enough, and assume that such behavior is not necessary for people who are "just doing what they are supposed to do."¹⁷⁰ Indeed, in the United States' case, policy makers have failed to praise the Taliban for their efforts to discuss Bin Laden's release. In response to Taliban leaders' statements that they were willing to discuss Bin Laden, Ambassador Richardson and other U.S. diplomats only expressed skepticism, noting that the Taliban leaders have broken many promises to the United States in the past, and that they doubted this time would be any different.¹⁷¹

C. *Problem-solving Achieves Better Long-term Solutions*

Unlike adversarial models, problem-solving paradigms create better long-term solutions because they seek the root cause of a problem by examining personal and cultural preferences that may shape an opponent's interests and needs. This analysis is essential, especially where an opponent is "unconventional," and does not fit into a traditional, Western mold. As Professor Carrie Menkel-Meadow suggests, people cannot be neatly severed from problems, and in some cases, "the personality of the other party or other negotiator itself may become a problem to be solved."¹⁷²

In the United States' case, a "root cause" and cultural analysis is especially critical because the Muslim-terrorist problem is not temporary, and diplomacy may be the only practical solution for obtaining Bin Laden's release. One expert in foreign relations contends that the threats to the West posed by terrorist networks under Taliban protection in Afghanistan will never be eliminated

168. See Lewicki, *supra* note 1, at 193.

169. See *id.*

170. *Id.*

171. See Penkava, *supra* note 8.

172. Menkel-Meadow, *supra* note 2, at 836-38, n.324.

unless U.S. policy makers identify and eliminate their root cause.¹⁷³ He further notes that “[h]owever illegitimate the actions of terrorist groups ... they underscore the importance of answering questions about what these people hate so much about the United States, [and] what they admire.”¹⁷⁴

Moreover, it is unlikely that U.S. policy makers could ever capture Bin Laden if they continue to pursue an adversarial strategy. As evidenced by the August 7, 1998 bombings, air strikes cannot eliminate Bin Laden. Moreover, a second military assault against Bin Laden could prove risky in many ways. Bin Laden decamps every four or five nights to avoid attacks, and always takes his commandos along, who carry Stinger missiles to protect Bin Laden against a surprise air attack.¹⁷⁵ In addition, it is almost impossible to reach Bin Laden by air strikes because he has a very complicated infrastructure and networks on almost every continent. This infrastructure would mean that the United States would have to bomb every country to reach Bin Laden.¹⁷⁶

Any military operations to capture Bin Laden would have to be a covert operation by land. Because Afghanistan is landlocked, however, the United States would need help from another country, presumably Pakistan. However, it is unlikely that Pakistan will help. Pakistan’s Interior Minister, Shujat Hussain, has already told U.S. officials that “we cannot be a party to that.”¹⁷⁷ Also, a covert mission to flush out Bin Laden is very risky. Counter-terrorist experts in Washington, D.C. have speculated that for such a mission to have any success, it must be a major one.¹⁷⁸

Finally, it is not in the United States’ best interests to secure Bin Laden by use of threats or force. The Taliban must willingly release Bin Laden. Even if the Taliban leaders agree to extradition, the United States will still need their help in capturing Bin Laden. If the Taliban leaders feel that they have been unduly pressured into agreeing to extradition, they may alert Bin Laden so that he can escape. Also, if U.S. policy makers “bully” Taliban leaders into releasing Bin Laden and he is killed, he will become a martyr in the

173. See Aslam, *supra* note 32.

174. *Id.*

175. See McGirk, *supra* note 80, at 34.

176. See Robelot, *supra* note 36.

177. See Andrea Mitchell, *NBC News Special Report: Speculations As To What Contingencies Are Being Planned to Go After U.S. Embassy Bombing Suspects*, (NBC television broadcast, Aug. 20, 1998), available in LEXIS, News Library, Curnws File.

178. See McGirk, *supra* note 80.

eyes of extremists. As one foreign relations expert notes, “[o]ne Bin Laden can be killed, but many more Bin Laden’s will spring up to take his place if the conflicts that engender extremism and terrorism are not resolved.”¹⁷⁹

Thus, diplomacy through a problem-solving paradigm is not just the best solution for U.S. policy makers to pursue – it may be the *only* solution.

CONCLUSION

This paper has applied problem-solving principles of dispute resolution to the United States-Taliban negotiations to demonstrate that these principles should play a greater role in situations where negotiators face unconventional opponents. Far too often, policy makers fail to consider these principles and rely on adversarial strategies designed to influence the unconventional opponent by force or threats. In the case of the Taliban, however, this adversarial strategy failed to yield the desired results. By neglecting to consider the Taliban’s underlying needs, interests, and cultural perspective, U.S. policy makers missed opportunities for creating meaningful solutions, and achieving their ultimate goal.

179. Maan, *supra* note 49, at 13.