Lawfare

**By David B. Rivkin, Jr.
And Lee A. Casey**

The term "lawfare" describes the growing use of international law claims, usually factually or legally meritless, as a tool of war. The goal is to gain a moral advantage over your enemy in the court of world opinion, and potentially a legal advantage in national and international tribunals.

Al Qaeda, of course, is an experienced lawfare practitioner. Its training manual, seized by British authorities in Manchester, England, openly instructs detained al Qaeda fighters to claim torture and other types of abuse as a means of obtaining a moral advantage over their captors. That advice has been routinely followed by detainees at Guantanamo Bay, who have succeeded in generating incessant demands—from European officials among others—for the base's closure and their own liberation.

These efforts, however, pale to insignificance when compared to the blizzard of litigation initiated in the U.S. federal courts on behalf of al Qaeda and Taliban detainees. The suits range from habeas corpus petitions to free captured enemy combatants—cases that were dismissed by the U.S. Court of Appeals in Washington, D.C. last Tuesday—to tort suits seeking monies from U.S. government officials, to challenges regarding the detainees' conditions of confinement.

There was a quixotic attempt to save Saddam Hussein's life by asking a federal court in Washington, D.C. to "stay" his execution by the Baghdad government. Several suits seek to hold the U.S. liable for the alleged misconduct of other governments. Of these, the lawsuit by Canadian Maher Arar, ostensibly tortured after being "rendered" to Syria, is the best known.

The most significant common thread among all these actions is the clear desire to portray U.S. government actions as illegal and unprecedented. In fact, it is the claims for extensive due process rights for captured enemy combatants that are unprecedented.

Combatants, whether the regular soldiers of sovereign states, irregular guerillas or terrorists, have never enjoyed the right to contest the legality of their detention in the civilian courts, or to a criminal trial. The Supreme Court reaffirmed these traditional rules in *Hamdi v. Rumsfeld* (2004), where a clear majority held that captured al Qaeda operatives could constitutionally be held as enemy combatants for the duration of hostilities without the due process required for individuals accused of criminal violations. The only process the court considered necessary was an opportunity to contest, before military authorities, the factual basis of their classification as enemy combatants with a limited opportunity for judicial review.

Nevertheless, lawyers for the detainees continue to demand a full-fledged criminal process in the civilian courts for their clients. Former Clinton Attorney General Janet Reno has argued in a friend of the court brief that one detainee (Ali Saleh Kahlah al-Marri) should be entirely removed from the military justice system, even though he already has received far more extensive judicial process than that required by the *Hamdi* decision.

Similarly, in a grim echo of domestic prisoners-rights cases, lawyers for another detainee, Saifullah Paracha, have demanded that he be transferred from Guantanamo Bay to a civilian U.S. hospital for a common medical procedure—a cardiac catheterization.

Perhaps the most pernicious ongoing lawfare example is the effort to hold U.S. officials financially liable for their wartime conduct based on the theories developed in *Bivens v. Six Unknown Named Agents* (1971). In that case, the Supreme Court permitted a civil damage suit against individual federal drug enforcement agents for allegedly violating the plaintiff's constitutional rights, in particular the Fourth Amendment guarantee against unreasonable searches and seizures.

Several *Bivens* actions have been filed on behalf of foreign combatants captured, detained and later released by U.S. forces. None have been particularly successful—so far—but the determined effort to use legal principles developed in the context of civilian law-enforcement operations on U.S. soil against officials directing an ongoing armed conflict overseas reveals an unsettling policy agenda.

These efforts are of a piece with a similar "progressive" movement—ongoing at least since the end of World War II—to re-

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make the traditional laws of war, attempting to import into the area of armed conflict concepts and norms from the world of domestic law enforcement. Thus, leftist NGOs routinely demand that irregular enemy combatants like al Qaeda and the Taliban be treated as POWs or criminal defendants, claim that military force can be applied only to the minimum amounts necessary to neutralize a particular opponent (rather than with a view to achieving ultimate victory), and have sought to ban an increasing number of weapons and weapons systems as being "inherently indiscriminate."

The effect of this lawfare effort, were it successful, would be to make it exceptionally difficult—if not impossible—for a law-abiding state to wage war in anything like the traditional manner, bringing the full weight of the national armed forces to bear against an enemy, without prompting charges of war crimes and efforts to intimidate individual officials with prosecutions on ersatz "war crimes" theories. In fact, the criminalization of traditional warfare seems to be the goal.

Unfortunately, the progressive humanitarians (as they would certainly describe themselves) have embarked on this campaign to criminalize warfare (a kind of judicially enforced Kellog-Briand Pact), without giving much thought to alternatives for ensuring the welfare and security of the civilian populations that the armed forces of states, and of the U.S. in particular, are raised and maintained to protect. To the extent that terrorist combatants are given the rights of criminal defendants, their ability to sustain long-term hostilities, and to reach their civilian targets, is increased.

Lawfare designed to delegitimize the use of American military force, and the American way of war, certainly has the potential to undermine public support for the war effort, both at home and abroad. Recognizing the stakes involved, the U.S. should be as committed to winning the lawfare battle as the ground combat in Afghanistan and Iraq.

Merely defending itself in court is not enough. The U.S. must go on both the legal and public diplomacy offensive, utilizing such aggressive litigation tactics as seeking sanctions against lawyers who make frivolous arguments or violate security regulations. Most important, the administration should strive to explain, tirelessly and at the highest levels, that its policies are both legal and legitimate and that it is the lawfare's practitioners who are the true radicals.

Messrs. Rivkin & Casey, who served in the Department of Justice during the Reagan and George H.W. Bush administrations, are writing a book on war's evolving legal architecture.

Reserve Relief

**By Eswar S. Prasad
And Raghuram G. Rajan**

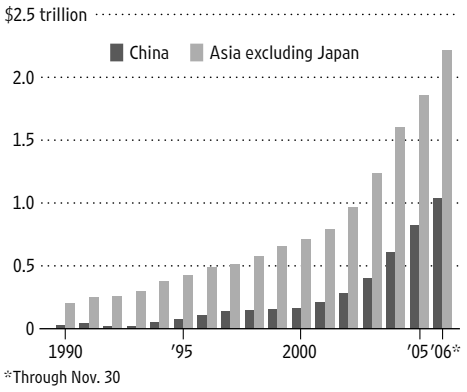
China's foreign exchange reserves have finally crossed the remarkable level of $1 trillion. While this number has received a lot of attention, many other emerging market economies in Asia have also been stockpiling reserves at a prodigious rate. And they are discovering, like China, that while a certain amount of reserves provide a useful cushion against financial crises, a plenitude can soon turn into a problem. It's costly to soak up the liquidity created by inflows and prevent it from generating domestic inflation.

What to do? Politicians want to spend the reserves to fill holes in their budgets. But foreign exchange reserves aren't free, unencumbered assets. In many cases, central banks issue domestic bonds to soak up the foreign exchange—so the reserves are pledged against the bonds. Spending reserves is then akin to non-transparent off-budget financing. Moreover, unless they are spent in buying foreign assets, as China is doing buying oil reserves, the foreign exchange will simply return to the central bank kitty. Unfortunately, the distortionary policies such as rigid exchange rates and repressed financial sectors that allow rapid reserve accumulation in the first place do not allow much additional demand for foreign real assets.

Some countries, like Singapore, have directed state-run investment companies to invest the money in financial assets abroad—but this requires the state to be good at financial investments, and to not upset foreign governments, not always givens. Finally, countries like South Korea have started to relax capital account restrictions, allowing individuals to invest more money abroad, relieving the pressure on domestic exchange rates and slowing the accumulation of reserves. But many developing countries with fragile financial sectors can't risk liberalizing capital outflows hastily, for fear that the banking system couldn't handle abrupt shifts in investor sentiment.

A Soaring Safety Net

Foreign exchange reserves, in dollars



*Through Nov. 30
Source: IMF

There's a better way to solve this problem; namely, through transforming foreign exchange reserves into vehicles for loosening capital controls by encouraging overseas investment. How can this be accomplished?

We propose a practical way for countries to reduce the build up of reserves, even while limiting risk and allowing their financial sector to develop. Countries would authorize a number of closed-end mutual funds to issue shares in domestic currency, use the proceeds to purchase foreign exchange from the central bank and then invest the proceeds abroad.

The central bank would control the timing and amount of outflows by stipulating the amount of foreign exchange it would make available to the mutual funds in a given period. Licenses for such mutual funds could be auctioned by the government to foster competition among the funds and capture any excess profits. The sale of foreign exchange to the mutual funds would still take place at the market exchange rate, thereby avoiding any multiple currency practices. Other than its traditional role in financial sector regulation and supervision, the government would need to maintain clear separation from the funds to avoid any presumption of bailouts.

This would eliminate the fiscal costs of sterilizing inflows, give domestic investors opportunities for international portfolio diversification and stimulate the development of domestic financial markets. The mutual funds would be allowed to invest in a wide array of assets abroad.

There are of course complementary approaches to gradual capital account liberalization, such as allowing pension funds and other institutional investors to invest abroad. But such alternatives typically do not allow the government to control the quantity and timing of external flows as easily. Furthermore, our proposal would give domestic retail investors experience with international investments and allow for gradual learning-by-investing. In countries with weak financial systems, it would give domestic banks some breathing room to adjust to the new reality of their depositors having alternative investment opportunities. These developments would improve the depth and efficiency of the domestic financial sector, and better prepare the ground for more comprehensive capital account liberalization.

Indeed, if appropriately structured, our proposal has the benefit of allowing countries to make progress towards the goal of capital account convertibility in a carefully calibrated manner, without exposing the domestic financial system to risks associated with uncontrolled outflows.

This proposal should not be seen as a substitute for more basic policy reforms such as strengthening of the domestic financial sector or, in some cases, greater exchange rate flexibility. By relieving some of the pressures caused by inflows, this approach could create a more conducive environment for countries to adopt these essential policy reforms. For that alone, it deserves consideration.

Mr. Prasad is a professor of trade policy at Cornell University. Mr. Rajan is a professor of finance at the University of Chicago's Graduate School of Business.