



NEWPORT PAPERS

A Series of Point Papers
from the Naval War College and the
Navy Warfare Development Command
For Senior Leadership
In Response to Critical Issues

Strategy / CONOPS / Doctrine / Decision

United States Naval War College
Navy Warfare Development Command
Newport, Rhode Island

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**THE USE OF FORCE IN THE WAR ON TERROR:
A LEGAL PERSPECTIVE**

Purpose: To examine the legal basis for using force in combating international terrorism.

Background: Since all actions of the United States Government must be in accordance with law, the U.S. military response to the attacks of September 11, 2001 must be lawful. This means two things: First, there must be a legal basis for using force; there must be an exception to the general rule that states are required to settle disputes by peaceful means. Second, assuming that there is a legal basis for using force, how that military force is used depends on whether operations occur inside or outside the United States: domestic military operations must comply with the U.S. Constitution and any applicable U.S. law; operations occurring outside the U.S. must comply with the Law of Armed Conflict either as a matter of law or policy.

Discussion: While Article 2(4) of the United Nations Charter requires that states "refrain in their international relations" from using force against other states, Article 51 of the Charter makes clear that every state has an inherent right of individual self-defense if an armed attack should occur. Since the September 11th terrorist attack was an "armed attack," it follows that the United States may use force to defend itself in the terror war. Consequently, Article 51 gives the United States the legal authority to use force against individual terrorists and terrorist organizations responsible for the attacks on the World Trade Center and Pentagon. Under the law, force also may be used against any state supporting or harboring the terrorists responsible for the attacks.

Given, there is a legal basis for using force, an equally important issue is how that force may be used. If U.S. armed forces are used to deter or prevent terrorists located inside the United States from committing acts of terrorism, any force used must comply with the Fourth Amendment to the Constitution. That amendment, when applied to a military operation, requires that force used to seize a person or property not be "unreasonable." What is reasonable or unreasonable depends on the facts and circumstances of a particular use of force. That said, the bottom line is that military and naval commanders at all levels are not accustomed to considering the applicability of the Fourth Amendment in deciding how to use force. Additionally, the prohibition on using the military to "execute" civilian laws as embodied in the Posse Comitatus Act and related legislation also indicates that any plans for the domestic application of military force be carefully considered.

Outside the United States, use of force is restricted by three legal principles: military necessity, proportionality, and distinction.

? "Military necessity" means that U.S. armed forces may use force only against those persons, places and property that, by their nature, location, purpose, or use, effectively contribute to the terrorists ability to commit acts of violence, and whose destruction, capture, or neutralization gives the United States a definite military advantage. Measured by this standard, force may be used against individual terrorists, their training camps, equipment and materiel. Mountain passes, roads, caves, buildings, power stations, communications nodes, and other facilities that directly or indirectly facilitate terrorist operations may also be attacked.

? "Proportionality" requires that any loss of civilian life and damage to civilian property resulting from a use of force must not be excessive in relation to the concrete and direct military advantage expected to be gained. It follows that a proportional use of force against Bin Laden's terrorist organization and its Taliban supporters is lawful, even if it results in unavoidable and unplanned damage to civilians and their property. For example, if the military advantage to be gained from destroying a Taliban command and control structure is great, attacking it with air-delivered ordnance is lawful, even if the bombing results in the unavoidable death of civilians.

? "Distinction" requires that any U.S. use of force distinguish (or discriminate) between combatants and non-combatants, and that military objectives be distinguished from protected property and protected places. For example, bombing an Afghan city that lacked any specified military objectives or targets would violate the principle of distinction. The ongoing Taliban efforts to conceal military equipment in schools or mosques are aimed at confusing this issue.

The principles of military necessity, proportionality, and distinction apply to America's use of military force outside its borders. These principles do not, however, constitute legal obstacles or impediments to our current use of force in the war on terrorism.

Recommendation/Action: Policymakers may lawfully use force against terrorists, their organizations, and those states that harbor or support them. Any domestic use of military forces must be reasonable within the meaning of the Fourth Amendment. Outside of the United States, any use of force must satisfy the principles of military necessity, proportionality, and distinction.