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## NEWPORT PAPERS

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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

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

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**Newport Paper: 62**

**JUSTICE AS A U.S. WAR AIM:  
THE LEGAL IMPLICATIONS**

**Purpose:** To examine the legal implications of declaring “justice” a U.S. war aim.

**Background:** In his address to Congress and the nation on 20 September 2001, the President declared, “Whether we bring our enemies to justice, or justice to our enemies, justice will be done.” In the fairly recent past, when the United States has sought “justice” internationally—against Noriega, against the perpetrators of the bombing of Pan Am 103, and against the perpetrators of the Khobar Towers bombing, for example—the problem has been turned into a legal issue. The result in almost every case has been to reduce policy flexibility.

Since the United States has made “justice” a goal in the effort to suppress worldwide terrorism, important definitional and policy issues have been raised. National goals affect policy choices. Different instruments of policy support different goals and, indeed, definitions of justice. It is desirable to understand the policy impact of using one or another instrument in the pursuit of war objectives.

**Discussion:** “Justice” means different things to different people; for U.S. policymakers and political leaders, it typically means the outcome of law enforcement and judicial process. In cases of armed conflict, it also refers to the outcome—e.g., victory as the equivalent of justice. However, since World War I Americans (or at least some Americans) have seen victory as one, not necessarily sufficient, step on the road to achieving justice against an attacking enemy. Many leaders call for the trial and punishment of aggressors or leaders responsible for acts such as ethnic cleansing. Foreign policy and national security decision-makers may seek justice in non-judicial or non-legal terms and base choices on non-legal criteria and information. Law enforcement involves other approaches.

Over the last three decades, Congress and the Justice Department have pushed the limits of U.S. criminal jurisdiction geographically outwards in response to terrorist events. With a number of anti-terrorist statutes, some of which implement international treaties and some of which independently extend off-shore U.S. jurisdiction to cover the killing of Americans abroad in connection with terrorist events, law enforcement has increasingly become a regular part of U.S. international counter-terrorist actions and strategy. The statutes cover crimes on or against aircraft, crimes against persons, crimes against internationally protected persons, crimes against airport safety, use of plastic explosives, and the like. In addition, the Justice Department has interpreted pre-existing statutes, such as the law chartering the FBI, to allow extra-territorial law enforcement operations. The FBI engages in criminal investigations in foreign countries whenever it

can in connection with killings of Americans abroad. The goal is evidence that is usable in court according to the Federal Rules of Evidence. The number of examples is substantial, including the bombing of Pan Am Flight 103, the bombing of the Khobar Towers barracks in Saudi Arabia, and the attack on the USS COLE in Yemen.

Treaties underlying many of the relevant statutes create jurisdiction in affected countries. Defendants may find themselves in front of courts in a number of countries. In addition, the U.N. Security Council, exercising its authority to take whatever steps it deems necessary to restore or maintain international peace and security under Chapter VII of the U.N. Charter, may create an ad hoc international criminal tribunal.<sup>1</sup> As a result, the pursuit of justice through law enforcement may involve a number of fora in different jurisdictions and the resulting bureaucratic tensions among them.

Seeking at this time to try suspected perpetrators of the attacks, whether before U.S. courts, courts of other countries, or an ad hoc international tribunal would raise policy issues of great significance. Going to court—even indicting defendants—circumscribes one's policy options. For example, we could find ourselves having to deal with arguments that we lacked sufficient, legally probative evidence, and should not use military force until after a trial and appeals would have satisfied objective observers that we had found those truly responsible. Indeed, several nations have repeatedly asked for "evidence" that ties Osama bin Laden to the 11 September attacks. It might be argued that, unless we waited until a judicial process was complete, we would not have tried hard enough to resolve the problem peacefully, as international law is said to require, prior to exercising our inherent right to self-defense. If the perpetrators include governments and heads of government, we may find ourselves unable to negotiate arrangements were we of a mind to do so. For example, the indictment of Libyans for destroying Pan Am Flight 103 froze U.S.-Libyan relations and took away all policy flexibility. Similarly, the indictment of Noriega imprisoned U.S.-Panama relations: the U.S. Government wanted to quash the indictment in exchange for Noriega's departing Panama. Washington discovered it could not make such an arrangement because the public would not stand for so political a use of the criminal justice system.

**Recommendations/Actions:** These examples point to the importance of understanding the policy implications of identifying justice as a U.S. war objective. No such careful analysis took place either before the indictment of Noriega or before the indictment of the

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<sup>1</sup> It did so to address alleged crimes in the former Yugoslavia and in Rwanda. A permanent International Criminal Court (ICC) is likely to come into existence soon, pursuant to the 1998 Rome Statute. Its jurisdiction would be limited to grave breaches of the laws of war, aggression, and genocide. Conceivably, the ICC could have jurisdiction if the attacks were orchestrated by a country party to the Rome Statute. The International Court of Justice (World Court) hears cases between states only and only with the consent of those states pursuant to treaty or agreement to submit a particular dispute to the Court. In the past, therefore, the World Court has not been an appropriate venue for criminal trials.

Libyans. At the moment, we have maximum diplomatic and military flexibility. Policy makers should be aware of the implications of surrendering or limiting that flexibility.