

**Human Rights Watch**  
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**Legal Issues Arising from the War in Afghanistan and Related Anti-Terrorism Efforts**

The horrific attacks of September 11, 2001 on the World Trade Center and the Pentagon that claimed the lives of thousands of civilians constituted criminal acts under both United States and international law. In particular, as acts of murder committed deliberately as part of a widespread attack against a civilian population, they constitute crimes against humanity which can be prosecuted by any nation on earth. Chief among suspected perpetrators is Osama bin Laden, a Saudi exile in Afghanistan, who is said to have inspired, organized, trained and bankrolled a network of militants. Allegedly included in this network are groups dedicated to covert attacks on U.S. targets, both military and civilian, as well as armed forces affiliated with bin Laden that operate under the overall command of Taliban armed forces in Afghanistan.

In response, a U.S.-led military force has now attacked Taliban armed forces and targets associated with bin Laden and his network. This new international conflict comes on top of a longstanding civil, or internal, war between the Taliban and a group of opposing military forces known as the United Front or the Northern Alliance.

As this paper explains, governments may not use unlimited methods and means to pursue war, even a war against indistinct enemies. International humanitarian law, also known as the “laws of war,” is designed, in principal part, to protect civilians and other non-combatants. Warring forces must distinguish combatants from non-combatants. As discussed below, these forces are required to minimize harm to civilians and civilian facilities and to refrain entirely from attacks that would disproportionately harm the civilian population and from attacks whose effects would be indiscriminate as between combatants and civilians.

Despite the existence of an armed conflict, certain aspects of international human rights law also remain in force. Even in a state of emergency, it is unlawful to suspend some rights, such as the prohibition on arbitrary deprivation of life, the prohibition of torture, freedom of religion, and trial *ex post facto*. Other civil and political freedoms may be derogated in an emergency, but under highly restricted conditions: the derogation must be for a limited period of time, in a way that involves no invidious discrimination, and only to the extent strictly required by an emergency so severe that it threatens the life of the nation.

The two bodies of law – humanitarian and human rights – can simultaneously govern different geographic areas. For example, an armed conflict raging in one country would be governed primarily by humanitarian law while in another country the pursuit of criminal networks through traditional law-enforcement means would be governed by human rights law, with full rights protections regulating the use of force and the fairness

of trial, even if those networks had links to one of the parties in the armed conflict in the first country. Whether those who become the targets of the United States and its allies in the emerging anti-terrorism coalition are viewed as criminals or as an enemy in wartime is not merely a rhetorical distinction, since it affects such basic matters as when lethal force can be used. This paper addresses various questions about the requirements of international humanitarian and human rights law and the interplay between the two.

*Q: Is the U.S. military response to the September 11 attacks lawful?*

The question of whether it is lawful to wage war on states that are complicit in or tolerant of acts of terror is a complex one that is engendering considerable debate. See, for example, [www.crimesofwar.org](http://www.crimesofwar.org) and [www.asil.org/insights](http://www.asil.org/insights). The United Nations Charter restricts the use of force by states in their international disputes. Under the Charter, a state may lawfully employ force as a matter of individual or collective self-defense or when authorized by the Security Council to address acts of aggression or other threats to international peace and security.

Human Rights Watch avoids evaluating whether the launching of a given war is either lawful or just, in order to maintain our neutrality and authority in analyzing the way wars are fought under international humanitarian law. Like the International Committee of the Red Cross, our mandate in wartime focuses on the conduct of war, or *jus in bello*, rather than the legitimacy of war, or *jus ad bellum*. The only exceptions that Human Rights Watch has made to this policy is to call for military intervention where massive loss of human life, on the order of genocide, can be halted through no other means, as was the case in Bosnia and Rwanda in the 1990s. This paper addresses *jus in bello* questions under international humanitarian law.

*Q: What is international humanitarian law?*

International humanitarian law governs the conduct of parties to international and internal armed conflicts. It comprises, among other treaties, the four Geneva Conventions of 1949 and their two protocols of 1977, the Hague Conventions of 1907 regulating the means and methods of warfare, and those principles that, because of their wide acceptance by the community of nations, have become customary international law binding on all states and belligerents. For most of the last decade through October 7, 2001, Afghanistan was embroiled in a civil war governed by the laws relating to internal armed conflicts. The U.S.-led military action against Afghanistan beginning on October 7 is governed by the laws of international armed conflict, which provide the strongest and most developed protections to civilians and soldiers alike.

The cornerstone of international humanitarian law is the duty to protect the life, health and safety of civilians and other non-combatants such as soldiers who are wounded or captured or have laid down their arms. It is prohibited, for example, to attack or deliberately injure.

The distinction between combatants and non-combatants is fundamental in international humanitarian law. While it is legitimate under this law to target and use lethal force against enemy combatants and their commanders, it is never legitimate to target civilians and other noncombatants. In addition, as described below, the anticipated harm to noncombatants in any given attack may never be disproportionate to the expected military advantage.

*Q: What are some of the main differences between international humanitarian law and international standards on law enforcement?*

Under the “combatant’s privilege,” international humanitarian law does not prohibit soldiers from killing enemy combatants—even if the opposing fighters are in retreat—so long as they are not wounded, captured, or otherwise out of combat (*hors de combat*). In contrast, international standards on law enforcement prohibit officers from using lethal force against criminal suspects except where strictly necessary to defend themselves or others from an imminent threat of death or serious injury. Criminal suspects, once in custody, may be prosecuted for any act of violence, whereas captured enemy combatants in international conflicts are normally entitled to specific protections as prisoners of war and may not be tried for their mere participation in hostilities against other combatants, although they may be prosecuted for other offenses, including common crimes, war crimes, and crimes against humanity.

*Q: What international humanitarian law governs a war against non-state actors?*

As noted, the most developed part of international humanitarian law is the law governing armed conflict between states. The hostilities between the forces of the U.S.-led coalition and the Taliban government in Afghanistan fit into this category. The same law governs armed conflict insofar as one government has been joined by a paramilitary organization that has been integrated into the government’s armed forces. The military portion of al-Qaeda in Afghanistan, sometimes referred to as the 55<sup>th</sup> Brigade, appears to have such an integrated relationship with Taliban military forces. But what law governs potential U.S. efforts to pursue al-Qaeda or other alleged terrorist groups outside of Afghanistan, particularly if they are not integrated into the military forces of a government?

“War,” of course, has been invoked rhetorically to describe campaigns against criminal groups such as drug cartels or the Mafia. However, such campaigns in fact are generally coordinated efforts at law enforcement, even where military means are employed, and not the launching of combat operations outside the context of criminal justice. Traditional human rights law applies to such efforts.

However, international humanitarian law does apply to certain armed conflicts between states and non-state actors, such as insurgents in a civil war. The International Committee of the Red Cross, in its Commentaries on Article 3 Common to the four Geneva Conventions of 1949, describes the understanding in this regard of the states that negotiated this provision. They believed, according to the ICRC, that a conflict with a rebel group would amount to an armed conflict governed by international humanitarian

law insofar as the group is organized, has a responsible command, acts on a determinate territory, and is capable of respecting and ensuring respect for humanitarian law. As a loose network of individuals and groups said to be operating in some sixty countries, al-Qaeda appears unlikely to meet these requirements, at least outside Afghanistan.

Even when military force is used against non-state actors that lack these attributes, Human Rights Watch maintains that the basic principles enshrined in international humanitarian law should still be upheld as a minimum standard. The Commentaries of the International Committee of the Red Cross also state that the fundamental guarantees of Common Article 3 of the 1949 Geneva Conventions would apply even if non-state combatants lacked all the hallmarks of classic rebel forces. Although the ICRC commentary addresses civil wars against insurgents, the same rationale should apply to an international conflict against non-state actors.

*Q: Where there's a choice between pursuing criminal suspects through law enforcement or military action, what should the United States or its coalition partners do?*

As explained above, Human Rights Watch takes no position on the legitimacy or justness of any particular military intervention. However, in the absence of armed conflict against a particular country, Human Rights Watch insists on respect for that country's ordinary criminal justice guarantees so long as law-enforcement cooperation is feasible. Similarly, we oppose governments using military force against an internal enemy when it is feasible to employ available criminal justice remedies. Otherwise, the use of military force effectively subverts criminal justice guarantees such as the rights to life, liberty and a fair trial.

*Q: Is it lawful to assassinate persons suspected of terrorist acts?*

International humanitarian law allows the targeting of opposing troops and commanders—even top commanders—in the course of armed conflict, provided that such attacks otherwise comply with the laws that protect civilians. However, it is a war crime to execute prisoners or to target non-combatants. In situations that fall short of armed conflict, international policing standards are more restrictive. They allow law enforcement agents to use lethal force only to protect themselves and others from the threat of imminent death or serious injury—and not, for example, to kill a suspect fleeing arrest in the absence of such a threat. These rules under international humanitarian and human rights law apply not only to government security forces but also to proxy forces whom they might engage.

Since 1976, successive U.S. presidents have endorsed an executive order banning political assassinations. This order followed revelations of earlier U.S. assassinations and assassination attempts of various world leaders. Consonant with the rules outlined above, this order does not prohibit targeting opposing combatants and their commanders in an armed conflict, and it does not prohibit the use of lethal force by law enforcement agents when necessary to avoid imminent death or serious injury. But it rightfully prohibits

summary execution in any circumstance and the targeted killing of people (other than combatants in armed conflict) in lieu of invoking available criminal justice remedies.

*Q: President Bush said that Osama bin Laden is “wanted, dead or alive.” Can the United States put a bounty out for the killing of bin Laden or other suspects?*

No. The placing of a bounty for anyone’s death is an invitation to his extrajudicial execution, which is prohibited.

*Q: Can those captured in a war be prosecuted for crimes? What is the effect if they are found to be prisoners of war?*

Prisoners of war (PoWs) are certain categories of combatants in an international armed conflict who “have fallen into the power of the enemy.” They may not be tried for the mere act of being combatants—that is, for taking up arms against other combatants. However, they may be prosecuted for the same offenses for which the forces of the power that detains them could be tried—including common crimes, war crimes, and crimes against humanity. Even if convicted, prisoners of war retain the detailed protections of the Third Geneva Convention of 1949 governing humane treatment.

The United States and its allies have not made clear their intentions with respect to affording PoW status or treatment to every combatant they may capture in Afghanistan. In international conflicts, captured members of a state’s armed forces are prisoners of war. Although the Taliban’s armed forces control most of Afghanistan, the United States (as well as the United Nations) does not recognize the Taliban as the legitimate government of the country. In the past, U.S. officials have affirmed the rule of international humanitarian law that if there is any doubt as to whether a captured person is entitled to PoW status, he will be treated as a PoW until a competent tribunal determines otherwise. Given that both the United States and Afghanistan are parties to the Third Geneva Convention governing the treatment of PoWs, both should be bound to respect these treaty provisions regardless of whether they view their opponent’s armed forces as commanded by a lawful government.

“Irregular” troops such as volunteers or militia members—including any units affiliated with al-Qaeda—must be treated as PoWs only if they fulfill certain conditions. Under the Third Geneva Convention, those conditions include having a responsible commander, carrying arms openly, having a fixed distinctive sign recognizable at a distance, and conducting military operations in accordance with the laws and customs of war. Again, if questions arise about whether given troops meet these requirements, they should be afforded presumptive PoW status until a competent tribunal makes a determination to the contrary.

The First Additional Protocol to the Geneva Conventions (Protocol I) eased these requirements by allowing troops who as combatants do not bear a fixed, distinctive mark, such as a uniform (so long as they bear their arms openly) still in certain circumstances to be eligible for PoW status. Although some coalition states are parties to Protocol I, the

United States is not, and this provision is not considered customary international law that would bind non-parties.

Captured combatants who are found not to meet the requirements for treatment as PoWs are considered to be detainees. Detainees do not receive the protections provided for PoWs; for instance, they may be tried for taking part in hostilities. However, they must be treated as civilians in custody and are entitled to the protections for such civilians found under international humanitarian and human rights law.

International humanitarian law governing internal armed conflicts does not accord combatants captured by an opposing side PoW status.

*Q: For what crimes could those who participated in the September 11 attacks be prosecuted?*

Persons who planned, aided or abetted the September 11 attacks could be prosecuted by U.S. authorities for the domestic crimes of murder and hijacking. In addition, the hijacking of the planes could constitute offenses under various international terrorism treaties. Finally, these atrocities could be considered crimes against humanity.

Under the most recent definition of crimes against humanity as set forth in the statute of the International Criminal Court, acts such as murder and “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health” qualify as crimes against humanity “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” Human Rights Watch believes that the deliberate hijacking of passenger planes and their use as explosives against office buildings causing some five thousand deaths would constitute a “widespread” attack. Although most adjudicated cases address crimes against humanity that were committed in the context of ongoing war and were organized under state authority, recent jurisprudence allows for the commission of such crimes in peacetime and by non-state actors.

*Q: Where can suspects be prosecuted?*

Crimes against humanity, war crimes, and violations of treaties such as the Hague Convention for the Suppression of Unlawful Seizure of Aircraft give rise to universal jurisdiction, meaning that any state may try suspected perpetrators, regardless of the nationality of the suspect or the location of the crime. Whether a state can take advantage of universal jurisdiction depends on whether its domestic law gives such powers to its courts. However, if a state fails to prosecute a suspected perpetrator, it is obligated to extradite the suspect to another state that is willing and able to do so.

The continued existence of the death penalty in United States law has created difficulties in extradition from countries in Europe that have abolished it. Human Rights Watch opposes the death penalty in all forms and notes that the overwhelming trend of state practice is towards abolition. Before extraditing suspects, European countries have

typically required assurances from the United States that the death penalty will not be applied, and such assurances have become relatively routine.

Some commentators have suggested an international forum to try those accused of the September 11 attacks. Because these crimes give rise to universal jurisdiction, an international forum could be given jurisdiction. However, because the International Criminal Court has not yet come into being, and by its founding statute has only prospective jurisdiction, it would not be able to take these cases. However, a new international tribunal could be constituted for this purpose. One option would be an *ad hoc* tribunal created by the U.N. Security Council and patterned on the international tribunals for former Yugoslavia and Rwanda. Another would be an international panel created by all or some of the various states whose citizens were victims of the attack.

*Q: Exactly what provisions of international humanitarian law apply to the conflict in Afghanistan?*

The United States and Afghanistan are both parties to the Geneva Conventions of 1949. They are also bound by those provisions of the laws of war that, through wide state recognition and practice, have become customary international law. Many NATO and other possible coalition countries are also parties to Protocol I to the Geneva Conventions. Although neither the United States nor Afghanistan is party to Protocol I, the United States recognizes many of its provisions as reflective of customary international law. In addition, by virtue of having signed (but not ratified) Protocol I, the United States is obligated under international law to avoid actions that would undermine the guarantees of that treaty.

*Q: What are the restrictions that international law places on targets of attack?*

A fundamental precept of international humanitarian law is that of “civilian immunity.” At all times, it is forbidden to direct attacks against civilians; indeed, to do so intentionally amounts to a grave breach of humanitarian law, or a war crime. It is thus an imperative duty to identify and distinguish non-combatants from combatants in every situation and not to rely on inadequate reconnaissance or intelligence. A notable example of inadequate efforts to make this distinction was the NATO bombing of a refugee convoy on the Djakovica-Decane road in Kosovo during the 1999 air campaign in the mistaken belief that it was a military convoy.

Non-combatants include soldiers who are wounded or captured or otherwise removed from a combat role; however, regular combatants are still legitimate targets of attack even when “off-duty.” Civilians lose their protected status when they are engaged in hostilities; however, when they return to civilian life their protection resumes. Political leaders would not be legitimate targets of attack unless their office or direct participation in military hostilities renders them effectively combatants. According to the International Committee of the Red Cross, direct participation in hostilities means “acts of war which by their nature and purpose are likely to cause actual harm to the personnel and equipment of enemy armed forces” and includes acts of defense. Thus, political leaders

who are effectively commanders of a state's forces would be legitimate targets, but absent some unusual circumstance, officials of, say, a ministry of education would not.

It is also generally forbidden to direct attacks against what are called "civilian objects," such as homes and apartments, places of worship, hospitals, schools, or cultural monuments, unless they are being used for military purposes. Military objects are those that make an "effective" contribution to military action and whose destruction, capture or neutralization offers a "definite" military advantage. Where there is doubt, the object must be presumed to be civilian.

The mere fact that an object has civilian uses does not necessarily render it immune from attack if it meets the above-noted test: it makes an "effective" contribution to military action and its destruction, capture or neutralization offers a "definite" military advantage. However, such "dual use" objects might also be protected by the principle of proportionality, described below.

Even when a target is serving a military purpose, precautions must always be taken to protect civilians. One such precaution is effective warning of an attack where "circumstances permit" (discussed below). Another is taking steps to avoid attacks that threaten disproportionate harm to civilians – that is, "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."

*Q: But isn't it lawful to attack targets that will demoralize the civilian population or weaken its support for the war effort?*

Lawful targets of attack are only those which by their "nature, location, purpose or use make an effective contribution to military action" and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers "a definite military advantage." Human Rights Watch takes the position that attacks directed at civilian morale do not meet this test – indeed, that they are inimical to international humanitarian law's purpose of protecting civilians. While there is no doubt that military attacks aimed at civilian morale can undermine one side's willingness to carry on hostilities, such a practice would also completely undermine the aim of protecting civilians. The logic of attacking civilian morale opens the door to attacking civilians and civilian objects themselves. In addition, international humanitarian law explicitly prohibits attacks whose primary purpose is to instill terror in the civilian population.

That said, there is no international law prohibition on targeting civilian morale or political will through non-military means, such as propaganda, diplomacy and the like. Attacks on military targets designed to harm military morale are not unlawful so long as they are not disproportionately harmful to civilians.

*Q: What about the specific targets of the airstrikes in Afghanistan?*

The initial information is that the airstrikes of the U.S.-led coalition have targeted, aircraft and air defense systems, military headquarters, military command and communications facilities, military training camps, front-line military positions, and airports. All except for the last are unambiguously military objects which may be lawful targets of attack, so long as the military advantage in destroying or harming them is outweighed by the prospective harm to civilians.

Airports, roads and bridges may be dual-use targets, in that they might be used both for military purposes and to deliver humanitarian assistance to civilians. Electrical facilities also may serve both a military and civilian purpose. Although most of the Afghan population lacks electricity, certain urban facilities for civilians depend on electricity for long-term function, such as hospitals.

When a target is dual-use in nature, the impact on civilians must be carefully weighed against the military advantage served; all ways of minimizing the impact on civilians must be considered, and attacks should not be undertaken if the civilian harm outweighs the definite military advantage.

*Q: What are the legal constraints on methods of attack?*

A corollary to the principle of civilian immunity is the basic prohibition of indiscriminate attacks. An attack is “indiscriminate” when its effect is not or cannot be limited to military targets and so it harms military targets and civilians or civilian objects without distinction. Typical examples would be the carpet-bombing of populous areas where military targets are interspersed, or the laying of anti-personnel landmines, which cannot distinguish between civilian or military feet. Indiscriminate attacks also include those which, as noted above, may be expected to cause incidental loss of civilian life, injury to civilians, or damage to civilian objects which would be excessive in relation to the “concrete and direct military advantage” anticipated from the attack. Human Rights Watch considers that the evaluation of whether an attack may cause excessive harm to civilians must be conducted for each attack and potential target, and not with regard to the conflict as a whole.

The law requires precautions and choices where civilians are at risk from attacks. The duty to take all feasible steps to minimize injury to civilians and civilian objects requires commanders to choose the means of attack that will minimize incidental harm to civilians. Where a party to the conflict has precision weapons at its disposal, it is under a duty to use “smart” rather than “dumb” bombs in or near populated areas. Likewise, where various military targets offer a similar military advantage, commanders must choose the target that threatens the least danger to civilian lives and civilian objects. Each party to the conflict also has the duty to provide “effective advance warning” of attacks that may affect the civilian population, “unless circumstances do not permit,” such as where the element of surprise is critical to the success of the attack. So, for example, if a bridge or major highway is useful to the military as well as civilians, the opposing military is obliged to determine whether there are alternative targets whose destruction offers a similar advantage but less risk to civilians, or whether warnings are

feasible before bombing, or whether there is a time of day for attack that would minimize potential harm to civilians. Finally, where an attack would be indiscriminate, or the target questionable, the attack must be cancelled or suspended.

*Q: What about the use of civilians as “shields” for military targets?*

Parties to the conflict are required to take precautions against the effect of attacks on civilians to the maximum extent feasible. Among these precautions are removing the civilian population from the vicinity of military objectives and avoiding locating military objectives within or near densely populated areas.

Should one party violate this rule by using the presence of civilians to shield military targets, the opposing force is not excused, in calculating the legality of an attack, from taking the risk to civilians into account. That is, it is still necessary to weigh the concrete and direct military advantage of any attack against the prospective harm to civilians.

*Q: What about the prospect that thousands of Afghans who are fleeing their homes will starve or freeze this winter? Is that a violation of humanitarian law?*

Deliberate starvation of the enemy’s population is prohibited as a tactic of war, as are any methods designed to cause extremely severe damage to the environment or the destruction of objects on which civilians depend for survival, such as food or water sources. The population of Afghanistan has for years suffered extreme deprivation of food and health care due to political repression and the interrelated effects of war, conflict-related violence, and drought. Now, war-induced fear has exacerbated what was already a crisis, putting thousands of civilian lives at risk as foreign aid workers leave and humanitarian assistance is scaled back. There is no evidence that the U.S. or any of its allies sought to cause such a grim humanitarian consequence. However, attacking forces must still remain conscious of the precarious situation and take it into account when calculating the effect on the civilian population of attacks on any potential military target. For example, certain roads, bridges and airports may ordinarily be legitimate military targets, but if they are also essential to the delivery of humanitarian relief throughout the winter, their attack may yield more harm to civilians than definite military advantage, and so would be forbidden.

In addition to making military decisions with the fragility of the civilian population in mind, Human Rights Watch believes it is morally incumbent on the U.S. and its allies, as well as the international community at large, to provide humanitarian aid and take other effective and proactive measures to alleviate the prospect of starvation and mass civilian deaths.

*Q: What types of weapons, or means of attack, are violations of international humanitarian law?*

A fundamental principle is that weapons and means of warfare must not cause “superfluous injury” or “unnecessary suffering.” Dum-dum bullets were an early

category of weapon found to violate this principle; blinding lasers are a more modern example. This principle, and the norm against weapons that harm civilians and soldiers indiscriminately, underlie the prohibition of a variety of weapons. Among these are biological and chemical weapons, and weapons such as anti-personnel landmines.

Cluster bombs, employed widely in the Gulf War as well as in the early stages of the NATO air war in Kosovo, present a hazard to civilians similar to anti-personnel landmines. The “bomblets” they release have been shown to have a high initial dud rate, leaving highly volatile explosives on the ground that cannot distinguish between combatants and civilians who might encounter them. The high initial dud rate is magnified by the large number of sub-munitions used. In addition, cluster bombs are difficult to target precisely and thus can also be an indiscriminate weapon if used near populated areas. Human Rights Watch urges the United States and its allies to refrain from using anti-personnel landmines entirely and from using cluster bombs in circumstances where they pose a deadly menace to civilians.

*Q: If the Taliban or its allies violate international humanitarian law, does that absolve the United States and its allies from the duty to comply with this law?*

No. Non-respect for humanitarian law by one side to a conflict, however deplorable, does not excuse the opposing party from obeying the law.

*Q: What responsibility does the United States bear if its allies violate these rules of warfare?*

The United States is directly responsible for any forces over which it exercises effective control. In addition, Human Rights Watch has long advocated that no security assistance be given to forces whose conduct displays a consistent pattern of gross violations of human rights and humanitarian law. In particular, Human Rights Watch urges that no such assistance be given to any group or coalition that includes commanders with an unremedied record of serious violations of international humanitarian law standards, including but not limited to General Abdul Rashid Dostum, the head of the Uzbek militia known as the Junbish; Haji Muhammad Muhaqqiq, a senior commander of the Shi’a Hazara party Hizb-i Wahdat; Abdul Rasul Sayyaf, leader of the now defunct Sunni Islamist party, Ittihad-i Islami; and Abdul Malik Pahlawan, a former senior Junbish commander. In addition, we urge the establishment of mechanisms to hold abusers accountable as a way of serving justice and marginalizing these figures from any future Afghanistan government.