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Certain Legal Questions Raised by the Septermber 11th Attacks

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Certain Legal Questions and Issues Raised by the September 11th Attacks

*by Professor Robert K. Goldman**

In trying to analyze the legal implications of the events of September 11th, international lawyers and government officials are finding themselves in somewhat uncharted territory. Because the attacks on the Pentagon and the World Trade Center complex were apparently carried out by non-state actors who may have planned, organized and financed key aspects of their illicit activities in other states, it is not easy to frame U.S. responses within familiar categories recognized by international law. Normally, a state goes to war against another state or internal enemies. Although the war that the U.S. has pledged to wage against the perpetrators of these horrific acts and the state(s) that harbor them does not fit neatly within existing paradigms, any ensuing hostilities will nonetheless be largely based on or extrapolated from preexisting international law rules and principles.

In analyzing these events, it is important to distinguish two separate, but interrelated branches of international law: the law governing the resort to armed force, and the law applicable to the conduct of hostilities. The former is found in the United Nations Charter (Charter) and state practice, and the latter in the law of armed conflict, also known as International Humanitarian Law (IHL).

Historically, states recognized a right to resort to war between or among themselves as a lawful means to settle political disputes. Hostilities were frequently triggered by formal declarations of war, armed attacks followed by such a declaration, or other acts indicating an intention to engage in warfare. With the adoption of the UN Charter in the wake of World War II, the legal rules changed in this regard. By virtue of Articles 2(3) and 2(4) of the UN Charter, states renounced the use of force as a means of settling disputes and effectively outlawed aggressive war. However, Article 51 of the Charter recognizes that a state that is the victim of an armed attack (presumably by another state(s)) can lawfully resort to force in exercise of the inherent right of individual or collective self-defense against aggression.

The term "war" has a particular meaning in U.S. law, which involves complex constitutional issues of separation of powers. Under the federal Constitution, only Congress can declare war and it has not done so since World War II. However, the U.S., without such a declaration, but under the President's express and implied powers, has been involved in numerous armed conflicts, including Korea, Vietnam, Kosovo, Grenada, and Panama. Like his father in the Gulf war, President Bush has received from Congress, not a declaration of war as such, but a joint resolution authorizing him to use military force against nations, organizations and persons involved in these attacks and those states which harbor such organizations and persons. Various actions on the international level also have significantly strengthened the President's hand to undertake, consistent with international law, hostile acts against these persons, groups and/or states.

Certainly, if a state had launched these attacks, the U.S., as the victim of aggression, could under Article 51 of the Charter legitimately take military action against that state and call on other states to assist it. Significantly, the NATO Treaty—which declares an attack on one member an attack on all members of the alliance—has been invoked for the first time, and may well result in unprecedented joint military operations under that treaty. A claim by NATO members to be acting in accordance with Article 51 and the Charter's purposes would carry great weight and contribute to the interpretation of Charter norms. Most importantly, the United Nations Security Council, on September 12, 2001, unanimously approved Resolution 1368 (2001), stating that any act of international terrorism was a threat to international peace and security. While calling on all states to bring to justice "the perpetrators, organizers and sponsors" of these terrorist acts, it stressed that "those responsible for aiding, supporting or harboring them would be held accountable," and pointedly recognized the right to individual and collective self-defense under the Charter. This measure, while not expressly authorizing the use of force, is sufficiently broad that it will unquestionably be relied on by the U.S. if it decides to employ force against any or all of these parties.

Can the U.S. be at "war" and engage in hostilities against non-state actors? Historical precedents suggest that it can. For example, the U.S. in 1805 sent an expeditionary force to Tripoli to destroy the Barbary Pirates. In 1916, the U.S. military was sent into Mexico to capture or kill Pancho Villa and his band after they attacked U.S. nationals in New Mexico. It is well settled that non-state actors who engage in hostile acts during an armed conflict may be lawfully killed or wounded. IHL permits governments engaged in civil wars and lesser internal hostilities to attack members of dissident armed groups, as well as the targeting of individual

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civilians who directly participate in internal or interstate hostilities. All such persons are effectively non-state actors. One might anticipate that the U.S., by analogy to interstate armed conflict rules, will treat Osama bin Laden and his associates as constituting a paramilitary organization whose members do not comply with the most basic rules and customs of warfare. As such, the U.S. could treat them as unprivileged combatants subject to direct attack and, if captured, not entitled to prisoner of war status. Accordingly, they would be liable for trial in a U.S. court and punishment for all their hostile acts, as well as pre-capture offenses. These offenses entail multiple crimes under U.S. and international law associated with the attacks on the Pentagon and the World Trade Center complex, and the bombings of the U.S. embassies in Kenya and Tanzania in 1998, for which bin Laden has already been indicted.

Credit: Shaphan Connely

September 11, 2001

Had a state launched these attacks, that state would clearly be responsible for having initiated an aggressive war in violation of the UN Charter. It is unclear whether non-state actors can be charged with and tried for this particular offense. However, if their attacks are treated as acts of war, those acts would constitute serious violations of the laws and customs of war. In this regard, IHL categorically prohibits launching intentional attacks against the civilian population, individual civilians, as well as civilian objects. Moreover in 1977, states by treaty (Protocol Additional to the Geneva Conventions of 12 August, 1949, and Relating to Protection of Victims of International Armed Conflicts—Protocols I & II) prohibited in all armed conflicts acts or threats of violence whose primary purpose is to terrorize the civilian population. The World Trade Center complex was a civilian object dedicated to ordinary civilian purposes and inhabited by peaceable civilians. Thus, these buildings were immune from direct attack. Their deliberate destruction with the clear intent to kill or wound civilians within those structures constituted an illegal indiscriminate attack. Another clear and illicit purpose of the attacks was to terrorize and attack the morale of the civilian population. So great was the intended and actual number of civilian deaths attending these attacks that they also might well qualify as a crime against humanity. The attack against the Pentagon arguably was also illegal. Although the Pentagon does qualify under IHL as a military objective, and is thus a lawful target of attack during an armed conflict, it was attacked by perfidious or treacherous means—a hijacked civilian jetliner.

Other international crimes, punishable under U.S. law and the laws of other nations, were committed by the perpetrators of these attacks and their confederates. The seizure and destruction of the jetliners violated the 1970 Hague anti-hijacking convention, as well as 18 U.S.C. § 32, which imposes criminal liability for, *inter alia*, willfully destroying an aircraft and assaulting its passengers and crew. Further, the effect on the passengers of these hijacked planes might well amount to hostage taking in violation of the Convention against the Taking of Hostages and 18 U.S.C. § 1203, which contains a similar proscription. Most of these crimes are already within the subject matter jurisdiction of U.S. courts. War crimes, crimes against humanity, hijacking, hostage taking, and other serious violations of the laws and customs of war are international crimes of universal jurisdiction, making the perpetrators subject to criminal prosecution by other states. At present, there is no international court with jurisdiction to try the perpetrators and their accomplices. However, the UN Security Council, or perhaps a group of states which are parties to these treaties, such as NATO members, could establish an ad hoc tribunal for this purpose, based on the Yugoslav and Rwanda models.

President Bush has stated that the U.S. will make no distinction between the perpetrators and those, presumably states, who harbor them. Can the U.S. invoke Article 51 of the UN Charter to justify taking military action against a state that did not perpetrate the attacks of September 11, but merely harbors the intellectual authors of and other accomplices in these events? It is legally plausible that the U.S. and its allies might impute these acts of terrorism, constituting an armed attack, to such a state(s), thereby holding it responsible for these crimes. International law recognizes that the acts of non-state actors may be attributed under certain circumstances to a state. The U.S. may argue that Afghanistan, for example, is guilty of both omission and commission in connection with these and previously realized or foiled attacks by Osama bin Laden and his associates. That argument might posit that the Taliban's failure to take action against bin Laden effectively amounts to a pattern of state tolerance of and acquiescence in these illicit acts sufficient to impute and thus attribute the conduct to the state itself. International human rights bodies have used such reasoning in finding states responsible for the conduct of non-state actors. For example, in 2000, the Inter-American Commission on Human Rights (Commission) in the *Massacre of Rio Frio* case found Colombia responsible for atrocities committed by the *Autodefensas Unidas de Colombia*, a paramilitary group. The Commission found that, even though the state had declared

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such groups to be illegal, it tolerated their presence and had acquiesced in their depredations and killings in the particular circumstances of that case.

If the United States takes military action against Afghanistan or any other state, it will be involved in an international armed conflict with that state within the meaning of Article 2 common to the 1949 Geneva Conventions. As such, the U.S., its allies, if any, and the target state will be legally bound to conduct hostilities in accordance with IHL, most particularly, the Geneva Conventions and the laws and customs of warfare contained in the Hague Regulations. Unlike UN law, modern IHL is not concerned with the legality of the resort to force. Rather, its fundamental rules are designed to regulate and restrain the conduct of hostilities in order to spare the victims of armed conflicts. Foremost among these rules are those designed to ensure the immunity of the civilian population and civilian objects, such as houses and schools, etc., from direct attack by requiring the belligerents to distinguish at all times such protected persons and objects from military objectives and to direct their attacks solely against the latter. The warring parties, moreover, cannot attack military targets with impunity. When so doing, they must take the necessary precautions to avoid or at least minimize expected civilian casualties, *i.e.*, collateral damage. In other words, the U.S. cannot fight terror with terror. Apart from being unlawful, attacks against civilians and their morale are totally counterproductive, as the reaction of the American people demonstrates, and wasteful of military assets.

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Can the U.S., without violating U.S. and international law directly, target bin Laden in connection with such an attack? The answer is yes. Executive Order 12333 (Order) effectively renounces the use of assassination as an instrument of U.S. policy. While so doing, the Order does not define the term "assassination," but it should be understood as meaning an act of murder undertaken for political purposes. The ostensible purpose of the Order at the time of its adoption was to preclude the U.S. from killing, for example, a foreign leader of a state with whom the U.S. was not at war. The Order not only prohibits this, but also the willful killing of a private person for political purposes. This prohibition is consistent with international human rights law, which prohibits a state from engaging in arbitrary deprivations of life.

The legal situation is different during situations of armed conflict. Combatants may lawfully target and kill enemy combatants, as well as civilians who directly participate in the hostilities. As these persons are legitimate targets of attack, their deaths are treated as justifiable homicide for which the attacker incurs no liability under domestic or international law. Such killings do not constitute assassinations within the meaning of the Executive Order or IHL, nor would they violate, in principle, the prohibition against arbitrary deprivation of life in human rights law.

As previously noted, the U.S. is justified in treating bin Laden and the members of his organization as a paramilitary force which engages in the illegal use of force. Whether they be regarded as paramilitary or merely civilians who have assumed a combatant's role, they are in the context of interstate hostilities unprivileged combatants who are subject, individually and collectively, to direct attack. So long as they are not attacked in a "treacherous" manner, which does not include by commando raid, their deaths would be lawful acts of war.

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The *Human Rights Brief* is profoundly saddened by the incomprehensible events of September 11, 2001.

We respectfully offer our thoughts, prayers, and heartfelt sympathy to all of those who have been affected by this unspeakable tragedy.

Moreover, we extend our deep gratitude to the firefighters, police officers, and emergency workers who serve this nation.