

WHEN IS A WAR NOT A WAR? THE MYTH OF THE GLOBAL WAR ON TERROR

*Mary Ellen O'Connell**

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The starting point of human rights law is the right of the individual, including the right not to be arbitrarily killed. The international law of armed conflict, which is very much older in its origins than human rights law, starts from totally different premises. The soldier has the right to kill another soldier.¹

Françoise Hampson’s observation is a good place to begin a discussion of the “war on terror” proclaimed by President George H. Bush within hours of the September 11, 2001 attacks. She presents starkly the importance of accurately classifying situations as war or peace. First, as she notes, human lives depend on the distinction, but so do liberty, property, and the integrity of the natural environment. This brief article reviews the reasons why the Bush Administration declared war after September 11. It considers whether that declaration and related policies are consistent with international law as to the meaning of war. The conclusion here is that they are not. The President’s “war on terror” does not meet the legal definition of war. Moreover, to the extent there is ambiguity, the United States should err on the side pursuing terrorists within peacetime criminal law, not the law of war. Not only does the criminal law better protect important human rights

* Robert and Marion Short Chair in Law, Notre Dame Law School. B.A., Highest Honors (History), Northwestern University, 1980; M.Sc. (International Relations), London School of Economics, 1981; LL.B., First Class Honors, Cambridge University, 1982; J.D., Columbia University, 1985. This article is a revised version of oral remarks presented at the International Law Weekend 2005, held at the House of the Association of the Bar of the City of New York, from October 20 to 22, 2005.

1. Françoise Hampson, *Human Rights Law and International Humanitarian Law: Two Coins or Two Sides of the Same Coin?*, 1 BULLETIN OF HUMAN RIGHTS 46, 50 (1991), quoted in Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 42 COLUM. J. TRANSNAT’L L. 1, 3 (2004).

and other interests, it avoids elevating terrorists to the status of combatants in a war with the world's only superpower.

I. UNDERSTANDING THE "WAR ON TERROR"

Within hours of the September 11 attacks President Bush declared that the United States was at war.² Shortly, thereafter, he said the "war" "will not end until every terrorist group of global reach has been found, stopped, and defeated."³

Many of us in international law, even those of us who work on the international legal regulation of the use of force, were slow to take in that the President meant literally that the United States would act as though it were in an armed conflict in every part of the globe wherever a terrorist might be found. This was not the "war on drugs" or "war on poverty", this was "World War III."

On November 13, 2001, the Administration gave its first public indication that, indeed, it did consider the U.S. to be in an actual war. Executive Order, Detention, Treatment, & Trial of Certain Non-Citizens in the War Against Terrorism states that terrorist suspects will be tried before military tribunals and subjected to military detention, irrespective of whether they are captured in an armed conflict or not.⁴ Asked in October 2002 when the Afghan war detainees at Guantanamo Bay would be released, lawyers for the Administration answered not until every terrorist in the world has been found, killed or captured.

About a week later, the world learned how serious the Administration really was about treating the entire world as a war zone. On November 3, 2002, agents of the CIA, using an unmanned Predator drone, launched a Hellfire missile at a vehicle in remote Yemen, killing six men. Yemen recognized no armed conflict on its territory at the time of the strike, nor was the United States at war with Yemen. National Security Adviser Condoleeza Rice explained, however, that "We are in a new kind of war. And we've made very clear that it is important that this new kind of war be fought on different battlefields."⁵ The Deputy General Counsel of the Department of Defense for International Affairs said in the global war on

2. See George W. Bush, President's September 11, 2001 Address to the Nation on the Terrorist Attacks, 37 WEEKLY COMP. PRES. DOC. 1301 (Sept. 17, 2001).

3. See George W. Bush, President's September 20, 2001 Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1348 (Sept. 24, 2001).

4. Military Order of Nov. 13, 2001, Detention, Treatment, & Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 16, 2001).

5. Interview: Tony Snow and Condoleeza Rice (FOX NEWS SUNDAY, Nov. 11, 2002), available at http://www.foxnews.com/printer_friendly_story/0,3566,69783,00.html (last visited Feb. 10, 2006).

terrorism the U.S. could target Al Qaeda suspects and kill them without warning wherever they are found. He indicated that that included targeting persons on the streets of a peaceful city like Hamburg, Germany.⁶

It is clear that the Administration following September 11 wanted the wartime privileges of killing without warning, detention without trial, and trials under wartime rather than peacetime rules. It has exercised all of these rights quite separately from the wars in Afghanistan and Iraq.⁷

II. UNDERSTANDING THE MEANING OF WAR IN INTERNATIONAL LAW

A war or armed conflict, however, has two important components: It consists of two or more organized armed groups engaged in protracted and intense armed hostilities. In *Prosecutor v. Tadić* before the International Criminal Tribunal for the Former Yugoslavia, the Tribunal defined “armed conflict” as existing “whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state.”⁸ The Additional Protocols to the Geneva Conventions also incorporate concepts of intensity and organized fighting for a situation to be an “armed conflict.” Additional Protocol II applies only to conflicts “more than situations of internal disturbances and tensions such as riots and isolated and sporadic acts of violence.” Even “many isolated incidents, such as border clashes and naval incidents, are not treated as armed conflicts. It may well be, therefore, that only when fighting reaches a level of intensity which exceeds that of such isolated clashes will it be treated as an armed conflict to which the rules of international humanitarian law apply.”⁹

Nathaniel Berman suggests, however, that a worldwide struggle with al Qaeda could meet the definition of armed conflict as long as “protracted” is deemed to include “a conflict that is both spatially dispersed and temporally discontinuous, waxing and waning by fits and starts for over ten years—and provided that such a discontinuous conflict is not disqualified as an armed conflict by describing it as ‘sporadic.’”¹⁰ Outside

6. ANTHONY DWORKIN, CRIMES OF WAR PROJECT, LAW AND THE CAMPAIGN AGAINST TERRORISM: THE VIEW FROM THE PENTAGON (Dec. 16, 2002), available at <http://www.crimesofwar.org/print/onnews/pentagon-print.html> (Feb. 10, 2006).

7. It is beyond the scope of this article to discuss the Administration’s conduct of its global war on terror. Suffice it to say that serious charges have been leveled that the Administration has not complied with the law of war.

8. *Prosecutor v. Tadić*, Case No. IT-94-I, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995).

9. Christopher Greenwood, *Scope of Application of Humanitarian Law*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICT 39, 42 (Dieter Fleck ed., 1995). “International humanitarian law” or “IHL” are the more common terms used for the law that applies to the conduct of hostilities and occupation.

10. Berman, *supra* note 1, at 32–33.

the real wars of Afghanistan and Iraq, al Qaeda's actions and our responses have been too sporadic and low-intensity to qualify as armed conflict.

Some try to argue that a war began on September 11 because the attacks were an "act of war," or those attacks plus others by al Qaeda during the previous ten years. Wars, however, do not begin with an attack. They begin with a counter-attack. States may have the right to engage in a war of self-defense following an attack. If they chose not to do so, there is no war. War, as discussed above requires exchange, intensity and duration.

Kenya, the United Kingdom, Indonesia and Spain have all been attacked by al Qaeda. They have all responded, but not with a military counter-attack. They have turned to their law enforcement agencies. None of these countries declared they were in a war. As the United Kingdom stated when it became a party to the 1977 Additional Protocol I to the Geneva Conventions: "... 'armed conflict' of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation."¹¹

In addition to the legal definition of war, governments have had strong policy reasons for avoiding calling terrorism "war." Governments typically prefer not to acknowledge that a terrorist group can challenge the state at the level of "war" rather than mere criminality. War connotes a loss of control. Crime, on the other hand, can remain under control. Every society has crime, while few are engaged in war and those few are perceived to have failed in some important sense. Nor do governments normally wish to extend the privileges of humanitarian law to armed groups. They prefer to apply national criminal law to their enemies and even to their own armed forces when fighting enemies within the state. Calling opponents "combatants" and declaring the struggle against them "war" elevates their status above that of mere criminals. According to Greenwood,

[i]n the language of international law there is no basis for speaking of a war on Al-Qaeda or any other terrorist group, for such a group cannot be a belligerent, it is merely a band of criminals, and to treat it as anything else risks distorting the law while giving that group a status which to some implies a degree of legitimacy.¹²

11. Reservation by the United Kingdom to art. 1, ¶. 4 & art. 96, ¶ 3 of the Geneva Conventions of Aug. 12, 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 3 (cited in Marco Sassòli, *Use and Abuse of the Laws of War in the "War on Terrorism,"* 22 *LAW & INEQ.* 195 (2004)).

12. Christopher Greenwood, *War, Terrorism and International Law*, 56 *CURR. LEG. PROBS.* 505, 529 (2004); see also, Mary Ellen O'Connell, *Enhancing the Status of Non-State Actors Through a Global War on Terrorism*, 43 *COLUM. J. TRANSNAT'L L.* 435 (2005).

When President Bush declared war on al Qaeda and other terrorist groups, he elevated Osama bin Laden to his own status, commander-in-chief, in a war with the world's only superpower.

It was a strategic blunder to have enhanced the status of terrorists through declaring a war on them. Apparently this was belatedly recognized in the Pentagon and an attempt was made in the summer of 2005 to back away from the policy. Secretary Rumsfeld and Chairman of the Joint Chiefs of Staff Myers began using the phrase "global struggle against violent extremism" (G-SAVE) instead of global war on terrorism (GWOT). President Bush, however, rejected the change, saying the U.S. was in a war.¹³ Without a war, there could be no wartime privileges to kill, detain without trial, and try without peacetime due process.

III. CONCLUSION

International law has a definition of war and it refers to places where intense, protracted, organized inter-group fighting occurs. It does not refer to places merely where terrorist suspects are found. Nevertheless, the definition may not be clear enough or comprehensive enough given the lack of international protest against the Bush Administration, especially following the Yemen strike. There appears to be some tolerance for a return to the old days of formalism when a government's declaration of war was all it took for international law to recognize a *de jure* war. Yet, in war human beings and the natural world lose important protections. Therefore, it is time to restate and strengthen a narrow definition of war. War should be considered an aberration. It should only be recognized when compelled by the facts: facts of real fighting and situations of emergency where normal peacetime law and protections cannot operate. Doubtful situations should be treated under the law of peace. The human right to life, to a speedy trial, to peacetime due process, and the duty to protect the environment should be respected unless the state is compelled by intense and protracted armed hostilities from doing so.

¹³ Ronald Brownstein & Mark Mazzetti, *Dissonance on Message for Bush*, *Pentagon*, L.A. TIMES, Aug. 13, 2005. In early 2006, Pentagon officials reportedly changed the name again from "GWOT" to the "Long War." See, e.g., Patrick Walters, *It's a New Cold War, and It May Go on Even Longer*, AUSTRALIAN, Feb. 11, 2006, at 19.