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## Enhancing the Status of Non-State Actors Through a Global War on Terror?

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# Enhancing the Status of Non-State Actors Through a Global War on Terror?

MARY ELLEN O'CONNELL\*

*Soon after September 11, President Bush declared a global war on terrorism and members of terrorist groups "combatants." These declarations are not only generally inconsistent with international law; they also reverse the trend regarding the legal status of international non-state actors. For decades, law-abiding non-state actors, such as international humanitarian aid organizations, enjoyed ever-expanding rights on the international plane. Professor Schachter observed how this trend came at the expense of the nation-state. He also predicted, however, that the nation-state would not fade away any time soon. And, by the late Twentieth Century, the trend toward enhanced status was noticeably slowing. During this same period, international criminal organizations, such as terrorist groups, made little or no progress regarding international status. They remained firmly within national criminal law. That situation ended when the United States catapulted them to the international plane, enhancing their status at the United States' cost.*

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## INTRODUCTION

The puzzling decision of the Bush Administration to declare a global war on terror and to label terrorists “enemy combatants” has quite possibly had an unintended consequence for non-state actors. It has lifted certain individuals out of the status of *criminal* and into that of *combatant*, the same category that the United States’ own troops have while engaging in armed hostilities. The move to label terrorists combatants is contrary to strong historic trends. From the earliest times, governments have struggled to prevent their enemies from approaching a status of equality. Even governments on the verge of collapse due to the pressure of a rebel advance have vehemently denied that the violence inflicted by their enemies was anything but criminal violence. Governments fear the psychological and legal advantages to opponents of calling them “combatants” and their struggle a “war.” Yet, the Bush Administration, within days of the September 11 attacks in the United States, declared a “global war on terror” and designated terrorists “enemy combatants.” This Essay delineates the traditional standing of non-state actors under international law; it describes the legal distinctions between two groups of non-state actors: combatants and terrorists; and it concludes by warning of the potential negative consequences of the collapsing of the distinction.

The Essay begins by defining non-state actors and describing their evolving legal status relative to state actors. This first Part draws upon Professor Schachter’s observations on the decline of the nation-state and the rise of the non-state actor in the late Twentieth Century.<sup>1</sup> This Essay then turns to the decision by the Bush Administration to declare non-state actor terrorist groups “enemy combatants” regardless of their participation in actual armed conflict. The Essay explains how this designation pulls terrorists from a lowly position within the state criminal system, boosting them to a place more solidly on the international plane. This boost occurs because “combatants” are generally defined and regulated directly under international law, while the status and regulation of terrorists

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1. Oscar Schachter, *The Decline of the Nation-States and Its Implications for International Law*, 36 COLUM. J. TRANSNAT’L L. 7 (1997), also printed in *POLITICS, VALUES, AND FUNCTIONS: INTERNATIONAL LAW IN THE 21ST CENTURY* 13 (Jonathan I. Charney et al. eds., 1997).

traditionally has been a matter of national criminal law. The Essay's final Part considers the potential consequences of enhancing terrorist status in this way and suggests some possible antidotes. It is a dark irony that the most powerful nation-state of all has put the legal category of "state" under pressure through the decision to declare war on terrorism. The final Part again draws on Professor Schachter's observations on the resilience of the nation-state even in the face of powerful pressures toward its decline.

## I. THE EVOLUTION OF NON-STATE ACTORS UNDER INTERNATIONAL LAW

These days, when we hear "non-state actor," we tend to think "terrorist organization." As a technical matter, however, non-state actors can be any actor on the international plane other than a sovereign state. Conveniently, most sovereign states are identifiable by their membership in the United Nations. Non-state actors, therefore, are those actors on the international plane that are not members of the United Nations. Inter-governmental organizations,<sup>2</sup> non-governmental organizations (NGOs), and individuals—natural and juridical—can all be classified as non-state actors. We will focus here on those international non-state actors that consist of groups of human beings rather than groups of sovereign states. The law-abiding non-state actors such as Amnesty International, Greenpeace, Doctors Without Borders, CARE, and Human Rights Watch are typically designated "NGOs."<sup>3</sup> Across the legal divide we find organized

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2. "Intergovernmental organization" may be defined as "an association of States established by and based upon a treaty, which pursues common aims and which has its own special organs to fulfill particular functions within the organization . . ." Rudolf L. Bindschedler, *International Organizations, General Aspects*, in 2 *ENCYCLOPEDIA OF INTERNATIONAL LAW* 1289–90 (Rudolf Bernhardt ed., 1992).

3. According to Steve Charnovitz, the term "NGO" originated with the United Nations Charter. Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 *MICH. J. INT'L L.* 183, 186 (1997). Article 71 of the U.N. Charter states: "The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence." "NGOs are private organizations not established by a government or by intergovernmental agreement which are capable of playing a role in international affairs by virtue of their activities." *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 612 (1997). The NGO also has been defined as "[a] private international organization that serves as a mechanism for cooperation among private national groups in international affairs . . ." *INTERNATIONAL LAW DICTIONARY* 77 (Robert L. Bledsoe & Boleslaw A. Boczec eds., 1987). The International Committee of the Red Cross defines them as "organizations, both national and international, which are constituted separate from the government of the country in which they are founded." The Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief, at <http://www.ifrc.org/publicat/conduct> (last visited

crime and terrorist groups such as the Mafia, the Colombian drug cartel, the Irish Republican Army, Hamas, Abu Sayyef, and Al-Qaeda.

NGOs traditionally have had the legal status of individuals, and consequently, like most individuals, they generally exist under national law—the law of the place where they are created as well as the law of the places where they are active. Little, if any, case law exists describing the parameters of this status. The International Court of Justice (ICJ) decided in *Barcelona Traction* that corporations have the nationality of the place of incorporation.<sup>4</sup> By analogy, the same can be said of those non-state actors that are formed under the law of a particular state, usually as a non-profit or charitable organization. Individual members of any type of non-state actor group enjoy basic human rights wherever they are.<sup>5</sup> NGOs as organizations may, like corporations, claim treatment by a foreign government at the “minimal international standard.” Among other things, NGO property may not be nationalized without compensation. Like corporations, NGOs must comply with both the law of the state of nationality as well as the law of the state where they are active. Still, NGOs, through the 1990s, gained greater rights and duties directly from international law. NGOs, supported by some governments, steadily pressed for greater rights of access—to state territory and to law-making fora. A certain amount of progress was made.<sup>6</sup> This progress, however, was often thought to be at the cost of the nation-state’s own status on the international plane.

By contrast, international criminal groups remained almost entirely subject to national criminal law. During the Nuremberg trials, the Nazi SS and other organizations were declared criminal

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Nov. 24, 2004) [hereinafter *The Code of Conduct*].

4. *Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain)*, 1970 I.C.J. 42–43 (Feb. 5).

5. INTERNATIONAL LAW: CASES AND MATERIALS 375 (Louis Henkin et. al. eds., 3d ed. 1993) (stating that:

Customary international law and international agreements have created obligations of states in favor of natural and juridical persons. The customary law of state responsibility, under which a state may be responsible to another state for certain injuries to aliens, is an important example . . . .

Under the traditional law of state responsibility, as seen in the *Mavrommatis Case* . . . , certain injuries to foreign nationals were considered to be offenses against the state of which they were nationals. Once the injured alien exhausts available remedies under the legal system of the state causing the injury, the state of which the injured party is a national may seek reparation in a state-to-state claim.)

6. See *infra* text accompanying notes 10–21.

entities under international law.<sup>7</sup> But apparently no one was prosecuted for mere membership in these organizations. A variety of treaties today mandate that governments prohibit, through national criminal law, the existence of such groups and/or the right of such groups to carry out certain specified acts.<sup>8</sup> Some limited principles of international law, therefore, are relevant. For the most part, however, non-state actors, especially criminal groups, are regulated under national law and have only limited status or "personality" on the international plane.

Nevertheless, commentators have also suggested that the pre-eminence of the state is challenged by criminal organizations. Professor Schachter identified the impact on the state of "uncivil" society or criminal organizations:

Criminal activity, of course, has always challenged state authority, but from the standpoint of international law a new dimension has been added. States and the international community are now threatened by transnational crime on an unprecedented scale. Some of the . . . causes of globalization as well as the new communication networks have also increased the power of lawless groups. The scale of illegal drug traffic dwarfs the gross national product of many states and appears to be beyond the effective control of individual states or even the world community as a whole. The illegal arms trade also flourishes ostensibly beyond state control. International money laundering has expanded into a huge business. Terrorist activities, while mainly political in aim, also belong in the category of international criminal activity. All of these activities dramatically underscore

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7. See Charter of the International Military Tribunal ("Nuremberg Charter"), annexed to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, arts. 8–9, 58 Stat. 1544, 82 U.N.T.S. 279, 284, *reprinted in* 1 INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS 8–9 (1947); *but see* United States v. Altstoetter (The Justice Case), *reprinted in* 3 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 954 (1946–1953); United States v. Ohlendorf (The Einsatzgruppen Case), *reprinted in* 4 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 411 (1946–1953).

8. Relative to terrorism, see UNITED NATIONS, INTERNATIONAL INSTRUMENTS RELATED TO THE PREVENTION AND SUPPRESSION OF INTERNATIONAL TERRORISM (2001). *See also* Christopher Greenwood, *War, Terrorism and International Law*, 56 CURRENT LEGAL PROBS. 505, 507 n.7 (2003). Relative to organized crime, see United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, U.N. GAOR, 55th Sess., Annex 1, Agenda Item 105, at 30, U.N. Doc. A/RES/55/25 (2000).

the weakness of nation-states and of the international legal system.<sup>9</sup>

Since 1990, however, counter-trends are evident respecting the prominence of non-state actors and their challenge to the state. The next section looks particularly at developments respecting the premier NGOs—the international humanitarian assistance organizations. These organizations arguably have made the most progress toward enhanced status, owing to their enjoyment of international legal rights ensured in treaties and to their willingness to accept international legal duties that accompany those rights. We review some of those rights and duties below but also some cases indicating a slowed pace toward greater international personality for NGOs. On the other hand, for groups at the opposite end of the non-state actor spectrum—international criminal organizations that use violence to achieve their goals—the United States has reversed its long-held position that terrorists and other criminal organizations receive no legal recognition as international actors.

#### A. *Aid NGOs*<sup>10</sup>

Of all non-state actors, Aid NGOs have arguably made the most progress toward enhanced international status. A variety of treaties include provisions that accord special status to certain NGOs. The Geneva Conventions, for example, refer to “impartial humanitarian organizations,” which shall be allowed to supply foodstuffs, medical supplies, and clothing.<sup>11</sup> States many not object to the presence of such groups if the civilian population in a zone of occupation is in need. This suggests that organizations meeting the criteria of “impartial” and “humanitarian” have certain rights granted to them directly under international law. Failing to allow NGO access in such circumstances is a breach of the Geneva Conventions.<sup>12</sup>

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9. Schachter, *supra* note 1, at 14–15.

10. Adapted from Mary Ellen O’Connell, *Humanitarian Assistance in Non-International Armed Conflict, The Fourth Wave of Rights, Duties and Remedies*, 31 *ISR. Y.B. HUM. RTS.* 183 (2002).

11. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 59, 6 *U.S.T.* 3516, 75 *U.N.T.S.* 287.

12. The Conventions also allow for organizations to be designated “Protecting Powers,” which gives the organizations considerable status—including the right to intervene on behalf of persons in detention. See, e.g., *id.* art. 143. Another treaty according NGOs rights directly includes the European Convention on Human Rights, which permits NGOs to make claims that their rights under the treaty have been violated. Likewise, the Inter-American and African Conventions on Human Rights allow NGOs to make claims for individuals who have

Additional Protocol I to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977 requires that states allow the free access of all relief consignments, equipment, and personnel, even if such assistance is destined for the civilian population of the adverse party.<sup>13</sup> Considering this particular provision, the ICJ stated in the 1986 *Nicaragua* case that "there can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law."<sup>14</sup>

NGOs have pressed for the right of access to all populations in need—not just those caught in international armed conflict. The fact that more aid is increasingly distributed by NGOs than by governments makes for a strong argument that aid organizations must now be accorded certain rights, including the right of access to sovereign territory, regardless of the state's consent.<sup>15</sup> "Sovereign rights should no longer be an excuse to refuse humanitarian assistance or authorized humanitarian intervention."<sup>16</sup> NGOs have been seeking the right to enter state territory without specific permission.<sup>17</sup> In September 1999, the Security Council underlined in Resolution 1265, "the importance of safe and unhindered access of humanitarian personnel to civilians in armed conflict, including refugees and internally displaced persons, and the protection of assistance to them . . .", and emphasized "the need for combatants to ensure the safety, security and freedom of movement of United Nations and associated personnel, as well as personnel of international humanitarian organizations . . ." The case could be made that rights

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suffered human rights abuse. See MARK E. VILLIGER, *HANDBUCH DER EUROPÄISCHEN MENSCHENRECHTSKONVENTIONEN* (2d. ed. 1998).

13. Protocol Additional to the Geneva Conventions on 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 70, 1125 U.N.T.S. 3, 16 I.L.M. 1391.

14. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, para. 242 (June 27) [hereinafter *Nicaragua*].

15. See NGOs: *Sins of the Secular Missionaries*, *ECONOMIST*, Jan. 29, 2000, at 25, available at 2000 WL 8140551.

16. Jovica Patnogie, *Humanitarian Assistance—Humanitarian Intervention*, in *INTERNATIONAL LEGAL ISSUES ARISING UNDER THE UNITED NATIONS DECADE OF INTERNATIONAL LAW* 1013, 1023 (Najeeb Al-Nauimi & Richard Meese eds., 1995); see generally European Commission, 2 *LAW IN HUMANITARIAN CRISES, ACCESS TO VICTIMS: RIGHT TO INTERVENE OR RIGHT TO RECEIVE HUMANITARIAN ASSISTANCE?* (1995).

17. See Rohan J. Hardcastle & Adrian T. Chua, *Humanitarian Assistance: Towards a Right of Access to Victims*, 325 INT'L REV. RED CROSS 589 (1989).



and duties are developing for NGOs directly under international law. This would mean that beyond the right of access, NGOs could make claims and could be held accountable in international or national courts when states fail to observe their rights or when the NGO does not fulfill its duties, duties such as the obligation to do no harm, to remain impartial in conflicts, to remain neutral, and to accept accountability.<sup>18</sup>

Of these duties, Aid NGOs have pressed for a modified view of neutrality, one that would allow them to report on human rights violations or other violations of international law and to play a role in mitigating violence.<sup>19</sup> Such activities are inconsistent with the traditional concept of neutrality. Aid organizations have also sought to refine the "no harm" principle, seeking ways to deliver aid without exacerbating a conflict. For example, aid groups face the problem of deciding whether to negotiate agreements with rebel groups for access to needy populations. Rebel groups have been known to dishonor agreements intentionally to create new occasions to negotiate. These groups believe that negotiating with international aid organizations enhances their status.

The enforcement of NGO rights and duties is the subject of on-going debate. Christa Rottensteiner reasons that impeding relief even in non-international armed conflict now constitutes a war crime,<sup>20</sup> i.e., a crime under international law that could be enforced in various national and international courts. In 1999, UN Secretary General Kofi Annan called on the Security Council to enforce access rights. He said the Council should "actively engage the parties to each conflict in a dialogue aimed at sustaining safe access for humanitarian operation, and to demonstrate its willingness to act where such access is denied."<sup>21</sup>

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18. See The Code of Conduct, *supra* note 3.

19. See Thomas Weiss, *Principles, Politics and Humanitarian Action*, 13 ETHICS & INT'L AFFAIRS 1 (Carnegie Council on Ethics and International Affairs ed., 1999). For voices defending traditional, strict neutrality, see Joelle Tanguy & Fiona Terry, *Humanitarian Responsibility and Committed Action*, 13 ETHICS & INT'L AFFAIRS 29, 29-35 (Carnegie Council on Ethics and International Affairs ed., 1999). See also Report of the Secretary General, U.N. GAOR 55th Sess., Agenda Item 10, Prevention of Armed Conflict, at 25, U.N. Doc. A/55/985-S/2001/574 (1999).

20. Christa Rottensteiner, *The Denial of Humanitarian Assistance as a Crime Under International Law*, 81 REV. INT'L CROIX ROUGE 555, 568-69 (1999). Despite the exclusion of this crime from the International Criminal Court's jurisdiction, Rottensteiner believes that using starvation as a weapon is a war crime in non-international armed conflict and that impeding relief is a form of using starvation as a weapon, ergo impeding relief is a war crime.

21. Report of the Secretary General, *supra* note 19, Annex I, at 16.

More recent events, however, suggest retrenchment. Humanitarian organization personnel have been detained in Russia and Afghanistan and expelled from Sudan. The United Nations has not authorized a use of force to enforce humanitarian principles in the absence of a ceasefire since the Haiti mandate in 1994. These and other events indicate that the expansion of rights and duties relative to humanitarian assistance may not continue as in the first decade after the Cold War. A few cases are reviewed below suggesting that recent practice is in opposition to the trend toward the enhanced status of NGOs. These cases indicate that NGOs have had greater difficulty gaining access if non-neutral. They have had difficulty developing a no harm principle. The cases suggest aid groups do not have greater discretion regarding the principle of neutrality. Rather, such groups remain largely under the law of the place where they are working, in distinction to international law.

One case indicating retrenchment concerns Afghanistan. On December 19, 2000, the Security Council voted to increase sanctions against Afghanistan and approved Resolution 1333, which imposed financial, travel, and trade sanctions on the country in support of conventions to eliminate illegal drugs, to secure humanitarian law and human rights, and to suppress terrorism.<sup>22</sup> An Afghan official stated after the vote that the "sanctions . . . will aggravate the problems of the common Afghan people because almost 70 percent of the Afghan population have been grappling with malnutrition and hunger as a result of the drought situation in the country and UNSC previously imposed sanctions."<sup>23</sup> Many aid workers left the country when the new sanctions were imposed.<sup>24</sup> Shelter Now, a group based in Germany, remained in Afghanistan but had six foreign workers and over twenty local workers arrested in August 2001, apparently on charges of preaching Christianity. The Taliban rulers of Afghanistan alleged they had confiscated Bibles and other religious material from Shelter Now's offices.<sup>25</sup>

The international reaction to the arrest, as well as Shelter

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22. UN Security Council Resolution 1333 strengthens sanctions already imposed in Resolution 1267. Compare S.C. Res. 1333, U.N. SCOR, 55th Sess., 4251st mtg., U.N. Doc. S/RES/1333 (2000) with S.C. Res. 1267, U.N. SCOR, 54th Sess., 4051st mtg., U.N. Doc. S/RES/1267 (1999).

23. *National: Afghan Govt. Pulls Out of Talks with Opposition, Protests Sanctions*, PAK. PRESS INT'L INFO. SERV. LTD., Dec. 20, 2000, at 2000 WL 30047543; *Off-Target Sanctions*, BOSTON GLOBE, Dec. 26, 2000, at A22, available at 2000 WL 3356913.

24. *The Taliban Dilemma: More Sanctions Against the Taliban?: They Will Also Hurt Afghanistan's Starving*, ECONOMIST, Dec. 16, 2000, at 44, available at 2000 WL 8144844.

25. O'Connell, *supra* note 10, at 214-15.

Now's reaction, was to deny that the group preached Christianity and to demand consular access. This reaction implies that the group had the right to be in Afghanistan and to distribute aid, but recognized no right to be anything but strictly neutral in doing so. Thus, the group had no right to preach.<sup>26</sup>

A second case publicized in 2000 involved the Canadian branch of a prominent international aid organization. CARE (the Cooperative for Assistance and Relief Everywhere) had contracted with the Canadian government to recruit human rights monitors for the Organization for Security and Cooperation in Europe (OSCE). The OSCE planned to use the monitors to ensure compliance with the October 1998 cease-fire agreement that Richard Holbrooke had negotiated with Yugoslavia with regard to Kosovo in October 1998.<sup>27</sup> CARE's lead representative in Kosovo was arrested by Yugoslavia and charged with spying. The question was whether CARE violated the obligation of strict neutrality. One media account held: "The latest disclosures come amid growing international concern about the apparent readiness and willingness of the CARE aid agency to compromise its independent humanitarian role in war-torn countries such as Somalia and Bosnia."<sup>28</sup>

In 2004, in the crisis in Darfur, Sudan, the government ordered the local directors of the prominent international aid agencies, Oxfam and Save the Children, to leave the country. The NGOs protested, as did the United Nations. None of the protests questioned Sudan's right to exclude aid workers. Rather, the protests indicated Sudan's government has full discretion regarding whom it allows in its country.<sup>29</sup>

No state or organization today argues that NGOs operate on the international plane on anything like the same footing as states or even inter-governmental organizations. In contrast to the 1990s, there are few indications that the premier non-state actors, impartial international humanitarian aid organizations, have significantly raised their status on the international plane since the start of the new century.

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26. *Id.*

27. *CARE "Spies" Cast Shadow on Aid Agency's Work*, TORONTO STAR, Feb. 15, 2000, available at 2000 WL 126850595; see also Sue Neales & Andre Clennel, *CARE Aided U.S. Agents in Somalia*, SYDNEY MORNING HERALD, Feb. 9, 2000, available at 2000 WL 2310651.

28. *Id.*

29. Somini Sengupta, *Sudan Orders Out Leaders of Two Groups Aiding Darfur*, INT'L HERALD TRIB., Nov. 30, 2004, at 2, available at 2004 WL 90971334.

## B. *Terrorist Groups*<sup>30</sup>

Before September 11, 2001, terrorist organizations remained largely the subject of national criminal law. A variety of treaties and resolutions of the United Nations Security Council and General Assembly have mandated that states take action to suppress terrorism, but these obligations have been directed at states.<sup>31</sup> Even when terrorist groups have used significant and sustained armed violence, their acts were treated as criminal unless a state was found to be legally responsible for the actions of the group.<sup>32</sup> In those cases where a state was responsible, a significant act of violence could be treated as an armed attack, giving rise to the right of self-defense by the victim state under Article 51 of the United Nations Charter.<sup>33</sup> Where no link to state responsibility exists, terrorist and other criminal non-state actors remain, as a matter of law, at the sub-state level rather than at the inter-state level. For criminal groups' acts of violence to rise to the level of direct concern for international law, the view has been that the non-state actor must be connected with a state or be in a position to challenge a state authority by controlling significant territory.<sup>34</sup> The acts of groups lacking these links to a state or territorial control are usually viewed as acts of criminal violence, not acts of war. More recently, the creation of the International Criminal Court (ICC) and the formation of a body of crimes for which individuals and groups can be held accountable directly under international law have enhanced the status of non-state actors under international law. Yet, as explained below, the ICC statute reinforces the traditional view that for a group's actions to be considered war or armed conflict there must be a connection to a state.

The categorization of terrorism as a criminal act and not a war-like act has held true since the first attempts to regulate terrorism at the international level. The 1937 League of Nations Convention on

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30. Adapted from Mary Ellen O'Connell, *Ad Hoc War*, in *KRISENSICHERUNG UND HUMANITÄRER SCHUTZ—CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION* 405 (Horst Fischer et al. eds., 2004).

31. See, e.g., S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/RES/1368 (2001); S.C. Res. 1373, U.N. SCOR, 55th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (2001).

32. O'Connell, *supra* note 30, at 413–14.

33. "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."

34. Armed groups that control significant territory in an armed conflict have traditionally been designated "belligerents."

the Prevention and Punishment of Terrorism addressed states directly and contained a broad definition of terrorism. It never entered into force, attracting only one ratification.<sup>35</sup> Since then, no general treaty against terrorism has developed, but various conventions have required states to make specific acts a violation of national criminal law, such as airplane hijackings, bombings, and hostage-taking.<sup>36</sup> Consensus for a general treaty foundered over the issue of whether national liberation movements, regardless of the methods they used, should be exempted from the definition of terrorist organization. The United States and other Western states opposed such an exemption. For Schachter, too, it was the act, not the cause, that mattered. For him, terrorism "has a core meaning that virtually all definitions recognize. It refers to the threat or use of violence in order to create extreme fear and anxiety in a target group so as to coerce them to meet political (or quasi-political) objectives of the perpetrators."<sup>37</sup> It is not the terrorist's objective that determines his status, but the methods used. Terrorists generally operate as organized groups not under state control; they are non-state actors.<sup>38</sup> When they operate with the support of or under the control of a state, the legal situation shifts and the groups are then usually referred to as state-sponsored terrorists.

The United States has consistently opposed exempting any group from criminal liability for terrorist acts based on the nature of their causes. In addition to the area of anti-terrorism treaties, the United States firmly opposed exempting national liberation movements that used terrorist methods from the UN General Assembly's Definition of Aggression and other resolutions.<sup>39</sup> The

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35. Greenwood, *supra* note 8, at 506.

36. *Id.* at 506-07 (citing Rosalyn Higgins, *The General International Law of Terrorism*, in *TERRORISM AND INTERNATIONAL LAW* 13, 14-19 (Rosalyn Higgins & Maurice Flory eds., 1997)).

37. OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 162-63 (1994).

38. *Id.* at 163.

39. G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631 (1974):

Article 3 provides:

Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:

(a) the invasion or attack by armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof,

(b) Bombardment of the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of

United States refused to become a party to the 1977 Additional Protocol I to the 1949 Geneva Conventions chiefly because national liberation movements were elevated to the status of states for purposes of designating an armed conflict "international" rather than "internal" and according to liberation fighters the status of combatants. President Reagan asserted forcefully that designating groups based on cause rather than objective factual indicators would encourage terrorism:

One of [Protocol I's] provisions . . . would automatically treat as an international conflict any so-called "war of national liberation." Whether such wars are international or non-international should turn exclusively on objective reality, not on one's view of the moral qualities of each conflict. To rest on such subjective distinctions based on a war's alleged purposes would politicize humanitarian law. . . . It would give special status to "wars of national liberation," an ill-defined concept expressed in vague, subjective, politicized terminology. Another provision

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another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement of any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Article 7 provides:

Nothing in this Definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination: nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

would grant combatant status to irregular forces even if they do not satisfy the traditional requirements . . . . This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves.<sup>40</sup>

The United Kingdom did ratify Additional Protocol I, but only with the following understanding when it did so: "It is the understanding of the United Kingdom that the term '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."<sup>41</sup>

The traditional U.S. position, like that of the United Kingdom, is that a group using terrorist tactics should be equated with states only when sponsored by a state or in control of territory. Otherwise, as the excerpt above from President Reagan's letter clarifies, the United States would not grant combatant status to irregular fighters, especially not to terrorists. Professor Schachter observed in 1995 that "no State has considered itself to be legally at war in response to terrorism . . . ."<sup>42</sup>

The exception to this traditional position occurred where a state was legally responsible for terrorist acts. If a state were involved, terror attacks could possibly trigger the right of another state to respond in self-defense against the responsible state and thus initiate an armed conflict. This is also possible where terrorists establish a *de facto* state by controlling territory within a former unitary state. Whether terrorist acts are the responsibility of the state is a question answered by the law of state responsibility.<sup>43</sup> Today, a

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40. President's Message to the Senate Transmitting a Protocol to the 1949 Geneva Conventions, 1 PUB. PAPERS 1987-88 (Jan. 29, 1987), reprinted in 81 AM. J. INT'L L. 910, 911 (1987); but see Hans Peter Gasser, *An Appeal for Ratification by the United States*, 81 AM. J. INT'L L. 912 (1987). Reagan includes the following examples of requirements to qualify as a combatant: the need "to distinguish [oneself] from the civilian population and otherwise comply with the laws of war." These are, however, the requirements to qualify for prisoner-of-war status, not combatancy. A combatant is one who participates directly in armed conflict. Thus, the key to understanding who is a combatant is knowing what an armed conflict is and what direct participation is. See *infra* text accompanying notes 56-57.

41. Marco Sassòli, *Use and Abuse of the Laws of War in the "War on Terrorism,"* 22 LAW & INEQ. 195 (2004) (citing Reservation by the United Kingdom to art. 1, para. 4 & art. 96, para. 3 of Protocol I, available at <http://www.icrc.org/ihl.nsf/e29be9b3462f48b8c12563110050c790/0a9e03f0f2ee757cc1256402003fb6d2?OpenDocument>).

42. SCHACHTER, *supra* note 37, at 169.

43. The most up-to-date statement of this law is found in the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-third Session, U.N. GAOR, 56th Sess., Supp. (No. 10) at 43, U.N. Doc. A/56/10 (2001), available at

state will be responsible if it sends persons to carry out an attack,<sup>44</sup> adopts the acts of the group after the fact, or develops sufficiently close links with a terrorist group.

The ICJ found in the *Nicaragua* case that acts of the Contra rebels fighting in Nicaragua were not attributable to the United States because the United States did not exercise "effective control" over the rebels.<sup>45</sup> The ICJ also found in the *Hostages* case that a state might be responsible if it adopts the acts of the attackers as its own.<sup>46</sup> More recently, the International Criminal Tribunal for the Former Yugoslavia (ICTY) has developed a new test of attribution—one with a significantly lower threshold than "effective control." In *Prosecutor v. Tadic*, the ICTY said:

The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) *has a role in organising, coordinating or planning the military actions* of the military group, in addition to financing, training and equipping or providing operational support to that group.<sup>47</sup>

The *Tadic* judgment sought to distinguish the test in *Nicaragua*. However, both *Tadic* and *Nicaragua* were dealing with the question of when the acts of individuals or groups could be attributed to a state. The ICTY plainly established an alternative attribution standard to that in *Nicaragua*, despite its claims to the contrary.<sup>48</sup> Moreover, the international community appeared to accept

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[http://www.un.org/law/ilc/texts/State\\_responsibility/responsibilityfra.htm](http://www.un.org/law/ilc/texts/State_responsibility/responsibilityfra.htm) (last visited Jan. 15, 2005) [hereinafter *Responsibility of States*]. The articles are also annexed to G.A. Res. 56/83, U.N. GAOR, 56th Sess., U.N. Doc. A/RES/56/83 (2001).

44. See G.A. Res. 3314 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 19, at 143, Annex, art. 3 (1974) ("Definition of Aggression") (defining aggression as:

Any of the following acts, regardless of a declaration of war, shall . . . qualify as an act of aggression: . . . (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.).

45. *Nicaragua*, 1986 I.C.J. at 54–55.

46. In the *Hostages* case, the ICJ found Iran was responsible for the hostage-taking at the U.S. Embassy because of the "failure on the part of the Iranian authorities to oppose the armed attack by militants" and "the almost immediate endorsement by those authorities of the situation thus created." United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, para. 9 (June 27) [hereinafter *Hostages* case].

47. *Prosecutor v. Tadic*, Judgment, No. IT-94-1-A, para. 137 (July 15, 1999), available at <http://www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.pdf> (July 15, 1999).

48. Greenwood, *supra* note 8, at 521.



that the Taliban, Afghanistan's *de facto* government in 2001, was responsible for actions of the terrorist group Al-Qaeda. Yet, the evidence did not support the argument that the Taliban "effectively controlled" Al-Qaeda. At best there was coordination, joint financing efforts, and the provision of safe haven.<sup>49</sup> Thus, the *Tadic* test appears to be the prevailing one.

Under the *Tadic* test, if a state is responsible for terrorist attacks amounting to an armed attack on the territory of another state, the state attacked may respond in self-defense against the territory of the responsible state.<sup>50</sup> The rule is less clear in the case of failed states, but the better argument appears to be that if a state is wholly unable to control the acts of terrorists on its territory, a state suffering attacks originating in such a failed state may also use force in self-defense. In all other cases, measures less than force in self-defense are required. Because the habitable landmass of the entire world is basically divided into state territory, any state wishing to use armed force in self-defense against a terrorist organization not on its own soil must first assess the responsibility of the state against whose territory the force will be used.

The above analysis is the legal position long maintained by the United States. The United States used force against Libya in 1986 because its agents were perpetrating terrorist attacks and the United States had clear and convincing evidence these attacks would continue.<sup>51</sup> The United States supported Israel's military operations against Lebanon in the 1980s and Turkey's incursions into Northern Iraq in the 1990s because in both cases the states in question were wholly unable to control the on-going attacks of terrorists on their territory. Israel's use of force against Tunisia in the 1980s did not follow the U.S. legal position, and the United States was critical of Israel for using force against a state that was not responsible for the PLO's terrorist acts and was not a failed state.<sup>52</sup>

In the ICJ's 2004 advisory opinion as to the legal consequences of Israel constructing a security barrier or wall on occupied Palestinian territory, Israel cited Security Council

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49. Mary Ellen O'Connell, *Re-leashing the Dogs of War*, 97 AM. J. INT'L L. 446, 451-52 (2003) (reviewing CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* (2000)).

50. See generally, Mary Ellen O'Connell, *Lawful Self-Defense to Terrorism*, 63 U. PITT. L. REV. 889 (2002); Mary Ellen O'Connell, *Evidence of Terror*, 7 J. CONFLICT & SEC. L. 19 (2002).

51. O'Connell, *Evidence of Terror*, *supra* note 50, at 25-26. In some cases, consent of the territorial state will also allow a victim state to use force in self-defense.

52. Candice Hughes, *Security Council Condemns Wazir Slaying, U.S. Abstains*, ASSOCIATED PRESS, Apr. 25, 1988, at 1988 WL 3779956.

resolutions made following September 11 that acknowledge the right of a state to act in self-defense against terrorist attacks per UN Charter Article 51. Israel argued that if a state may use armed force in self-defense against terrorists, non-forcible measures, such as a security barrier, were *a fortiori* lawful. The ICJ replied to this argument that "Article 51 of the Charter . . . recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State."<sup>53</sup> Thus under Article 51 Israel had no right of self-defense that could be cited as justification for constructing the wall or barrier.

Rather, the situation Israel faced at the time of the Advisory Opinion was more akin to terrorist attacks perpetrated by the state's own nationals within the state's own territory because of the measure of control Israel exercises over the occupied territories. Terrorist attacks by nationals within their own state have invariably been treated as criminal. The British and Spanish have long resisted the IRA and ETA being labeled anything but terrorist groups.<sup>54</sup> Only when terrorists have organized themselves into armed groups with a chance of challenging a government in effective control will a state admit that civil war is occurring on its territory. In other words, only when terrorists have reached a status of belligerency or *de facto* statehood, or are sponsored by a foreign state, is Article 51 relevant.

This is arguably the situation for Russia with respect to Chechnya, yet even there the Russian government resists calling the violence civil war rather than terrorism.<sup>55</sup> Russia does not want to admit that it has lost control of its territory to the degree that organized armed groups are able to engage Russia's own military in an armed conflict. Russia prefers to call these opponents terrorists, rather than combatants.

Combatants are those who take direct part in armed conflict. Thus, the key elements of the status are the existence of an armed conflict and direct participation. Armed conflict involves fighting at a certain degree of intensity, among organized armed groups fighting within or between states.<sup>56</sup> Direct participation means more than

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53. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 131 (July 9).

54. See generally HILAIRE MCCOUBREY & NIGEL D. WHITE, INTERNATIONAL LAW AND ARMED CONFLICT 318 (1992).

55. That was the case until September 2004. See Dmitry Zaks, *Putin's Chechnya War, Five Years and Still Counting*, AGENCE FR.-PRESSE, Oct. 1, 2004, at 2004 WL 9493944.

56. See Leila Nadya Sadat, *Terrorism and the Rule of Law*, 3 WASH. U. GLOBAL STUD. L. REV. 135, 140 (2004).

association with a group that may be participating directly; it means actually fighting in the armed conflict or providing close support to those who are fighting.<sup>57</sup> Those far from the zone of hostilities are not combatants.

The Rome Statute of the International Criminal Court further supports the traditional position. Although the Statute includes some provisions that would make terrorist acts criminal directly under international law, the statute makes clear that no act is a war crime unless it occurs during an armed conflict.<sup>58</sup>

In sum, international law continues to reflect that non-state actors are largely regulated under national law. Even international humanitarian aid organizations with at least some limited rights provided directly under international law have not made great strides in recent years to build on those rights. Terrorist groups—the antithesis of humanitarian aid organizations—also remain largely regulated under national law. Acts of terror are not equated with acts of war. While acts of war are regulated directly under international law, terrorism and terrorists remain subject to national law.

## II. GLOBAL WAR AND ENEMY COMBATANTS

Despite the requirement of a state connection for terrorists to be considered part of an armed conflict and to be considered combatants, following the attacks of September 11, 2001, the Bush Administration declared the United States to be involved in a global war on terrorism;<sup>59</sup> it declared terrorists to be “enemy combatants;”<sup>60</sup> and it declared the war on terror would “not end until every terrorist group of global reach has been found, stopped and defeated.”<sup>61</sup> This

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57. Michael Schmitt, “*Direct Participation in Hostilities*” and *21st Century Armed Conflict*, in *KRISENSICHERUNG UND HUMANITÄRER SCHUTZ—CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION* 505 (Horst Fischer et al. eds., 2004).

58. See Michael Bothe, *War Crimes*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 379, 388 (Antonio Cassese et al. eds., 2002).

59. See President’s Address to the Nation on the Terrorist Attacks, 37 WEEKLY COMP. PRES. DOC. 1301 (Sept. 11, 2001); President’s Address to a Joint Session of Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1432 (Sept. 20, 2001); Training Camps and Taliban Military Installations in Afghanistan, 37 WEEKLY COMP. PRES. DOC. 1432 (Oct. 7, 2001); President’s Address Before a Joint Session of the Congress on the State of the Union, 39 WEEKLY COMP. PRES. DOC. 109 (Jan. 28, 2003), all available at [www.whitehouse.gov](http://www.whitehouse.gov).

60. Memorandum from William J. Haynes, II, General Counsel of the Department of Defense, *Enemy Combatants*, at <http://www.cfr.org/publication.php?id=5312>.

61. President’s Address to a Joint Session of Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1432 (Sept. 20, 2001).

Part reviews the Administration's arguments in support of its declaration of global war,<sup>62</sup> its designation of terrorists as combatants, and its reversal of the United States' long-held position.

The Administration says that the September 11 attacks were an act of war committed by Al-Qaeda, and thus the United States is at war wherever Al-Qaeda exists. National Security Adviser Condoleezza Rice explained the global war on terror is a "new kind of war" to be fought on "different battlefields."<sup>63</sup> The Deputy General Counsel for International Affairs at the Department of Defense, Charles Allen, has explained that in a global war on terror the United States can target "Al Qaeda and other international terrorists around the world and those who support such terrorists *without warning*."<sup>64</sup> He emphasized that the existence of the "war" depends on the person targeted, not the existence of armed hostilities. Thus, Allen suggests the United States has the legal right to target and kill an Al-Qaeda suspect on the streets of Hamburg, Germany, or any other peaceful place.<sup>65</sup>

The Administration has produced few arguments to defend its declaration of global war and its conferral of combatant status on terrorists. Rather than defend its decision to declare terrorists to be combatants, the Administration has devoted more legal argumentation to explaining why members of terrorist organizations are "unlawful" combatants. This is plainly an easier argument to make than explaining how individuals who were never in combat can be combatants in the first place. The General Counsel of the Department of Defense, William J. Haynes, II, has explained, "The President has determined that al Qaida members are unlawful combatants because (among other reasons) they are members of a non-state actor terrorist group that does not receive the protections of the Third Geneva Convention."<sup>66</sup> It is true that a non-state actor terrorist group does not

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62. President's Address Before a Joint Session of Congress on the State of the Union, 39 WEEKLY COMP. PRES. DOC. 109 (Jan. 28, 2003), available at [www.whitehouse.gov/news/releases/2003/01/20030128-19.htm](http://www.whitehouse.gov/news/releases/2003/01/20030128-19.htm).

63. *Fox News Sunday* (Fox News television broadcast, Nov. 10, 2002), at 2002 WL 7898884.

64. Anthony Dworkin, *Official Examines Legal Aspects of Terror War*, at [http://hsm.intellibridge.com/summary?view\\_id=117201800](http://hsm.intellibridge.com/summary?view_id=117201800) (on file with author). See also Doyle McManus, *A U.S. License to Kill, A New Policy Permits the C.I.A. to Assassinate Terrorists, and Officials Say a Yemen Hit Went Perfectly. Others Worry About the Next Time*, L.A. TIMES, Jan. 11, 2003, at A11.

65. Anthony Dworkin, *Law and the Campaign Against Terrorism: The View from the Pentagon*, Crimes of War Project, at <http://www.crimesofwar.org/print/onnews/pentagon-print.html> (Dec. 16, 2002).

66. Memorandum from William J. Haynes, II, *supra* note 60.

receive the protections of the Geneva Convention. The reason it does not is because the group is a non-state actor and not a group of combatants. Pointing out that Al-Qaeda is not covered by the Third Geneva Convention only helps to confirm that, generally, Al-Qaeda members are not combatants. It adds nothing to support Haynes's argument that Al-Qaeda members are combatants, unlawful or otherwise.

According to Ruth Wedgwood, treating Al-Qaeda terrorists as combatants is justifiable because "Al Qaeda has declared jihad against the United States, and in *fatwa* after *fatwa*, Osama bin Laden has announced that all Americans are valid targets."<sup>67</sup> She ignores the fact that, since the adoption of the United Nations Charter, declarations of war no longer have legal significance.<sup>68</sup> What matters, as President Reagan pointed out in the excerpt above,<sup>69</sup> is the actual fact of armed conflict. Wedgwood's focus, however, is not so much on trying to prove that the war on terror is a real war with real combatants, but rather on arguing that the application of national criminal law is cumbersome. She makes it clear that the Bush war on terror is about making it easy to kill, detain, and interrogate people, not about a defensible case of war or combatancy under international law.<sup>70</sup>

It is true that during armed conflict, the U.S. armed forces may target enemy combatants without warning and may detain enemy combatants who are captured until the end of hostilities without trial.<sup>71</sup> "The purpose of captivity is to exclude enemy soldiers from further military operations. Since soldiers are permitted to participate in lawful military operations, prisoners of war shall only be considered as captives detained for reasons of security, not as criminals."<sup>72</sup>

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67. Ruth Wedgwood, *Combatants or Criminals? How Washington Should Handle Terrorists*, FOREIGN AFF., May-June 2004, at 127, available at <http://www.foreignaffairs.org/20040501faresponse83312/ruth-wedgwood-kenneth-roth/combatants-or-criminals-how-washington-should-handle-terrorists.html>.

68. See Mary Ellen O'Connell, *What is War?* JURIST, Mar. 17, 2004, at <http://www.jurist.law.pitt.edu/forum/oconnell1.php> (Mar. 17, 2004).

69. President's Message to the Senate Transmitting a Protocol to the 1949 Geneva Conventions, 1 PUB. PAPERS 1987-88 (Jan. 29, 1987), reprinted in 81 AM. J. INT'L L. 910, 911 (1987).

70. Wedgwood, *supra* note 67.

71. Geneva Convention [No. III] Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 118, 75 U.N.T.S. 135 [hereinafter Prisoners' Convention]; cf. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 75(3), 1125 U.N.T.S. 3 [hereinafter AP I]. At the end of active hostilities, however, prisoners must be released. Prisoners' Convention, *supra*, art. 118.

72. Horst Fischer, *Protection of Prisoners of War*, in THE HANDBOOK OF

Detainees may, however, in proceedings consistent with minimum due process, be tried for law violations committed prior to capture.<sup>73</sup> Arguably the detaining power has a duty to try persons for grave breaches of humanitarian law.<sup>74</sup> Combatants who have not violated humanitarian law, however, may not be tried for acts of war. In the absence of an armed conflict, international human rights law prohibits arbitrary detention.<sup>75</sup> If authorities wish to detain someone because he or she is a criminal suspect, the person must be informed of the charges and receive a fair, public, and prompt trial.<sup>76</sup> Suspects may not be detained indefinitely.

The Administration argues that any person suspected of association with terrorists may, as an enemy combatant, be detained in military prisons without access to defense counsel until the end of the war on terror. As of September 2004, President Bush had declared two people arrested in the United States to be "enemy combatants." Ali Saleh Kahlah al-Marri, a Qatari citizen, studying in Peoria, Illinois, was first placed in civilian custody as a material witness. Late in 2001, he was charged with lying to the FBI and with credit card fraud.<sup>77</sup> He then was declared an enemy combatant on June 23, 2003, and was moved from a prison in Illinois to a military brig in South Carolina.<sup>78</sup> José Padilla was arrested on May 8, 2002, in Chicago.<sup>79</sup> He was originally arrested by civilian authorities and charged with various terrorism crimes, and then he, too, was moved from civilian to military custody after President Bush declared him an enemy combatant. The President said Padilla qualified as a combatant for, *inter alia*, "conduct in preparation for acts of international terrorism."<sup>80</sup>

Neither al-Maari nor Padilla was detained in a zone of armed conflict. They are, therefore, not combatants, but the Bush Administration has created its own definition of "combatant." It

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HUMANITARIAN LAW IN ARMED CONFLICT 326 (Dieter Fleck ed., 1995).

73. Prisoners' Convention, *supra* note 71, arts. 84, 105; AP I, *supra* note 71, art. 75.

74. Prisoners' Convention, *supra* note 71, arts. 129–30.

75. International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 9, para. 1, 999 U.N.T.S. 171, 175.

76. *Id.* arts. 9(2), 14(1), 14(3)(a), 14(3)(c).

77. Eric Lichtblau, *Bush Declares Student an Enemy Combatant*, N.Y. TIMES, June 24, 2003, at A15.

78. *Id.*

79. Newman *ex rel.* Padilla v. Bush, 233 F. Supp. 2d 564, 571, 573 (S.D.N.Y. 2002).

80. Presidential Order Designating Jose Padilla an Enemy Combatant (June 9, 2002), at <http://www.cnss.org/padillapresord.pdf> (Aug. 27, 2002).

asserts anyone associated with terrorism is a combatant. This assertion means, according to Marco Sassòli, that we now have the "absurd result, [of] permitting targeted assassinations in the midst of peaceful cities . . . ." For Sassòli this possibility proves that "all those suspected to be 'terrorists' cannot be classified as combatants."<sup>81</sup>

In addition to its weak arguments regarding the definition of combatant, the Administration has also failed to explain the impact of the global war declaration on the U.S. military. If the war is everywhere, members of the U.S. armed services are lawful targets anywhere. Yet, most Americans surely make the common sense assumption that U.S. service members away from an active theater of combatant are not lawful targets for killing or detention. The common sense position tracks the law.

### III. CONSEQUENCES

Individuals have lost basic rights as a result of the Bush Administration's erroneous legal claims. Those are not, however, the only negative consequences of the Bush Administration's position. Past U.S. administrations had good reasons for standing against equating terrorists with combatants. The Bush Administration's post-September 11 position stands in stark contrast. Rather than striving to find war where it does not exist, governments typically refuse to acknowledge the existence of war when it does exist. Rather than extending the privileges of humanitarian law to armed groups,<sup>82</sup> governments prefer to characterize fighting on their territory as lawlessness or criminality. They prefer to apply national criminal law to their enemies and even to their armed forces when fighting enemies within the state. The motivation for this preference is the perception that calling opponents "combatants" and declaring the struggle against them "war" elevates their status above that of mere

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81. Sassòli, *supra* note 41, at 213 (citing LAWYERS COMMITTEE FOR HUMAN RIGHTS, ASSESSING THE NEW NORMAL: LIBERTY AND SECURITY FOR THE POST-SEPTEMBER 11 UNITED STATES 53, 71 (2003)). See also the position the Administration took in federal court that an elderly Swiss lady who sends money to a charitable organization could also be a combatant if the money ends up with Al-Qaeda. Neil A. Lewis, *Searching for Limits on Power to Detain*, INT'L HERALD TRIB., Dec. 3, 2004, at 4.

82. Humanitarian law "comprises the whole of established law serving the protection of man in armed conflict." Christopher Greenwood, *Scope of Application of Humanitarian Law*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICT, *supra* note 72, at 39. Humanitarian law is referred to more commonly in the United States as "law of armed conflict." It is the law governing the conduct of warfare—the *jus in bello*. It is found in conventions such as the 1907 Hague Convention, the 1949 Geneva Conventions, and the 1977 Protocols to the Geneva Conventions, as well as in customary international law.

criminals.<sup>83</sup> There is a reason that members of the IRA used hunger strikes to try to pressure the British government into recognizing them as prisoners of war. According to Greenwood, however,

In 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.<sup>84</sup>

The United States' traditional position better protects the United States. Terrorism, in all its forms, must be de-legitimized. It must be disassociated from any lawful objective, such as the right of self-determination or freedom from military occupation. The United States would have been far better served if it had declared "global law enforcement" instead of "global war" after September 11. A far better approach would have been fostering healthy states through the principle of non-intervention, the prohibition on force, respect for proportionality in the use of coercion, and promotion of human rights. Schachter emphasized the continuing importance of the territorial state. Even NGOs serving the public good, while they:

have a growing role in the political and legal processes of contemporary society, . . . [they are] only partial, serving some interests, some groups. They do not ensure what the territorial state promises—an arena in which all in the defined territory have access to common institutions and the equal protection of law.<sup>85</sup>

Supporting states over non-state actors would have left the United States in a far better position to demand that states be responsible for the activities on their territory and to prevent terrorism.<sup>86</sup> Instead, the United States has encouraged Russia to declare a global war on terror, as well, with the equal right to target and detain any person it designates an enemy combatant, anywhere. The terrorists have now moved up a rung in the hierarchy of actors under international law. They can now better challenge the state. The Bush Administration apparently failed to study past U.S. legal

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83. See Greenwood, *supra* note 8, at 528–29.

84. *Id.* at 529.

85. Schachter, *supra* note 1, at 22; see also, Gregory H. Fox, *Strengthening the State*, 7 IND. J. GLOBAL LEGAL STUD. 35 (1999).

86. See generally Sadat, *supra* note 56.



positions regarding terrorism. Whether for that reason or some other, they have failed to understand how their strategy of global war has enhanced the status of terrorist non-state actors.