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Committee on the Judiciary: Protecting U.S. Citizens'
Constitutional Rights During the War on Terror**

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**The Constitutional and Human Right to Life
in War and Peace**

Testimony of

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for the

House Judiciary Committee

Hearing on Protecting U.S. Citizens' Constitutional Rights
During the War on Terrorism

May 22, 2013

Introduction

Members of Congress, ladies and gentlemen, thank you for this opportunity to help clarify the law regarding fundamental rights in the war on terror. The basic Constitutional and human rights to life, to liberty, and to a fair trial have all been implicated by America's response to 9/11. My focus today is on the first of these basic rights, the right to life and on the use of armed unmanned aerial vehicles, known as drones, to launch missile attacks and to drop bombs far from the field of battle.

I am Professor Mary Ellen O'Connell of the University of Notre Dame. I hold degrees in history, international relations, and law from institutions including Northwestern University, Columbia, the London School of Economics, and Cambridge University. I have also served as a civilian employee of the United States Department of Defense, teaching at the George C. Marshall Center in Southern Germany for a number of years. I have taught, written, and chaired committees on the subject of this hearing for almost 25 years. Work in this area requires extensive education not just in U.S. law but also in the international law on the use of force, international human rights law and international law generally. Unfortunately, very few persons have these qualifications in the United States today. Even fewer are able to speak from the privileged position of an independent scholar.

I hold such a position thanks in large part to the longtime president of the University of Notre Dame, Father Theodore Hesburgh. I find it auspicious that I will present testimony today, on the very day that Father Ted will be honored at a reception this afternoon in the Rayburn Room. Father Ted has been a pillar of civil and human rights for well over a half century, and I have been honored to use him as a sounding

board myself on complex issues implicating law, morality and the efficient use of military force, including drone use.

The Right to Life

All human beings possess the right to life, which is protected in the Fifth Amendment to the United States Constitution: “No person shall be ... deprived of life, liberty, or property, without due process of law.” It is also protected in Article 6 to the International Civil and Political Rights Covenant (ICCPR) to which the United States is a party: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” As both the Fifth Amendment and Article 6 indicate, some deprivation of life may be justified under the law. The justifications are found in two different legal categories: one category pertains to the ordinary situation of peacetime and the other to the exceptional and extraordinary situation of war or armed conflict.

In peacetime, the state may only take a human life when “absolutely necessary in the defence of persons from unlawful violence.”¹ Police and other authorized agents of the state may resort to lethal force to save a life immediately or to apprehend a highly dangerous individual who resists arrest. The United Nations Basic Principles for the Use of Force and Firearms by Law Enforcement Officials (*UN Basic Principles*), which are widely adopted by police throughout the world, provide in Article 9:

Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any

¹ *McCann & Others v United Kingdom*, Series A no 324, App no 18984/91 (1995).

event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.²

On the battlefield, the rules are different. The members of the regular armed forces of a state and certain militias are defined by the 1949 Geneva Conventions as having the “combatant’s privilege.” During an armed conflict, troops will not face criminal charges for the taking of the lives of enemy fighters so long as they respect the law of armed conflict, in particular, that they respect the principles of distinction, necessity, proportionality and humanity. Distinction may be the most important of these principles. It requires that civilians never be intentionally targeted, unless and only for such time as the civilian takes direct part in armed conflict hostilities. The International Committee of the Red Cross has introduced a new category of persons involved in armed conflict, someone who is in a “continuous combat function.” Such a person may be targeted even when not directly participating in hostilities so long as targeting the person is consistent with the principle of necessity. Again, attacking persons in a continuous combat function is lawful only during armed conflict.

The critical concepts to the proper functioning of the rule respecting the right to life are, therefore, either 1.) the existence of armed conflict or 2.) the right to resort to military force. In all other situations, peacetime policing rules prevail, as described above.

² Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, <<http://www2ohchr.org/english/law/firearms.htm>>.

*Armed Conflict*³

We must look to international law for the definition of armed conflict, given that the concept refers to the use of major military force either among states or within a state such that the Geneva Conventions and other international law governing the conduct of armed conflict applies. The definition of armed conflict is found in customary international law. It is based on the objective facts of fighting, not declarations. The legal significance in international law of declarations faded away with the adoption of the United Nations Charter in 1945. “War” as a technical, legal term fell out of use. It was replaced by a broader term, “armed conflict.” The Charter in Article 2(4) prohibits all uses of force—war and lesser actions—except in self-defense to an armed attack or as mandated by the Security Council. Following the adoption of the Charter, treaties relevant to war, such as the Geneva Conventions of 1949 substituted the term “armed conflict” for “war.” “War” ministries became “defense” ministries. States engaging in armed conflict rarely declared war. What mattered after 1945 was actual fighting, not 19th century formalities that recognized a legal state of war in the absence of any use of military force. We still use the term “war” to refer to any serious armed conflict. But indicative of the fact that “war” is no longer the significant legal term it once was, the United States fought a war on poverty and a war on drugs.

According to a study by the International Law Association’s Committee on the Use of Force that I chaired for five years, international law defines armed conflict as always having at least two minimum characteristics: 1.) the presence of organized armed

³ This section draws from the article, Mary Ellen O’Connell, *The Choice of Law Against Terrorism*, 4 J. NAT’L SEC. L. & POL’Y 343 (2010).

groups that are 2.) engaged in intense inter-group fighting.⁴ The fighting or hostilities of an armed conflict occurs within limited zones, referred to as combat zones, theaters of operation, or similar terms. It is only in such zones that killing enemy combatants or those taking a direct part in hostilities is permissible.

Because armed conflict requires a certain intensity of fighting, the isolated terrorist attack, regardless of how serious the consequences, is not an armed conflict. It may amount to an armed attack that justifies the right to resort to armed force in self-defense. This possibility is discussed in the next section. Terrorism is, therefore, generally categorized as a crime, although in some circumstances it may be carried out so continuously as to be the equivalent of the fighting of an armed conflict. Terrorism is widely defined as the use of politically motivated violence against the civilian population to intimidate or cause fear.⁵ The Supreme Court of Israel found in 2006 that Israel was engaged in a “continuous state of armed conflict” with various “terrorist organizations” due to the “unceasing, continuous, and murderous barrage of attacks.”⁶ The Court described a situation that meets the definition of organized armed groups engaged in intense fighting—the attacks and responses are direct and constant enough to constitute fighting. The single, isolated act of terrorism, however, is consistently treated by states as crime, not armed conflict. Members of al Qaeda or other terrorist groups are active in Canada, France, Germany, Indonesia, Mali, Morocco, Saudi Arabia, Spain, the United

⁴ International Law Association, *Final Report of the Use of Force Committee, The Meaning of Armed Conflict in International Law* (August 2010), available online at <http://www.ila-hq.org/en/committees/index.cfm/cid/1022>.

⁵ See generally, SETH G. JONES AND MARTIN C. LIBICKI, HOW TERRORIST GROUPS END, LESSONS FOR COUNTERING AL QA’IDA (2008), available at http://www.rand.org/pubs/monographs/2008/RAND_MG741-1.pdf.

⁶ HCJ 769/02, *The Public Committee Against Torture in Israel v. Israel*, [2006] (2) IsrLR 459, ¶ 16 (Dec. 14, 2006). See also *The Wall Case*, *supra* note 45.

Kingdom, Yemen, Kenya, Uganda, and elsewhere. Still, these countries do not consider themselves in an armed conflict with al Qaeda. As Judge Christopher Greenwood of the International Court of Justice has concluded:

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.⁷

One U.S. Supreme Court decision seems to be commonly misread as supporting the possibility of a worldwide “armed conflict against al Qaeda” or other terrorist organizations even in the absence of continuous attacks. In *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), the Supreme Court found the Bush Administration’s special military commissions for trials at Guantánamo Bay unconstitutional. The Court ruled that while the president had the right to create military commissions, they had to comply with a federal statute governing the matter. The federal statute in question permitted the creation of military commissions that complied with the laws of war. For purposes of testing the compliance of the Guantánamo commissions with the law of war, the Court accepted the Bush administration’s characterization of being in a “non-international armed conflict with al-Qaeda.” The Court found that Common Article 3 of the 1949 Geneva Conventions covers even that purported conflict. It further found that the Guantánamo commissions did not comply with Common Article 3. The Supreme Court had only to find one plausible example of a violation of the laws of war to strike down

⁷ Christopher Greenwood, *War, Terrorism and International Law*, 56 CURR. LEG. PROBS. 505, 529 (2004).

the commissions. It did not find that the United States actually *is* in a worldwide-armed conflict with al Qaeda. It could not make such a finding, as there is no such conflict.⁸

The Hamdan decision, as well as many other decisions of the United States Supreme Court, the Israeli Supreme Court, and courts around the world have had to deal with the legal question of what constitutes an armed conflict. They deal with facts and law, not the assertions of political branches of government.

Self-Defense

If drone attacks are not being carried out in the context of armed conflict hostilities, the president's lawyers have suggested that the killings are nevertheless in lawful self-defense. The Bush administration never developed a persuasive argument as to why the U.S. could use force on the basis of self-defense far from the state legally responsible for the 9/11 attacks, namely, Afghanistan. In October 2001, the U.S. and U.K. took the position that the Taliban government of Afghanistan was responsible for al Qaeda so that under the law governing resort to armed force (the *jus ad bellum*) they had the right to use force against that sovereign state. The U.S. never argued that other states might also be responsible for the 9/11 attacks and has no right under the *jus ad bellum* to use force against them as was used against Afghanistan.

The armed conflict in self-defense in Afghanistan ended in 2002 when Hamid Karzai became Afghanistan's leader following a *loya jurga* of prominent Afghans who selected him.⁹ Today, the U.S. and other international forces are in Afghanistan at the invitation of President Karzai in the attempt to repress an insurrection. Thus, attacking or

⁸ *Hamdan v. Rumsfeld*, 548 U.S. 557, 628-31 (2006).

⁹ See *President Hamid Karzai*, THE EMBASSY OF AFGHANISTAN, WASHINGTON D.C., <http://www.embassyofafghanistan.org/president.html> (last visited July 20, 2010).

detaining members of al Qaeda or associates as a matter of the law of armed conflict must be connected with the Afghan insurgency.

References by Bush and Obama administration officials to the right of self-defense offer no justification for using force or exercising wartime privileges beyond Afghanistan. The former legal adviser to the State Department, Harold Koh in his now famous speech in March 2010 to the American Society of International Law setting out the Obama administration's legal justification for the use of force in self-defense began in the right place, the United Nations Charter. He then, however, mischaracterized what the law of self-defense permits.¹⁰

The right to use force in self-defense applies to inter-state uses of force. The law of self-defense was designed to allow a state to take necessary action against another state responsible for attacking the defending state, as in the case of the U.S. and U.K. attacking Afghanistan in response to 9/11. The law of self-defense is not designed for responding to the violent criminal actions of individuals or small groups. Article 51 of the Charter permits the use of force in self-defense if an armed attack occurs and permits collective self-defense if the state that has been attacked requests it. The Security Council may also authorize force in self-defense.

Little or no authority exists for the right to exercise self-defense against an individual or a non-state actor with no ties to a state. United Nations Charter Article 51 permits self-defense if an armed attack occurs, but, even then, only until the Security Council takes "measures necessary to maintain international peace and security."¹¹ The

¹⁰ Harold Hongju Koh, *The Obama Administration and International Law*, Annual Meeting ASIL, U.S. DEPARTMENT OF STATE (Mar. 25, 2010), <http://www.state.gov/s/l/releases/remarks/139119.htm>.

¹¹ U.N. Charter art. 51: Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security

International Court of Justice (ICJ), the chief judicial organ of the United Nations and the only court with general jurisdiction over states on matters of international law, has found that the Article 51 right of self-defense may only be exercised against a significant attack. The ICJ has not ruled on anticipatory self-defense but by requiring a significant attack, the evidence of the nature of the attack must necessarily be of an attack that is at least underway if not completed. Moreover, the response in terms of a counter-attack may only be against the territory, planes, or ships of a state responsible for the initial significant attack. If the non-state actor's attack is not attributable to a state, force in self-defense may not be exercised on any state's territory.

Where a state is responsible for attacks, the ICJ said in *Nicaragua*¹² and *Oil Platforms*¹³ that low level attacks or border incidents do not give rise to the right to use force in self-defense on the territory of the responsible state. The Ethiopia-Eritrea Arbitral Tribunal said much the same in the *Jus Ad Bellum* award.¹⁴ Additionally, in the *Nicaragua* case and the *Nuclear Weapons* case, the ICJ held that even where a state is responsible for a significant attack, there is no right to use force in self-defense if the use of force is not necessary to accomplish the purpose of defense and/or the purpose cannot be accomplished without a disproportionate cost in civilian lives and property. Necessity and proportionality are not expressly mentioned in the Charter, but according to the ICJ “there is a ‘specific rule whereby self-defence would warrant only measures which are

Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

¹² *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 195, 230 (June 27) [hereinafter

¹³ *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. 161, ¶ 61-64 (Nov. 6).

¹⁴ *Jus Ad Bellum (Eth. v. Eri.)*, Ethiopia Claims 1-8, Partial Award, ¶ 9-12 (Eri. Eth. Claims Comm'n 2005), <http://www.pca-cpa.org/upload/files/FINAL%20ET%20JAB.pdf>.

proportional to the armed attack and necessary to respond to it, a rule well established in customary international law.’ This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed.’¹⁵

Under these treaties, as well as customary international law rules and general principles, the United States has virtually no support for its claim to a right to detain or target persons not fighting in Afghanistan. The UN Special Rapporteur on extrajudicial, summary, or arbitrary executions found the 2002 strike in Yemen that killed six persons alleged to be associated with al Qaeda was an unlawful, extrajudicial killing.¹⁶ This is the correct finding in the view of most states that simply do not accept targeted killing as justifiable under Article 51 in particular or international law in general.

The current rules on the use of force have developed over time in the light of the threat of terrorism and other significant violence in our world. The ICJ has not indicated that the law is unclear. Most importantly, the current law on the use of force was thoroughly reviewed in 2003–05, following 9/11 and the 2003 invasion of Iraq. United Nations members committed in September 2005 at the World Summit in New York to “strictly” abide by the UN Charter and agreed, “that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security.”¹⁷

¹⁵ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶41 (July 8). See also Nicaragua, *supra* note 25, ¶ 176; Oil Platforms, *supra* note 82, ¶ 76.

¹⁶ Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, *Report of the Special Rapporteur, Asma Jahangir, Civil and Political Rights, Including the Questions of Disappearances and Summary Executions*, UN Doc. E/CN.4/2003/3, ¶ 37 – 39 (Jan. 13, 2003) [hereinafter *Report on Extrajudicial, Summary, or Arbitrary Executions*].

¹⁷ 2005 World Summit Outcome, GA Res. A/60/L.1, paras. 78–79 (Sept. 15, 2005), available at http://www.globalr2p.org/media/files/wsod_2005.pdf. This important document and other evidence of the current status of the law on self-defense are omitted in Theresa Reinold, *State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11*, 105 AJIL 244 (2011). For an overview and assessment of the principal literature in English on the law of self-defense, see Mary Ellen O’Connell, *The Right of Self-Defense*, OXFORD BIBLIOGRAPHIES (Mar. 2012), at <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0028.xml>.

No change was found to be necessary or desired, including by the United States under the leadership of our UN Ambassador, John Bolton.

Killing Americans

The first targeted killing beyond a battlefield was in November 2002 in Yemen. Agents of the U.S. Central Intelligence Agency, not the U.S. military, conducted the operation. The agents were based in the tiny former French colony of Djibouti and apparently had that state's consent to conduct lethal operations from its territory. Yemen's authoritarian ruler Ali Abdullah Saleh was informed or consented as well. The operation consisted of an attack with Hellfire missiles on a passenger vehicle driving in a remote part of Yemen. The attack killed all six passengers in the vehicle, including a 23-year old American from Lakawana, New York.¹⁸ We know this because CIA agents flew to the scene by helicopter within moments of the killing, repelled down to the ground, and took DNA samples from the persons killed.¹⁹

Targeted killings continued in Yemen but Saleh wanted them carried out with cruise missiles launched from ships or piloted jet aircraft—he wanted to be able to deny the U.S. was using military force in Yemen, that Yemen was doing this killing itself. Yemen at the time, however, had no drones. As soon as pro-democracy groups challenged Saleh in 2010-2011, the U.S. returned to attacking with drones. The U.S. attacked multiple times in the first half of 2011 hoping to kill Anwar Al-Awlaki. Awlaki's father, represented by the ACLU and CCR, had petitioned a U.S. court to issue

¹⁸ 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 Next Time*, L.A. TIMES, Jan. 11, 2003, at A1.

¹⁹ DINA TEMPLE-RASTON, *THE JIHAD NEXT DOOR: THE LACKAWANNA SIX AND ROUGH JUSTICE IN THE AGE OF TERROR 196-97* (Public Affairs, 2007).

a restraining order against the killing of his son. The court ruled the father did not have standing. In September 2011, the son was killed along with another American and two other men. Two weeks later, Awlaki's 16-year old son, 17-year old nephew, and a number other people were killed in another drone attack at a restaurant in Yemen. By now, the U.S. has killed more than 200 people in Yemen, including four more on May 18.

Conclusion

President Obama will speak on May 23 at the National Defense University on the rules his administration has developed respecting killing with drones. As this testimony demonstrates, however, the United States and the world have rules with respect to the fundamental right to life firmly in place. They are the rules found in our Constitution of 1789; in the United Nations Charter of 1945 and 2005, and in the Geneva Conventions of 1949 and 1977.