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# THE LEGAL CASE AGAINST THE GLOBAL WAR ON TERROR\*

*Mary Ellen O'Connell*<sup>†</sup>

## *I. Introduction*

In the first confusing days after the September 11, 2001, attacks on the United States, President George W. Bush declared a war on terror. Many of us heard this declaration as stirring rhetoric to rally the nation. We understood it as a declaration that the President would direct a strong response against those responsible. We had heard this sort of rhetoric before when the nation faced powerful challenges—from illegal drugs and chronic poverty. Many of us understood President Bush's declaration of war to refer once again to the determined, persistent struggle to overcome a social blight—this time terrorism. We did not understand it as the kind of war Franklin Delano Roosevelt declared after the attack at Pearl Harbor. Indeed, how could we have understood it any other way? When President Bush made his declaration, he did not even know who had carried out the attacks.

Our government's actions in the first weeks after September 11 lent further support to this initial understanding. We did not engage our military against known terrorists just anywhere. We waited until facts were known and then we waged a war of self-defense against Afghanistan, beginning October 7, 2001. It was not until November 2001, as the Administration's legal policies regarding detainees started to emerge that we began to detect the rhetoric of war on terror might not be mere rhetoric. Apparently, some Administration lawyers took the President's declaration as the basis to allow the United States to claim certain wartime rights and privileges even outside the conflict in Afghanistan.

Academic international lawyers were perhaps slow to take this in, but by 2003, scholarly articles began to emerge countering the Administration's claims to privileges in the absence of actual hostilities. The International Court of Justice (ICJ) in its advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory has further undermined the possibility of declaring war against "terrorism" per se. By contrast, we find virtually no support from independent scholars or tribunals for the Bush Administration's case for global war.

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This essay reviews the Administration's case, contrasting the scholarship and jurisprudence against global war. The essay's contribution is to point out that three years after the declaration of global war, the Bush Administration's case has virtually no support in the wider international legal community—the community beyond the Administration's own people. The claim of global war is a radical departure from mainstream legal analysis. Moreover, claiming global war is turning out to have negative unintended consequences, such as enhancing the status of terrorists on the international plane and creating a dangerous legal precedent that other states are following.

### A. The Bush Administration Case for Global War

President Bush declared global war on terrorism in his address to the nation following the attacks of September 11 and in his address to a joint session of Congress.<sup>1</sup> The President stated that the “war” “will not end until every terrorist group of global reach has been found, stopped and defeated.”<sup>2</sup> The war attaches to individuals not to situations of armed hostilities. So wherever a suspected member of a terrorist organization is, there is an armed conflict. Former National Security Adviser, Condoleeza Rice has explained the global war on terror as a “new kind of war” to be fought on “different battlefields.”<sup>3</sup>

In response to a question, “what is the legal basis for the global war on terror?” Deputy National Security Adviser Stephan Hadley in remarks at The Ohio State University explained that the legal basis was the attack on the United States on September 11. He said the American people could understand that the attacks were “an act of war.”<sup>4</sup> Apparently as soon as the attacks occurred, the Bush Administration believed a war had begun and the law of war was triggered. In addition to the September 11 attacks,

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<sup>1</sup> See President's Address to the Nation on the Terrorist Attacks, 37 WEEKLY COMP. PRES. DOC.1301, 1302 (Sept. 11, 2001); President's Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, in 37 WEEKLY COMP. PRES. DOC. 1347, 1347-49 (Sept. 20, 2001) [hereinafter Response to Terrorist Attacks]; President's Address to the Nation Announcing Strikes Against Al Qaida Training Camps and Taliban Military Installations in Afghanistan, in 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, 112-13 (Jan. 28, 2003); <http://www.whitehouse.gov>.

<sup>2</sup> Response to Terrorist Attacks, *supra* note 1, at 1348.

<sup>3</sup> *Fox News Sunday* (Fox News television broadcast, Nov. 10, 2002), 2002 WL 7898884, at 9.

<sup>4</sup> Stephan Hadley, Remarks at the Moritz College of Law of the Ohio State University (Sept. 24, 2004).

Professor Ruth Wedgwood, who advises the Secretary of Defense, adds “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>5</sup>

The U.S. Justice Department has also argued before US courts that the country is in a global war on terror.<sup>6</sup> It made this argument in three cases before the United States Supreme Court in the spring of 2004.<sup>7</sup> In December 2004, in a Federal district court case, the Administration took the position that where an elderly Swiss lady sends money to a charitable organization and the money ends up with Al-Qaeda, she could also qualify as a combatant.<sup>8</sup> Professor John Yoo, who was a member of the Justice Department and a chief architect of the “global war” argument, analyzed the Supreme Court’s decisions, concluding “the Court agreed that the U.S. is at war against the al Qaeda terrorist network . . .”<sup>9</sup> And that it is allowed to “use all of the tools of war to fight a new kind of enemy . . .”<sup>10</sup>

Having characterized the world as at war after September 11, the Administration has claimed that three types of legal privilege flow from this: the right to declare individuals “enemy combatants” if they are suspected of terrorism; the right to target and kill individuals wherever they are if they are suspected terrorists; and the right to search ships and seize cargoes suspected of carrying weapons or materiel for terrorists.<sup>11</sup> Judge Alberto Gonzales, White House Counsel, explained to the ABA’s Standing Committee on Law and National Security that the policy of declaring individuals “enemy combatants” is based on the view that “our conflict

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<sup>5</sup> Ruth Wedgwood, *Combatants or Criminals? How Washington Should Handle Terrorists: Fighting a War Under its Rules*, 83 FOREIGN AFF., 126, 127 (2004), available at <http://www.foreignaffairs.org/20040501faresponse83312/ruth-wedgwood-kenneth-roth/combatants-or-criminals-how-washington-should-handle-terrorists.html> (last visited Feb. 26, 2005).

<sup>6</sup> See, e.g., Brief for Respondents at 15, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (No. 03-6696); Brief for Petitioner at 10, *United States v. Alvarez-Machain*, 124 S.Ct. 2739 (2004) (No. 03-485).

<sup>7</sup> See *Rasul v. Bush*, 124 S. Ct. 2686, 2710-11 (2004); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2636-37 (2004); *Rumsfeld v. Padilla*, 124 S. Ct. 2711, at 2712, 2716 (2004).

<sup>8</sup> Neil A. Lewis, *Searching for Limits on Power to Detain*, INT’L HERALD TRIB., Dec. 3, 2004, at 4, 2004 WL 90971627. The answer was given to a question by Judge Green during the oral arguments in *In re Guantanamo Detainee Cases*, No. 02-CV-0299CKK, 2005 WL 195356 (D.D.C. Jan 31, 2005).

<sup>9</sup> John Yoo, *The Supreme Court Goes to War*, WALL ST. J., June 30, 2004, at A8.

<sup>10</sup> *Id.*

<sup>11</sup> See Mary Ellen O’Connell, *Ad Hoc War*, in KRISSENSICHERUNG UND HUMANITÄRER SCHUTZ [CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION] 399 (Horst Fischer et al. eds., 2004).

with al Qaeda is clearly a war.”<sup>12</sup> The Deputy General Counsel of the Department of Defense for International Affairs, Charles Allen, following the killing by the CIA of six men traveling in a vehicle in Yemen, justified the killing as lawful because the U.S. is at war with “Al Qaeda and other international terrorists around the world and those who support such terrorists.”<sup>13</sup> In other words, the U.S. can kill *without warning*. To underscore his point that the “war” attaches to the individual, not the situation, Allen went on to suggest it would be lawful to kill an Al Qaeda suspect on the streets of a peaceful city like Hamburg, Germany.<sup>14</sup>

Interestingly, despite the legal controversy surrounding the assertion that war can exist based on the presence of an individual, rather than an armed conflict, we find virtually no scholarship arguing in favor of the Bush Administration’s position. We certainly find very little from academics not connected with the Administration.

## B. The Scholars Case Against Global War<sup>15</sup>

As I have written elsewhere:<sup>16</sup>

Whether the U.S. was in fact in a war after September 11 depends on the definition of war in international law. Before the adoption of the UN Charter and its general prohibition on war, international law defined war with precision. A *de jure* war existed as soon as it was declared by a sovereign state. Real war, according to Oppenheim,

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<sup>12</sup> Alberto R. Gonzales, Remarks Before the American Bar Association Standing Committee on Law and National Security (Feb. 24, 2004), [http://www.abanet.org/natsecurity/judge\\_gonzales.pdf](http://www.abanet.org/natsecurity/judge_gonzales.pdf) (last visited Feb. 26, 2005); Memorandum from William J. Haynes II, General Counsel of the Department of Defense, to Members of the ASIL-CFR Roundtable on Old Rules, New Threats, Enemy Combatants (Dec. 12, 2002), <http://www.cfr.org/publication.php?id=5312> (last visited Feb. 26, 2005).

<sup>13</sup> Anthony Dworkin, *Law and the Campaign Against Terrorism: The View from the Pentagon* (Dec. 16, 2002), at <http://www.crimesofwar.org/print/onnews/pentagon-print.html> (last visited Feb. 26, 2005) (interview by Anthony Dworkin with Charles Allen, Deputy General Counsel for International Affairs at the Department of Defense).

<sup>14</sup> *Id.*

<sup>15</sup> In addition to the articles discussed more specifically herein, see O’Connell, *supra* note 6; Leila Nadya Sadat, *Terrorism and the Rule of Law*, 3 WASH. U. GLOBAL STUD. L. REV. 135 (2004); Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the ‘War on Terror,’* 27 FLETCHER F.WORLD AFF. 55, 57 (2003); Mary Ellen O’Connell, *Lawful Self-Defense to Terror*, 63 U. PITT. L. REV. 889 (2002); Mark Drumbl, *Victimhood in our Neighborhood: Terrorist Crime, Taliban Guilt and the Asymmetries of the International Legal Order*, 36 N.C. L. REV. 81 (2002).

<sup>16</sup> O’Connell, *supra* note 11 (some notes and parts of notes omitted).

was “a contention between two or more States through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases.”<sup>17</sup> The term “war” fell out of use as a legal term of art with the adoption of the Charter in 1945. The Charter in Article 2(4) prohibits all uses of force, war and lesser actions, except in self-defense 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 the actual fighting not the 19<sup>th</sup> century formalities that might mean a war was occurring legally even if no shot was ever fired. We still use the term “war” to refer to any serious armed conflict. Yugoslavia, Liberia, Sudan and Sri Lanka experienced civil war in the 1990s. We also had the Gulf War and the Ethiopia-Eritrea War in the 1990s. But indicative of the fact “war” is no longer the significant legal term it once was, the United States fought a war on poverty and a war on drugs. We would never say it was an armed conflict against poverty. The war on drugs does involve the military, but it is not an armed conflict against drugs.

Indeed, the division in the law depends today on the existence of actual armed conflict, not the rhetorical or even technical invocation or declaration of war. When President Bush first declared war on terrorism, many thought he was using the term war in the sense of the war on drugs. Presumably, the United States would use law enforcement methods and occasionally the military to pursue terrorists. And in fact that is largely what happened. But in the formation of [certain] policies ..., the Administration has acted as though the US is actually involved in armed conflict against terrorists everywhere. An armed conflict, however, has two important components. It consists of two or more armed groups engaged in 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

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<sup>17</sup> 2 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 202 (Hersch Lauterpacht ed., 7th ed. 1952).

authorities and organized armed groups or between such groups within a state.”<sup>18</sup> Thus, in distinction to the classic definition of war, armed conflict need not be between states or have domination of the other party as its goal. It occurs when organized groups use significant armed violence. The Geneva Conventions similarly incorporate a standard of intensity that must be reached to trigger the application of certain minimal rules in certain violent conflicts, namely those conflicts where all parties are not signatories to the Conventions.<sup>19</sup> Such conflicts must amount to “more than situations of internal disturbances and tensions such as riots and isolated and sporadic acts of violence.”<sup>20</sup> We tend to refer to fighting below the threshold as “lawlessness” or criminality when it occurs within a state. Minimal-armed force between states is often referred to as an incident, as in “border incident” or “frontier incident.”<sup>21</sup> Fighting serious enough to be above the threshold between two or more groups is an armed conflict. Once an armed conflict is triggered, whether internal or international, certain peacetime human rights protections will no longer apply. For example, most general human rights treaties protect the

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<sup>18</sup> *Prosecutor v. Tadić*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, No. IT-94-1, para. 70 (Oct. 2, 1995), available at: <http://www.un.org/icty/tadic/appeal/decision-e/51002.htm> (last visited Feb. 26, 2005).

<sup>19</sup> See 3 JEAN DE PREUX, COMMENTARY TO THE 1949 GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 19-23 (Jean Pictet ed., 1960). Common Article 2 of the four Geneva Conventions provides that the Conventions “shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.” *Id.* at 19. The Commentary defines “armed conflict” as used in Article 2 as “any differences arising between two states and leading to the intervention of members of the armed forces.” *Id.* at 23.

<sup>20</sup> 4 JEAN DE PREUX, COMMENTARY TO THE 1949 GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 3-9 (Jean Pictet ed., 1958); see also, Alain Pellet, *No, This is Not War*, EUR. J. INT'L L., Oct. 3, 2001, [http://www.ejil.org/forum\\_WTC/ny-pellet.html](http://www.ejil.org/forum_WTC/ny-pellet.html) (last visited Feb. 26, 2005) (“[W]ar...presupposes an armed conflict between adversaries if not identified, at least identifiable, to which the ‘laws and customs of war’ can be applied...”.) In other words, Pellet believes that non-state actors cannot engage in armed conflict because of their limits as subjects of international law. This formalistic conclusion does not comport with the more contemporary tests of armed conflict based on the facts of fighting.

<sup>21</sup> *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. U.S.)*, 1986 I.C.J. 14, 102-03 (June 27). [hereinafter *Nicaragua*]; see also INTERNATIONAL INCIDENTS: THE LAW THAT COUNTS IN WORLD POLITICS (W. Michael Reisman & Andrew R. Willard eds. 1988).

right to life, but the content of the right will differ depending on whether the right is invoked in war or peace.

Professor Christopher Greenwood shares this view with respect to the meaning of war:

Terrorism is one of the greatest threats facing humanity today. It is therefore entirely understandable and justifiable that we mark the gravity of that danger and express a commitment to defeating it by using the language of a war on terrorism. That is, however, a far cry from using that language in a technical, legal sense. 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>22</sup>

And Professor Marco Sassoli shares my view with respect to the wartime privileges claimed by the Bush Administration:

One of the dangerous effects of the U.S. characterization of the “war on terrorism” as a single global international armed conflict is that, if correct, such classification makes deliberate attacks upon members of the “enemy armed forces” lawful worldwide . . . . Thus, the United States justified an unmanned missile strike that hit and killed suspected members of Al-Qaeda in Yemen. Without this qualification under the laws of war, such targeted assassinations not preceded by an attempt to arrest the persons concerned would be classified as extra-judicial executions, which would seriously violate international human rights law. The latter accepts the deliberate killing of even the worst criminal only under the most extreme circumstances . . . . If fully applied, this theory would have justified, subject to the principle of proportionality, an ambush attack on Jose Padilla when he left his plane at a Chicago airport . . . . U.S. administration officials have indeed implied that the President’s claimed authority to designate as an enemy combatant any individual, including

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<sup>22</sup> Christopher Greenwood, *War, Terrorism, and International Law*, 56 CURRENT L. PROBS., 505, 529 (2004).

a U.S. citizen within the United States, includes authority to carry out extra-judicial executions, within or outside the United States, of suspects so designated. Under the laws of war, if those persons were combatants, such claims would be correct. This absurd result, permitting targeted assassinations in the midst of peaceful cities, proves once more that all those suspected to be “terrorists” cannot be classified as combatants.<sup>23</sup>

Justice O’Connor, writing for the plurality in *Hamdi*, says the right to detain under “long-standing law-of-war principles... may last no longer than active hostilities.”<sup>24</sup> She then describes those hostilities as existing in Afghanistan, where the United States has 13,500 troops engaged in active operations.<sup>25</sup> She talks about a real war, with real hostilities that will eventually end, but she does not address a so-called war on terror that will never end.<sup>26</sup> In the companion *Rasul* case, the majority allowed court review of Guantanamo Bay detentions. Concurring, Justice Kennedy gives guidance to reviewing courts when he refers to “a zone of hostilities,”<sup>27</sup> indicating that hostilities are occurring in specific locations and not everywhere in the world.

Finally, the International Court of Justice gave an advisory opinion to the UN General Assembly as to the legal consequences of Israel constructing a security barrier on occupied Palestinian territory. Israel cited Security Council resolutions acknowledging the right of a state to act in self-defense against terrorist attacks. Israel argued that if a state may use force in self-defense, then non-forcible measures are, 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>28</sup> In other words, the right to use armed force is connected with territory—facts of fighting on the ground, not the presence of an individual suspected of being a terrorist.

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<sup>23</sup> Marco Sassòli, *Use and Abuse of the Laws of War in the “War on Terrorism”*, 22 LAW & INEQ. 195 (2004) (citations omitted).

<sup>24</sup> *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2641 (2004).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Rasul v. Bush*, 124 S. Ct. 2686, 2700 (2005).

<sup>28</sup> See generally Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 ICJ 131 (July 9), available at: <http://www.icj-cij.org/icjwww> (last visited Feb. 26, 2005) (decision is an advisory opinion).

Since Israel is in control of the Occupied Palestinian Territory it cannot claim self-defense—that would be self-defense against itself.

## *II. Conclusions*

The decision to treat the struggle against terrorism as a global war, may well have had unintended consequences, including enhanced status for terrorists and setting dangerous precedent. I recently concluded:

The puzzling decision of the Bush Administration to declare a global war on terror and to label terrorists “enemy combatants” has possibly had an unintended consequence for non-state actors. It has lifted certain individuals out of the status of *criminal* to that of *combatant*, the same category America’s own troops have while engaging in armed hostilities. This move to label terrorists as combatants is contrary to strong historic trends. From 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.”<sup>29</sup>

And now we face the fact Russia has declared a global war on terror.<sup>30</sup> Now the Russians, in addition to Americans, believe they may target their enemies anywhere—including the streets of peaceful cities. These declarations of war are undermining the prohibition on the use of force, enhancing the status of terrorists and making the world a more dangerous place where human life is ever more de-valued.

It is time to call off the global war on terror.

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<sup>29</sup> Mary Ellen O’Connell, *Enhancing the Status of Non-State Actors Through a Global War on Terror*, COLUM. J. TRANSNAT’L L. (forthcoming 2004).

<sup>30</sup> See, e.g., *Putin’s Chechnya War, Five Years and Still Counting*, AGENCE FR.-PRESSE, Oct. 1, 2004, at <http://www.ivcc.edu/bigelow/Intro%20to%20Global/war%20on%20chechnya.htm> (last visited Feb. 26, 2005).

