

Testimony of Mary Ellen O'Connell
before the Subcommittee on the Constitution, Civil Rights and Civil Liberties
Committee on the Judiciary
United State House of Representatives
December 9, 2010

The Rights v. Security Myth¹

My primary purpose today is to try to dispel the myth of a human rights-national security tradeoff. Rights and security are intimately interrelated. Doing the right thing in terms of human rights is also the right thing in terms of American national security. Our nation is not facing tough tradeoffs. It is facing tough myths that need dispelling.

One particularly stubborn part of the trade-off myth is that the President may exercise extraordinary wartime privileges to kill and detain with respect to persons anywhere in the world. In fact, since the end of combat operations in Iraq, the United States has been involved in combat operations in only one country: Afghanistan. The Afghan conflict is a counter-insurgency war being fought by the government of Afghanistan with the assistance of outside troops, including Americans. The United States began its current involvement in Afghanistan in October 2001 in a war of self-defense as permitted by the United Nations Charter in response to the 9/11 attacks. That war ended in June 2002 when Afghan leaders replaced the ousted Taliban government and replaced it with a government friendly to the United States.

The only place where it is lawful today for the United States to intentionally target and kill persons is in Afghanistan. The only persons who may plausibly be held without trial until the end of hostilities are detainees in Afghanistan. With respect to individuals outside Afghanistan of concern to the United States, the U.S. must treat them as criminal suspects, just as it is treating Julian Assange and just as it is treating a number of persons within our own borders.

To do otherwise, weakens American security by fueling anger and hatred in response to our law violations. We also fuel anger by extending rights to people in the U.S. and in Europe that we do not extend in poorer regions. Law violations and disparate treatment weakens America's ability to lead in strengthening the rule of law in the world. Fundamentally, it will be respect for law and rejection of violence that will give Americans the greatest security.

Despite these truths, the United States is still operating under the flawed legal analysis that was developed after 9/11 by government lawyers trying to justify torture. Those arguments have been widely and roundly condemned as highly flawed. Yet, the same basic legal reasoning

¹ This testimony draws on an article scheduled for publication in December 2010, *The Choice of Law Against Terrorism*, JOURNAL OF NATIONAL SECURITY LAW (vol. 4:2) available at <http://www.jnslp.com/read/vol4no2.asp>.

underpins American's current use of targeted killing and to justify the detention without trial of many persons.

The United States is carrying out targeted killing with drones, helicopter gunships, cruise missiles fired from Navy vessels, bomber aircraft, and other means to kill individuals without warning in Pakistan, Somalia, and Yemen. The targets of these attacks are suspected members of al Qaeda, various Taliban groups, and other militant organizations. It was only on 9/11 that the U.S. began to treat such persons as anything but common criminals. The same lawyers who wrote the torture memo, who devised the detention policy, who tried to make Guantanamo Bay a legal black hole, developed specious legal arguments for the proposition that persons outside of armed conflict hostilities could be combatants and killed as if in a war.

Before September 11, 2001, the United States applied its criminal law to terrorism suspects.² President Ronald Reagan explained that terrorists have and should have the status of criminals, not combatants. He said that to “grant combatant status to irregular forces even if they do not satisfy the traditional requirements ... would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves.”³

In 2001, U.S. Ambassador to Israel, Martin Indyk, stated on Israeli television in connection with Israeli targeted killing of suspected terrorists: “The United States government is very clearly on the record as against targeted assassinations. They are extrajudicial killings, and we do not support that.”⁴ The U.S. position with respect to terrorists has been to treat them as criminals they are. After attacks by al Qaeda on American targets in 1993, 1998, and 2000, the U.S. used the criminal law and law enforcement measures to investigate, extradite, and try persons linked to the attacks.⁵

Our allies who dealt for years with determined problems of terrorism have taken the same approach. The British, Germans, Italians, Indians, and others have all faced terrorist challenges

² See Mary Ellen O’Connell, *Enhancing the Status of Non-State Actors Through a Global War on Terror*, 43 COLUM. J. TRANSNAT’L L. 435 (2005).

³ Ronald Reagan, *Letter of Transmittal*, The White House (January 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) (response).

⁴ Joel Greenberg, *Israel Affirms Policy of Assassinating Militants*, N.Y. TIMES, July 5, 2001, at A5.

⁵ After attacks on the U.S. embassies in Kenya and Tanzania in 1998, the U.S. used law enforcement techniques but also bombed sites in Sudan and Afghanistan. These bombings were controversial. *See, e.g.*, Jules Lobel and George Loewenstein, *Emote Control: The Substitution of Symbol for Substance in Foreign Policy and International Law*, 80 CHI.-KENT L. REV. 1045, 1071 (2005).

that they dealt with using law enforcement methods.⁶ When becoming a party to the 1977 Additional Protocols to the 1949 Geneva Conventions,⁷ the British appended the following understanding to their acceptance: “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.”⁸ France made a similar statement on becoming a party to the Protocol.⁹

In the days following the September 11 attacks, however, the United States asserted a different choice of law to deal with the perpetrators. President Bush declared a “war” on terrorists that “will not end until every terrorist group of global reach has been found, stopped and defeated.”¹⁰ In the months that followed, we saw the administration invoke the core privileges available to lawful belligerents during an armed conflict, including an expanded right to kill, a right to detain without trial, and a right to search and seize cargo of foreign-flagged vessels.¹¹

⁶ For a detailed account of the British struggle against the IRA and other counter-terrorism efforts, see LOUISE RICHARDSON, *WHAT TERRORISTS WANT: UNDERSTANDING THE ENEMY, CONTAINING THE THREAT* (2006).

⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protections of Victims of International Armed Conflicts (Protocol I), *adopted* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protections of Victims of Non-International Armed Conflicts (Protocol II), *adopted* June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

⁸ *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Reservation/Declaration (2 July 2002), *available at* <http://www.icrc.org/ihl.nsf/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument>.

⁹ *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Reservation/Declaration (11 April 2001), *available at* (in French) <http://www.icrc.org/ihl.nsf/NORM/D8041036B40EBC44C1256A34004897B2?OpenDocument>.

¹⁰ *See* George W. Bush, 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. 1347, 1348 (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.gpoaccess.gov/wcomp/index.html (Bush said the US was in a “war on terror” that would last ‘until every terrorist group of global reach has been found, stopped and defeated’.).

¹¹ Mary Ellen O’Connell, *Ad Hoc War, in* KRISENSICHERUNG UND HUMANITÄRER SCHUTZ—CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION 405 (Horst Fischer et al, eds., 2004).

It took some time before it was apparent that these privileges were being invoked outside of the armed conflict in Afghanistan that began on October 7, 2001. The first public evidence came on November 13, 2001, when President Bush issued an Executive Order titled “Detention, Treatment, & Trial of Certain Non-Citizens in the War Against Terrorism” which stated that terrorist suspects would be tried before military tribunals and would be subjected to military detention, irrespective of where the person was captured.¹² Detention would be based on a person’s associations not his actions or the factual situation in which he found himself. This was a novel assertion of when armed conflict privileges could be claimed. The Executive Order made no reference to armed conflict duties nor did it take any stand on whether other states should also have the same right to treat terrorist suspects as enemy combatants.

By January 2002, the prison at Guantánamo Bay was opened. Within a few years, the public learned that some detainees had been brought there from Malawi, Bosnia, Algeria and other places where no active hostilities were occurring.¹³ The first known killing under the “global war” declaration occurred on November 3, 2002. The CIA, based in Djibouti, fired a Hellfire missile from a Predator drone at a car in Yemen, killing the six men inside. Yemen recognized no armed conflict on its territory at the time of the strike, nor was the United States at war with Yemen. The CIA carried out the operation because the Air Force questioned its legality. National Security Adviser Condoleezza Rice, however, argued in an interview on Fox News that the killings were lawful by saying, “We’re in a new kind of war, and we’ve made very clear that it is important that this new kind of war be fought on different battlefields.”¹⁴ Also in 2002, a Department of Defense official said al Qaeda suspects could be killed without warning wherever they are found. Charles Allen said the U.S. could target “al-Qaeda and other international terrorists around the world, and those who support such terrorists.”¹⁵ In 2006, a Department of

For a prescient article respecting the problems of trying to fit crime into the armed conflict legal paradigm, see Mark A. Drumbl, *Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt and the Asymmetries of the International Legal Order*, 81 N.C. L. REV. 1 (2002).

¹² Executive Order of Nov. 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 16, 2001).

¹³ The United States Department of Defense maintains a web page with extensive documentation relevant to Guantánamo Bay. See *Detainee Related Documents*, DEPARTMENT OF DEFENSE, <http://www.dod.gov/pubs/foi/detainees/> (last updated May 24, 2010). See also ANDY WORTHINGTON, *THE GUANTÁNAMO FILES, THE STORIES OF THE 774 DETAINEES IN AMERICA’S ILLEGAL PRISON* (2007).

¹⁴ *Fox News Sunday with Tony Snow* (Fox News Network television broadcast Nov. 10, 2002) (Lexis News library, Allnews file).

¹⁵ Anthony Dworkin, *Law and the Campaign against Terrorism: The View from the Pentagon*, CRIMES OF WAR PROJECT (Dec. 16, 2002), <http://www.crimesofwar.org/print/onnews/pentagon-print.html>.

Justice official said in Congressional testimony that the President could order targeted killings inside the United States on the basis of the new kind of war—the global war on terror.¹⁶

State Department Legal Adviser, Dean Harold Koh, has made it clear that the U.S. no longer uses the term “global war on terror.” Rather, drone strikes, detention without trial and military commissions in the case of persons not involved in the hostilities in Afghanistan are now being based on the view that “as a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law.”¹⁷ The Legal Adviser emphasized that in his view this is a different legal paradigm than the “global war on terrorism.”¹⁸

In either case, whether “a global war on terror” or an “armed conflict against al Qaeda and the Taliban,” these are new positions for the U.S., apparently taken up in order to claim expanded wartime rights with respect to targeted killing, detention, and judicial procedure. Once an armed conflict is triggered, certain peacetime human rights protections no longer apply or no longer apply in the same way. Under customary international law it is evident that in the emergency situation of armed conflict hostilities, governments may detain opposition fighters and even use lethal force if reasonably necessary.¹⁹ States parties to certain human rights treaties must formally derogate from those treaties to be able to lawfully detain without trial or use lethal force at the more flexible level applicable in armed conflict. Most human rights continue during armed conflict as in peace, but the content of rights, such as the right to life may differ depending on the situation in which it is invoked. According to the International Court of Justice in the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, “whether a particular loss of life... is to be considered an arbitrary deprivation of life contrary to Article 6 of

¹⁶ Katerina Ossenova, *DOJ Official: President may have Power to Order Terror Suspects Killed in US*, JURIST (Feb. 5, 2006), <http://jurist.law.pitt.edu/paperchase/2006/02/doj-official-president-may-have-power.php>.

¹⁷ 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>. At time of writing, July 2010, the hostilities in Iraq had so subsided that U.S. military were following peacetime rules of engagement. *See infra* note 101.

¹⁸ *See* Ari Shapiro, *U.S. Drone Strikes Are Justified, Legal Adviser Says*, NPR (Mar. 26, 2010), www.npr.org/templates/story/story.php?storyId=125206000.

¹⁹ These customary international law rights are not found restated as affirmative rights but may be deduced from the customary international law duties governing targeting and detention. *See generally* I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Jean-Marie Henckaerts and Louise Doswald-Beck eds., 2005).

the [International Covenant on Civil and Political Rights], can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.”²⁰

Other human rights conventions similarly couch the right to life in relative terms, depending on the circumstances. Thus, they reflect that in armed conflict hostilities lives may lawfully be taken in circumstances that would be unlawful outside such situations.²¹ Governments reacting to violence in circumstances less than armed conflict may only lawfully use lethal force in situations of absolute necessity.

Within an armed conflict, lawful combatants are not restricted to killing only to save a human life immediately. Opposing combatants and civilians taking a direct part in hostilities may be killed in a zone of armed conflict hostilities unless they surrender or an alternative is available and dictated by the principle of humanity. In the International Committee of the Red Cross Customary Law Study, the right to target combatants but not civilians is the first rule:

Rule 1. The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.²²

This rule is supported by a number of legal authorities, including, perhaps most importantly, Additional Protocol I of 1977 to the 1949 Geneva Conventions:

Article 43(2) Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.

Article 51(3) Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.

In short, lawful combatants need to know two things with respect to the combatant’s privilege to kill: They must know they are targeting combatants or persons taking direct part in hostilities, and they must know they are killing in a situation of armed conflict.

The Obama administration argues that Congress’s Authorization for the Use of Military Force (AUMF) passed after the 9/11 attacks gives the President authority to attack suspected terrorist anywhere in the world. The AUMF, however, restricts the President to measures that are “necessary” and “appropriate.” Because targeted killing and detention without are generally

²⁰ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8) [hereinafter Nuclear Weapons].

²¹ See NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW xiii (2008).

²² I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 42, at 3.

unlawful anywhere outside of Afghanistan, they are hardly “appropriate.”

Professor Anderson correctly concludes: “[A] strategic centerpiece of U.S. counterterrorism policy rests upon legal grounds regarded as deeply illegal...by large and influential parts of the international community.”²³

Not only is targeted killing and detention without trial generally unlawful in the terrorism context, these battlefield practices do not succeed in ending terrorism:

In 2008, the Rand Corporation released a study that concluded:

All terrorist groups eventually end. But how do they end? Answers to this question have enormous implications for counterterrorism efforts. The evidence since 1968 indicates that most groups have ended because (1) they joined the political process or (2) local police and intelligence agencies arrested or killed key members. Military force has rarely been the primary reason for the end of terrorist groups, and few groups within this time frame achieved victory. This has significant implications for dealing with [al Qaeda] and suggests fundamentally rethinking post-September 11 U.S. counterterrorism strategy.²⁴

We are told with respect to detention without trial and targeted killing – as we were with regard to torture – that post-9/11 circumstances require extraordinary measures. Some of our leading ethicists countered those claims for torture by arguing that the absolute ban on torture must be respected as a moral imperative, regardless of the consequences.²⁵ We could say the same about targeted killing, indefinite detention, and military commissions. But, as in the case of torture, it turns out that doing the moral thing is also the effective thing. Torture is an unreliable means of interrogation that trained interrogators reject,²⁶ and, some of the best counter-terrorism experts similarly reject the use of military force in efforts against terrorism. Terrorists seek to undermine lawful institutions, to sow chaos and discord, and to foment hatred and violence. Upholding our lawful institutions, holding to our legal and moral principles in the face of such challenges, is not only the right thing to do – it is a form of success against terrorism that can lead to the end of terrorist groups.

Apparently, President Obama is aware that targeted killing by drones will not achieve greater national security in the face of terrorist threats. Bob Woodward writes in his new book, *Obama’s Wars*:

²³ Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law* 16 (May 11, 2009), <http://ssrn.com/abstract=1415070>.

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

25. See, e.g., Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681 (2005).

26. Peter Bauer, Statement on Interrogation Practices, Statement in lieu of Appearance Before the International Commission of Jurists (August 29, 2006), available at http://ejp.icj.org/IMG/Bauer_statement.pdf. See also Mary Ellen O’Connell, *Affirming the Ban on Harsh Interrogation*, 66 OHIO ST. L. J. 1231 (2005).

“Despite the CIA’s love affair with unmanned aerial vehicles such as Predators, Obama understood with increasing clarity that the United States would not get a lasting, durable effect with drone attacks.”²⁷

²⁷ BOB WOODWARD, OBAMA’S WARS, 284 (2010).