

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NASSER AL-AULAQI,

Plaintiff,

v.

BARACK H. OBAMA, *et al.*,

Defendants.

No. 10-cv-01469 (JDB)

DECLARATION OF PROF. MARY ELLEN O'CONNELL

I, Mary Ellen O'Connell, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I hold the Robert and Marion Short Chair in Law and am Research Professor of International Dispute Resolution—Kroc Institute at the University of Notre Dame. My area of specialty is the law of armed conflict. I have unique expertise respecting the definition of armed conflict. This expertise has developed over a thirty-year period that began in 1980 at Cambridge University in the United Kingdom where I was pursuing an advanced degree in international law as a Marshall Scholar. I took a specialized course on the law of armed conflict with the prominent expert, Judge Sir Christopher Greenwood. For two summers following my graduation from Cambridge with first class honors, I researched legal aspects of the Falkland Islands War with Sir Elihu Lauterpacht. While earning my JD at Columbia University, I continued to study, research, write, and teach on the subject of armed conflict. My first published article was on the Afghanistan conflict of the 1980s. My second article, published while I was an associate attorney at Covington & Burling, was on the Central American armed conflicts of the 1980s.

2. In 1989, I entered the academy and began teaching a course on international law and the use of force. In 1993 I published with Thomas Ehrlich my first book on the subject, *International Law and the Use of Force* (Little, Brown 1993). In 1995, I was asked to serve the United States as a professional military educator at the George C. Marshall European Center for Security Studies, a program developed jointly by the United States and German defense departments. I served for three years as a Title X associate professor, earning the Army's Certificate of Achievement upon my return to the academy. During my years with the Department of Defense, I continued to teach and write about the law of armed conflict. I regularly lectured at the NATO School at Oberammergau, Germany, and I was part of a NATO expert team advising the Albanian Defense Ministry in the aftermath of civil unrest in that country. Also, while in Germany, I married U.S. Army interrogator and decorated combat veteran, Peter Bauer.

3. Upon returning to the United States and joining The Ohio State University, I became the William B. Saxbe Designated Professor of Law and a senior fellow of the Mershon Center for International Security. For three years, I worked with an expert group of the International Institute of Humanitarian Law, San Remo, Italy, to produce a manual on the law of non-international armed conflict. In 2005, I published a new book, *International Law and the Use of Force* (Foundation 2005). In 2005, I joined the faculty of the University of Notre Dame, where I continue to teach, research, speak, and publish on the law of armed conflict. In 2008, I published *The Power and Purpose of International Law* (Oxford University Press) and in 2009, I published the second edition of *International Law and the Use of Force*.

4. Most relevantly, I have chaired a five-year study of the definition of armed conflict for the International Law Association (ILA). In June 2010, the ILA's 18-member Committee on the Use of Force submitted its final report, which was adopted without opposition by the full membership of the ILA at its biennial conference in The Hague on August 19, 2010. International Law Association, Final Report of the Use of Force Committee, The Meaning of Armed Conflict in International Law (Aug. 2010, The Hague) www.ilahq.org. See also, Mary Ellen O'Connell, *Defining Armed Conflict*, 13 J. CONFLICT & SECURITY LAW (2008).

5. In *Hamdi v. Rumsfeld*, the United States Supreme Court concluded that in 2004, the United States was engaged in an armed conflict in Afghanistan. Justice O'Connor pointed to the fact the U.S. had 20,000 troops in Afghanistan conducting intensive military operations. *Hamdi*, 542 U.S. 507, 521 (2004). The domestic legal basis for U.S. participation in the armed conflict in Afghanistan is the Authorization for the Use of Military Force. 115 Stat. 224 (2001). In the AUMF, Congress refers to the U.S. exercising "its rights of self-defense" in authorizing the president to "use all necessary and appropriate force." The rights of self-defense encompass the right to engage in armed conflict outside the state's own territory. It is a right provided in international law. In light of these facts, plaintiff's counsel has asked me to discuss the definition of "armed conflict" under international law.

6. The definition of armed conflict is crucial because during an armed conflict, and only during an armed conflict, regular members of a state's armed forces who respect the law of armed conflict (LOAC) may kill without warning. They may use lethal force without fear of prosecution for the deaths they cause. Knut Ipsen, *Combatants and Non-*

Combatants, in *The HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICT* 68 (Dieter Fleck ed., 1995). Outside armed conflict, law enforcement officials are authorized to use lethal force but only in personal self-defense or the defense of others facing an immediate threat to life or serious physical injury. Office of the U.N. High Commission for Human Rights, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, art. 9, 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, *available at* http://193.194.138/html/menu3/b/h_comp43.htm.

7. It is only during the intense fighting of an armed conflict that international law permits the taking of human life on a basis other than the immediate need to save life. In armed conflict, a privileged belligerent may use lethal force on the basis of “reasonable necessity”; outside armed conflict, the relevant standard is “absolute necessity.” *See* NILS MELZER, *TARGETED KILLING IN INTERNATIONAL LAW* 243 (2008). The combatant’s privilege is necessitated by the exigencies of military conflict. Therefore, the expanded right to kill during an armed conflict may be invoked in only the most exceptional circumstances—actual armed conflict in which regular law enforcement operations are difficult to maintain because of regular firefights, bombings, and the like. The Israeli Supreme Court described the condition as an “unceasing, continuous and murderous barrage of attacks.” *Public Committee Against Torture in Israel v Israel*, HCJ 769/02, para. 16 (14 December 2006). It is in such conditions that the combatant’s privilege applies. The combatant’s privilege to kill “in reality, exists under limited conditions and may only be exercised by lawful combatants and parties to armed conflict.” Gabor Rona,

Interesting Times for International Humanitarian Law: Challenges from the 'War on Terror,' 27 FLETCHER FORUM OF WORLD AFFAIRS 64 (2003).

8. Absent an armed conflict, domestic criminal law, as regulated by international human rights law, applies to persons suspected of participating in criminal conduct such as organized crime or terrorism. Individuals may not be killed on suspicion of membership in such groups or on suspicion that they have carried out criminal acts. Rather, authorities must attempt to arrest the suspect and provide a criminal trial to determine guilt or innocence. Criminal suspects are presumed innocent. It is these rules that generally prevail. Situations of armed conflict are exceptional. As discussed below, international law establishes clear criteria for determining when the normal peacetime criminal law may be suspended and the extraordinary right to kill in circumstances where there is no strictly immediate threat may be claimed.

9. Under international law, an armed conflict does not exist unless certain conditions are met. In particular, armed conflict does not exist except when organized armed groups engage in intense armed fighting.

10. The ILA's Use of Force Committee surveyed state practice and *opinio juris* (the two components of customary international law) from 1945 through mid-2010 regarding the definition of armed conflict. Hundreds of conflicts were considered; 72 were specifically discussed, along with dozens of judicial decisions that considered the definition of armed conflict, including decisions of the International Court of Justice, the Inter-American Court of Human Rights, the European Court of Human Rights, the International Criminal Court, the International Criminal Tribunals for Yugoslavia and Rwanda, the Ethiopia-Eritrea Claims Tribunal, as well as decisions of the national courts

of the United States, United Kingdom, The Netherlands, Sweden, Italy, Israel, Canada, Bulgaria, Belgium, and others.

11. The ILA Committee's conclusions are as follows:

a. The Committee undertook extensive research into hundreds of violent situations since 1945 and identified significant state practice and *opinio juris* establishing that as a matter of customary international law a situation of armed conflict depends on the satisfaction of two essential minimum criteria, namely:

- i. the existence of organized armed groups
- ii. engaged in fighting of some intensity.

The Committee's assessment of this evidence is confirmed in many judicial decisions and in scholarly commentary. These sources also indicate that the following conclusions respecting the concept of armed conflict are confirmed in customary international law:

- b. In international law the concept of armed conflict has largely replaced the concept of war.
- c. The earlier practice of states creating a *de jure* state of war by a declaration is no longer recognized in international law. Declarations of war or armed conflict, national legislation, expressions of subjective intent by parties to a conflict, and the like do not alone create a *de jure* state of war or armed conflict.
- d. The *de jure* state or situation of armed conflict depends on the presence of actual and observable facts, in other words, objective criteria.
- e. The accurate identification of a situation of armed conflict has significant and wide-ranging implications for the discipline of international law. Armed conflict may have an impact on treaty obligations; on U.N. operations; on asylum rights and duties; on arms control obligations, and on the law of neutrality, amongst others. Perhaps most importantly states may only claim belligerent rights during an armed conflict. To claim such rights outside situations of armed conflict risks violating fundamental human rights that prevail in non-armed conflict situations, i.e., in situations of peace.

Final Report on the Meaning of Armed Conflict, *supra*, at p. 32-33 (footnote omitted).

12. Thus, not all violence meets the definition of armed conflict. Terrorist violence and the instigation of terrorist violence involving intermittent attacks or hostage situations do not rise to the level of armed conflict. Nor does sporadic, one-sided violence, or mere instigation of violence. Hostilities that last only a short period of time generally do not amount to armed conflict. Moreover, to be able to engage in armed conflict, groups need to control territory for purposes of training, storage of weapons and supplies, for rest, and the like.

13. Armed conflict has a territorial aspect. It has territorial limits. It exists where (but only where) fighting by organized armed groups is intense and lasts for a significant period.

14. It is my understanding that the government has argued that the armed conflict against al Qaeda is a global conflict, and that the law of armed conflict governs the detention, prosecution, and killing of suspected al Qaeda associates wherever they are found. This conception of armed conflict is inconsistent with the one recognized by international law. That the United States is engaged in armed conflict against al Qaeda in Afghanistan does not mean that the United States can rely on the law of armed conflict to engage suspected associates of al Qaeda in other countries. The application of the law of armed conflict depends on the existence of an armed conflict. Armed conflict exists in the territorially limited zone of intense armed fighting by organized armed groups.

15. Based on my review of the declaration of Bernard Haykel, and on my own knowledge of the situation in Yemen, I conclude that the United States is not engaged in armed conflict in Yemen. Yemen is facing insurrectional and secessionist challenges in the north and south of the country. These challenges have at times reached a level of

armed conflict and may do so again, but the United States is not engaged in these hostilities. In addition, AQAP is not an organized armed force within the meaning of international law.

16. My views respecting the existence of armed conflict in Yemen today are consistent with a report provided in January 2003 to the United Nations Commission on Human Rights with respect to a killing carried out by the CIA of six persons, including a U.S. citizen, traveling in a passenger vehicle in Yemen. *See 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. The Commission's special rapporteur on extrajudicial, summary, or arbitrary killing found that the U.S. killing was "a clear case of extrajudicial killing." The U.S. killing of persons today in Yemen would occur in a similar factual setting to 2002. The killings were not justified by the combatant's privilege then; they cannot be so justified now. UN Doc. E/CN.4/003/3, paras. 37 – 39. Following the attack on the *USS Cole* in 2000, the United States sent agents of the Federal Bureau of Investigation to work with Yemeni authorities to investigate. They used law enforcement methods rather than military force. Conditions in Yemen at the time of the 2002 missile strike against a passenger vehicle have not changed markedly from the time of the *Cole* attack.

17. Because the United States is not engaged in armed conflict in Yemen, its use of force in that country is properly evaluated under international human rights standards applicable to law enforcement operations, and, where applicable, the Constitution.

18. It is also my understanding that the government has suggested, in distinction to its argument respecting a global armed conflict, that the law of self-defense may permit it to

use lethal force against suspected terrorists in Yemen. It is true that, even absent armed conflict, states have a limited right to use military force in self-defense under Article 51 of the UN Charter. Mary Ellen O'Connell, *Lawful Self-Defense to Terrorism*, 63 U. PITT. L. REV. 889 (2002). Article 51 permits the use of force in response to an armed attack. The right recognized by Article 51, however, is not engaged unless the state in question is responsible for the armed attack. *Armed Activities on the Territory of the Congo (Congo v. Uganda)* 2005 I.C.J. para. 301 (Dec. 19). Moreover, even where Article 51 is engaged, the use of force is permitted only insofar as it is necessary and proportional. The restriction on permissible force extends to both the quantity of force used and the geographic scope of its use. Christopher Greenwood, *Scope of Application of Humanitarian Law*, in *The HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS* 53 (Dieter Fleck ed., 1995). In other words, self-defense, like armed conflict, has a territorial dimension. International law requires the U.S. to work with Yemen using law enforcement methods to arrest and prosecute persons suspected of terrorist activity.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on October 8, 2010



Mary Ellen O'Connell