A WAR, YES; AGAINST TERROR, NO

John S. Baker, Jr.[1]

INTRODUCTION

Following the attacks of September 11, 2001, President Bush declared that the United States was fighting a "War on Terror." Congress followed with a declaration labeled an *Authorization for Use of Military Force Against Terrorists*. (AUMF).[2] These two differently worded declarations have generated a series of confusions. The first concerned the existence of a state of war because the Congressional declaration used the term "use of military force," rather than the word "war." In *Hamdi v. Rumsfeld,*[3] the plurality opinion noted that the AUMF authorized the President to "'use all necessary and appropriate force against [ ] nations, organizations, or persons'" associated with the September 11th attacks,[4] but never directly stated that AUMF constituted a declaration of war. The opinion did refer to the war power in the course of determining that Hamdi's detention was lawful based on the AUMF. Thereafter, the opinion addressed the process due to Hamdi—presumably a U.S. citizen—who had been captured on the battlefield but was being held in the United States.

In the opinion of this author, the Court's treatment of due process, as well as *habeas corpus,* both in *Hamdi* and *Rasul v. Bush*[5] confused the realms of war and domestic law enforcement.[6] Prior to, and since those decisions, disagreements about fighting foreign terrorism have turned on

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2. Pub. L. No. 1–07–40, 115 Stat. 224 (2001).

3. 542 U.S. 507 (2004).

4. *Id.* at 510.

5. 542 U.S. 466 (2004).

6. *See generally* John S. Baker, Jr., *Competing Paradigms of Constitutional Power in "The War on Terrorism"* 19 NOTRE DAME J. L. ETHICS & PUB. POL'Y 5 (2005).

whether the appropriate response involves "war" or "law enforcement." In this author's view, the Bush Administration was correct to treat the attacks as acts of war, rather than crimes; but wrong to label the U.S. response a "War on Terror." This rhetorical confusion seems to indicate that within the Bush Administration there were conflicting understandings concerning the Constitution's allocation of powers in war as distinguished from law enforcement.

John Bellinger, a State Department Legal Adviser during the Bush Administration, confirmed the difficulties surrounding the use of rhetoric related to the war the U.S. when he declared: "Our discussions with our allies contributed to convergence of our views on many issues. Part of what separated us was rhetoric."[7] The issue that underlies this conflict over the rhetoric, however, involved more than a simple choice of words:

> The U.S. references to a "Global War on Terror," for example, were often perceived to suggest that we thought war was the principal, or even only, framework for countering terrorism, and that we could lawfully use force against all terrorists at all times wherever they might be located. Other countries understandably bristled at this notion. On the other side, our allies often appeared to argue that combating terrorism was only a law enforcement matter and challenged the readily defensible proposition that States can use force against terrorist groups that attack or imminently threaten to attack them.[8]

This difference over the proper response to terrorism—whether through war or through law enforcement—is, as discussed below, fundamental. The State Department blurred the division, responding "that the 'Global War on Terror' was not a legal term of art, and that in many instances, law enforcement can be the appropriate legal paradigm for addressing terrorist threats."[9] In these discussions, the State Department was attempting to negotiate a consensus and avoid conflict with our allies. Nevertheless, this lack of clarity on the fundamental issue of war versus law enforcement, which divided elements of the Bush Administration, made it difficult to communicate to the American public and the world a coherent approach to the "war."

The State Department, however, apparently succeeded in engaging our allies in the kind of reasoned and reciprocal persuasion that was lacking in Congress. Bellinger said, "[o]ur allies, on the other hand, began to accept the notion that [the United States is and] can be in armed conflict with a

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7. John B. Bellinger III, *The Bush (43rd) Administration*, *in* SHAPING FOREIGN POLICY IN TIMES OF CRISIS: THE ROLE OF INTERNATIONAL LAW AND THE STATE DEPARTMENT LEGAL ADVISER 135, 145 (Michael P. Scharf & Paul R. Williams eds., 2010) [hereinafter SHAPING FOREIGN POLICY].

8. *Id.*

9. *Id.*

transnational terrorist group such as al Qaeda."[10] On detention and other issues, "the United States moved closer to our allies' positions partly as a result of U.S. domestic legal developments, including new legislation such as the Detainee Treatment Act and the Supreme Court's decisions in *Rasul, Hamdi,* and *Hamdan*, and *Boumediene*."[11] The State Department must have made the case for war, because "our allies acknowledged that the existing criminal laws and international humanitarian rules, such as the Geneva Conventions, [do] not neatly apply to the new threats posed by [transnational terrorist groups]."[12]

In regard to the rhetorical issues raised by the phrase "War on Terror," there are at least three points to be made: (1) the U.S. is not in a war against terror, (2) but it is at war, and (3) it is a war against non–state actors, which may increasingly represent the future of war as we witness the continued breakdown of sovereignty and statehood around the world.

I. THE "WAR ON TERROR"

The word "war" is officially avoided in international matters that, in fact, relate to war. In 1928 the Kellogg–Briand Pact[13] renounced war as a method or a use of national policy. In 1949, what had been the U.S. War Department became the U.S. Department of Defense. The UN Charter begins with the purpose "to save succeeding generations from the scourge of war;" but, in Article II, Subsection 4, the signers of the Charter agree to "refrain in their international relations [from] the threat or the use of force against the territorial integrity or political independence of any state."[14] Instead of "war," the operative term becomes "use of force."

According to some, the language of Article 2(4) restricts the war power of member states by substituting UN Police Action:[15]

> As a textual matter, it is obvious on its face that the Charter, in creating the new police power, intended to establish an exclusive alternative to the old war system. The old system was retained only as a fallback, available when the new system could not be made to work; not as an equal alternative to be chosen at the sole discretion of the members.[16]

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10. *Id.*

11. *Id.* at 145-46; *see* Detainee Treatment Act of 2005, Pub. L. No. 109–148, 119 Stat. 2680; *see* Hamdan v. Rumsfeld, 548 U.S. 557 (2006); *see* Boumediene v. Bush, 553 U.S. 723 (2008).

12. *Id.* at 146.

13. General Treaty for the Renunciation of War, Apr. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 1043.

14. U.N. Charter art. 2, para. 4.

15. *See* Thomas M. Franck & Faiza Patel, *UN Police Action in Lieu of War: "The Old Order Changeth*," 85 AM. J. INT'L L. 63, 64 (1991).

16. *Id.*

Even a nation's right to self–defense is supposedly limited.[17] Nevertheless,

> "the legal basis for [U.S.] military operations in Afghanistan has never been controversial, either internationally or domestically. The [State Department] Legal Adviser's office had no difficulty in establishing that we had a right to use force in self-defense against al Qaeda and any government supporting it, as well as any related terrorist organizations."[18]

The term "use of force" by international lawyers and diplomats does not communicate well to the American public. In communicating with other nations, the State Department's Legal Office uses the terminology of the UN Charter, which refers to "use of force." The "wars" in Afghanistan and Iraq were approved by two documents written in part by the State Department, both labeled "Authorization for the Use of Military Force." Many Americans, however, want to know: where is the declaration of war? Not only right–wing Republicans, but doves on war issues insist that the Constitution's war power rests with Congress, not the United Nations.[19] All need clarity about, "who is the enemy?" The lawyers worry primarily about judges and diplomats focus on other nations, but both need to realize that their legal rhetoric combined with the ambiguous political rhetoric about a "War on Terror" fails to communicate a coherent message to the public.

This confusion affects not only laymen, but also federal judges. When federal judges hear the term "War on Terror," some must wonder whether what is involved is a clearly defined war or a real war that is ambiguously and propagandistically defined. Americans have become all too familiar with phony wars: the "war on poverty," the "war on drugs," and more broadly the "war on crime." Such wars never end. To the extent that judges get the impression that the War on Terror is like other domestic "wars," they are more likely to view the War on Terror as another extension of the "war on crime," which should be treated as a law enforcement matter to be adjudged in regular courts.

Within the framework of the Constitution, war is primarily committed to the political branches, while the judiciary oversees the criminal justice system. So the challengers to the Bush Administration's policies effectively used a criminal justice model and an expanded rule of law—based on international law—to persuade a majority of the Supreme Court to view the issues as more in terms of law enforcement, rather than of war. Of course, the arguments of the challengers also played to the general inclination among most of that majority to expand federal judicial power.

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17. *See id.*at 63.

18. William H. Taft IV, *The Bush (43rd) Administration*, *in* SHAPING FOREIGN POLICY, *supra* note 7, at 127, 128-29.

19. *See* Franck & Patel, *supra* note 15, at 64.

Nevertheless, if the Bush Administration had publicly made the war more clearly one against specific groups, rather than one generically against "terror," it might have had some impact on the cases it lost in the Supreme Court beginning with *Rasul.* Some justices seem to be influenced by public perceptions, rather than simply the facts and the law. Moreover, the rhetorical failures of the Bush Administration aided Justice Ginsburg, who had already made it clear that she hoped to change the then–current law and limit presidential power abroad.[20]

II. DEFINING WAR

While diplomatic use of the term "war" has declined in describing the military acts of nations, the word has invaded the discussion of domestic issues. Politicians are continually "waging war" against their political opponents by declaring wars against "enemies" of the people: poverty, drugs, or crime in general. Politicians need to address poverty, drugs, and crime, but packaging government policies as a "war" against poverty or drugs or crime is purely propagandistic. Politicians seem to declare war only on those problems that everyone knows cannot be completely conquered. They may think that communicating their commitment can substitute for competently addressing the particular problem. Propagandistic application of "war" to domestic policy, however, cheapens the significance of sacrifices resulting from the horrors of war.

Such propaganda confuses war with domestic policy. Domestic law enforcement, with its increased use of SWAT teams, has come to resemble military action. Actual war directs the forces of the country against another country or identifiable group, "the enemy." Although it can happen in domestic law enforcement, especially with respect to organized crime and drug dealers, law enforcement ought not to be viewing other citizens—even criminals—as the "enemy." To the extent that does happen, it can foster an attitude that the requirements of due process should differ for domestic "enemies" just as traditionally they have for enemies in war. At least until recently, soldiers have not been reading Miranda rights to captured prisoners.[21] Until relatively recently, the FBI has not had offices around the

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20. *See generally* Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 40 IDAHO L.REV. 1 (2003).

21. *See U.S. Lawmaker Says Obama Administration Ordered FBI to Read Rights to Detainees*, FOXNEWS.COM, June 11, 2009, *available at* http://www.foxnews.com/politics/2009/06/11/lawmaker-says-obama-administration-ordered-fbi-read-rights-detainees (Congressman Mike Rogers, a senior Republican on the House Intelligence Committee, claimed U.S. soldiers are frustrated that high priority detainees are now being read Miranda rights within war zones; in response Robert Gibbs, the White House spokesman for President Obama, "acknowledged that it wouldn't be a surprise to find out that it was happening.").

world. Increasingly, it is difficult to distinguish some types of police actions from military actions.

Prior to September 11th, without really considering the implications, the U.S. was treating acts of terrorism originating abroad as if they were criminal acts. Either Justice Department officials had not thought through the difference between internal acts and external acts of violence directed against the United States, or the natural bureaucratic desire to expand its jurisdiction and to demonstrate its competence moved the Department of Justice to reach beyond its jurisdiction. Unfortunately, the Constitutional focus of many federal law enforcement officials is limited to the First, Fourth, Fifth, and Sixth Amendments.

Federal law enforcement officials demonstrate little understanding that the Constitution addresses the challenges posed by sovereignty by treating differently the external sovereignty of the nation and the internal division of powers.[22] Separation of powers and federalism mean that no branch of the federal government, nor the states, are truly sovereign in the sense of having all power. Each is sovereign in certain spheres. Externally, however, the nation has total sovereignty *vis–à–vis* other nations. In the Constitution's allocation of powers, the Executive is strongest during the course of foreign wars,[23] but relatively weak compared to Congress on domestic matters.[24]

As indicated above in the remarks of John Bellinger, [25] modern rules of international law do not adequately address the challenges posed by international terrorism. Those remarks suggest that international rules might need to be changed. But in which direction? International law, as well as domestic law, takes shape according to an understanding of sovereignty. Often, lawyers are so focused on the rules in the trees that they miss the larger picture of the sovereign forest. Certainly, those who are determined that the UN Charter should become an effective limit on U.S. sovereignty and its ability to make decisions regarding war see the larger picture of sovereignty.[26]

Those who wish to maintain the sovereign power of the U.S.—pursuant to the Constitution—to declare and conduct war would do well to revisit the framework of international law that shaped the Framers. It rests in political thought about sovereignty and war. Grotius, the first modern writer on international law, recognized the need for rules of war.[27] He wrote his

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22. *See generally* Baker, *supra* note 6.

23. *See generally* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936); THE FEDERALIST NO. 70 (Alexander Hamilton).

24. *See generally* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); THE FEDERALIST NO. 48 (James Madison).

25. *See supra* text accompanying note 12.

26. *See generally* Franck & Patel, *supra* note 15.

27. *See generally* HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE (Richard Tuck ed., Jean Barbeyrac trans., Liberty Fund 2005) (1625) [hereinafter THE RIGHTS OF WAR AND PEACE].

treatise on war right before the end of the Thirty Years War by the Treaties of Westphalia,[28] which effectively borrowed from him. This was the time when nations began to emerge as sovereign states. Although political bodies existing prior to that time are often referred to as states; the modern state did not exist until after 1648.[29]

Grotius' treatise, and others that followed, established an intellectual framework for the "law of nations" based on reason, custom, and conventional agreement to govern the relationships among sovereign states.[30] They made distinctions that seem to be lost on us today, but these would be worth recovering. For instance, Grotius said that war is not simply the use of force—he avoided the term later used in the UN. He said that war involves more than the use of force; it referred to a state of affairs. War, he said, depends on certain authorities and actors.[31]

Grotius identified three classes of war: public war, private war, and mixed war.[32] These classes are based on who the actors are. The class of war most apt to this discussion is the mixed war. On one side, there is a sovereign state, e.g. the United States. On the other side, there are non–state actors, e.g. the particular terrorist groups. This may be a phenomenon new to recent memory, but it is not entirely new. Before the nation–state, there were no states to engage in war; nonetheless, there were plenty of wars. There were wars between princes; there were wars between tribes; there were wars between other peoples. The fact that war is between groups that do not share the same common political bond is at the very essence of war. This notion has been lost, and failure to recover this will lead to continuing confusion.

III. FUTURE WARS

Increasingly, we see a world in which weak states are becoming failed states. Central America, in particular, comes to mind. Gangs trafficking in drugs, arms, and aliens are consolidating their power. Though Central American states may not yet experience the chaos of a Somalia, a failed state at its worst, they are confronted by armed groups that have more firepower—and often more money—than the legitimate governments. There is little reason to think that these problems will not worsen. Indeed, Mexico,

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28. The Treaties of Westphalia were established in 1648.

29. *See* TORBJORN L. KNUTSEN, A HISTORY OF INTERNATIONAL RELATIONS THEORY 108 (Manchester University Press 1997) (1992).

30. *See generally* THE RIGHTS OF WAR AND PEACE, *supra* note 27.

31. *See* THE RIGHTS OF WAR AND PEACE, *supra* note 27, at bk. 1, ch. 1.

32. *See* THE RIGHTS OF WAR AND PEACE, *supra* note 27, at bk. 1, ch. 3.

which did not seem to be in the same category, finds itself battling—but unable to break—the firepower of its drug cartels.[33]

De facto sovereignty requires the ability of the central power of a nation–state to control the territory within its borders. The sovereignty of nation–states in Europe derives originally from rulers who funded armies through borrowing and taxation and dominated the use of weapons and information. The U.S. Constitution reflects the different vision of Americans, who wanted to avoid mercenary armies, high taxation, and the control of weapons and information. The Internet, cheap information, and weapons technologies, however, make it possible for non–state actors to challenge any government—as demonstrated by the attacks of September 11th. Even the strong states of Western Europe would not have the ability to defend themselves if they were subjected to the same level of sustained attempts to attack them as the United States has experienced since September 11th.

The United States must be able to defend against various threats from all directions. Just imagine the consequences if the Mexican government is ultimately unsuccessful in battling the drug cartels. The U.S. could have at least a partially failed state with millions of people in the area just below its southern border. What would—what should—the U.S. do about it? Under the UN Charter, what could the U.S. 'lawfully' do about it? Unless a nation–state is attacked, the UN Charter would not seem to recognize the use of preemptive action as a matter of self–defense. Those who might say that the UN Charter would control even under those circumstances would have to ignore the most fundamental rights of a sovereign state to defend itself and its citizens. Until international law is rethought in light of these realities, the United States will only have the present, inadequate ways of dealing with the very serious challenges posed by violent non–state actors.

When it comes to a choice between defending the United States and suffering the criticism of world opinion, self–defense is the only reasonable decision for the U.S. The meaning of reasonableness assumes that two or more contradictory opinions on the same issue can both or all be reasonable. When the highest court in a nation's legal system reverses a lower court, that does not necessarily mean that the opinion of the lower court was actually unreasonable; it only means that the opinion of the higher court is authoritative. It remains for others to judge whose opinion was more reasonable and whether either was unreasonable.

Outside a court system that is part of a sovereign state, the opinion of the higher court would not be authoritative. That does not mean—as a Hobbesian theory of absolute sovereignty would hold—that the will of the sovereign is not subject to the rule of law. Although the rule of law is not derived from sovereign power, its implementation does depend on the

33. Stephen Sackur, *'No alternative' to Mexico's drug war - says Calderon*, BBC NEWS, Oct. 27, 2010, *available at* http://news.bbc.co.uk/2/hi/programmes/hardtalk/9130155.stm.

respect and cooperation of the sovereign power. In the United States, the Constitution implements the rule of law. Other countries implement the rule of law in different, reasonable ways. In a world of equal sovereigns—which still exist under the UN Charter—each State must ultimately decide the meaning of provisions in the UN Charter. If those opinions are not unreasonable, others should respect the reasons given even when they conflict with the opinion of the International Court of Justice (ICJ).

Abraham Sofaer, Legal Adviser during the Reagan Administration, has talked about differences with the ICJ. "My views (and those of my predecessors) differed from the views of the current ICJ majority, and of most international law scholars, with regard to both the meaning of self–defense, and whether a state may use force where it believes that a thorough evaluation of all the relevant considerations, in light of Charter's purposes, establishes the use of force is reasonable."[34] Sofaer was referring to the ICJ's decision in favor of Nicaragua and against the United States.[35] "The ICJ narrowly construed the 'inherent' right of self–defense in Article 51 of the Charter in the Nicaragua litigation…. [t]his unprecedented and artificial interpretation of the UN Charter directly threatened the scope of the Reagan Doctrine and the U.S. efforts to assist other States defend against anti-democratic insurgencies."[36] This "threat" led the U.S. to reject the ICJ's interpretation. In doing so, did it violate "the law" when it was acting in accord with the U.S. Constitution and a reasonable understanding of the right of self–defense and the defense of others?

The United States will predictably always take a view of self–defense at odds with that expressed by the ICJ. The American view represents the traditional understanding of the law of nations, that a nation's right of self–defense is absolutely fundamental. This right depends not merely on the sovereignty of individual states. Like the natural right of every human being, national self–defense is not only a right; it is an obligation. It is a dictate of reasonableness and part of any sane understanding of the rule of law. It would be quite unreasonable to give up the right of self–defense, except for some greater good, which would only be to save the life of another person. Rejecting an ICJ opinion narrowing the fundamental right of self–defense is an action defending the rule of law.

CONCLUSION

The present portends a future of continuing struggles with terrorists and other non–state actors of various descriptions from many parts of the world. Attacks will take new forms and need not actually be launched directly

34. Abraham D. Sofaer, *The Reagan and Bush Administrations*, *in* SHAPING FOREIGN POLICY, *supra* note 7, at 65, 82-83.

35. Military and Paramilitary Activities (Nicar. V. U.S.), 1986 I.C.J. 14 (June 27).

36. *Id.* at 83.

against a state itself. Cyber attacks over the Internet launched by unknown persons and groups, acting alone or on behalf of a state, have the possibility of crippling a country by destroying its communications system. These destructive possibilities available to small groups are phenomena not anticipated when the UN Charter was drafted sixty–five years ago.

After 1648, the law of individual states and the law of nations developed based on a theory of sovereignty that accommodated and advanced the new structures of statehood. Today, there are those who believe the demise of sovereignty is inevitable and even desirable to make way for a new world order. In fact, the theory of absolute sovereignty undergirding consolidated states may not last. It has only been around for about five hundred years.[37] But it will not be replaced by a utopia where international courts rule over a peaceful world under the rule of law, without being backed by some form of force. Given the undeniable failure of the UN and the Charter to establish a peaceful world—where only the UN uses force—it is more likely that the decline of state sovereignty translates into an increasing number of non–state groups—better labeled tribes—that exercise *de facto* sovereignty over larger areas of the globe. Avoiding such international lawlessness will require considerable thought about the impact of technology and non–state actor attacks on the de facto sovereignty of nation–states. Also as reflected in the rhetoric of the War on Terror, the political leadership in the U.S. needs to have a clear and coherent intellectual defense of America's sovereign, natural, and rule of law right to self–defense.

37. *See supra* text accompanying notes 28, 29.