The United States Targeted Killing Policy and the Threshold of Armed Conflict under International Law

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The United States policy of targeted killing, including by the use of unmanned aerial vehicles (drones) and the corresponding legal framework adopted in the context of the US global counter-terrorism strategy is problematic in several respects. For one thing, the practice occurs without any real geographic or temporal limitations. In addition, the United States has adopted a seemingly novel formulation of the *jus ad bellum* doctrine of self-defense and its purported applicability to non-State actors, a justification with which the United States purports to engage the use of targeted lethal force.[1] In carrying out the targeted killing operations, the US appears to have killed, injured and otherwise adversely affected the well being of significant number of the civilian population in certain areas.[2]

This note focuses particularly on the question as to the application of the appropriate legal regime that serves to protect persons from the effects of these operations. The identification of the legal regime, and its underlying legal standards, will determine both the normative rules constraining the conduct of operations and secondary rules relating to accountability and redress for victims. If the United States is using lethal force in furtherance of its aims in a genuine armed conflict, the rules of international humanitarian law (IHL) will apply, in complement with international human rights law. If, on the other hand, such force is used pursuant to counter-terrorism law enforcement operations, the rules of international human rights law, rather than IHL will place protective constraints on such operations.

To address this question, it is necessary to be consider the threshold at which the conduct of a non-state actor, including acts of terrorism and the opposing counter-terrorism operations, in this case targeted killings, involving the use of lethal force may be characterized as an armed conflict, as that term is understood under international law.

The United States position

The United States asserts that it is engaged in a non-international armed conflict with the non-State actors identified as "al-Qa'ida and associated groups" and that, pursuant to legislative statute, the Authorization for the Use of Military Force (AUMF), the US President may use all necessary and appropriate force against those entities.[3] The identification of "al-Qa'ida and associated groups" as the adversary in this putative armed conflict, is, *prima facie*, problematic from a legality perspective, at least in the absence of any meaningful clarification as to the actually identity of the "associated groups." Still, as open ended as the designation seems, it has departed significantly from US assertions of the existence of a more generalized "war on terror" announced in the immediate afternoon of 11 September, with President George W. Bush declaring: "Our war on terror begins with al Qaeda, but it

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1 See Harold Koh, Legal Advisor, Department of State, Address to the Annual meeting of the American Society of International Law, 25 March 2010, available at: http://www.state.gov/s/l/releases/remarks/139119.htm

2 See the reports and casualty estimates by the Bureau of Investigative Journalism, available at: http://www.thebureauinvestigates.com/category/projects/drones/

3 Harold Koh Address, supra, n. 2; see also Department of Justice White Paper, Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operation Leader of al-Qa'ida or an Associated Force, Available at: http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf

does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated."[4]

A confusion arises from the fact that the "war" against al Qaeda and associates is not the only one in which the US is engaged, nor, critically, is it the only one in which in which it is deploying drones for use in targeted killing. The US has also been engaged, together with its NATO allies and the recognized government of Afghanistan, in an indisputably real armed conflict against the Taliban. The US may well also be engaged in non-international armed conflict against other armed groups in support of governments, such as in respect of armed conflicts between Pakistan and armed groups operating in the Federally Administered Tribal Areas.[5] The facts here are murky, obscured by the fact that Pakistan, at the official level has repeatedly condemned armed activities by the US on its territory,[6] including through drone attacks, despite substantial evidence that at least some organs of the State are inviting or at least cooperating in the conduct of such operations.[7]

Wherever the posture lies in *jus ad bellum* terms between the US and Pakistan in respect of the drone operations carried out on the territory of Pakistan, it is clear that in Afghanistan, and perhaps in Pakistan, the US is engaging multiple separate armed conflicts on the same territory, and that each of these requires a separate assessment in order to determine which legal regime must govern the conduct of operations. On the ground, the distinction no doubt is complicated by fact that membership of armed groups is difficult to determine and some may act in collusion. Amidst this confused backdrop, it is the identity of the purported adversaries, and not only the territorial State, that is consequential, indeed decisive, for making a determination as to classification of armed conflict and the designation of the appropriate regime is to govern operations involving the use of force.

The fact that the US is participating in the armed conflict between the Government of Afghanistan and the Taliban on the territory of Afghanistan does not imply that all armed operations by the US on that territory are undertaken pursuant to that same conflict; some operations may be taken against al-Qaeda and associates. The picture comes into sharper focus when considering the operations the US is alleged to have conducted in respect of the territories where it does not purport to be engaged in any hostilities aside from against al-Qaeda and associates, such as Yemen[8] and Somalia.[9] In respect of

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4 According to the legal advice provided by then Deputy Assistant Attorney General John Yoo, the President could unilaterally and summarily make the determination as to nature hostilities, which did not have to be limited to "those individuals, groups, or states that participated in the attacks on the World Trade Center and Pentagon." See Memorandum of 25 September 2001, available at: http://www.justice.gov/olc/warpowers925.htm

5 See the study by NYU School of Law and Stanford Law School, *Living under Drones*, available at: http://living under drones.org/

6 The UN Special Rapporteur on Human Rights and Counterterrorism, Ben Emmerson, on return from a visit to Pakistan in March 2013, issued a statement reporting: "The position of Pakistan is quite clear. It does not consent to the use of drones on its territory and it considers this to be a violation of Pakistan's sovereignty and its territorial integrity." Statement available at: http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13148&LangID=E

7 Accounts from leaked US embassy cables and admissions from former Pakistan President Pervez Musharraf appear to confirm substantial cooperation and authorization from the highest levels for at least some of the operations. See http://www.guardian.co.uk/world/us-embassy-cables-documents/167125; and http://www.guardian.co.uk/world/2013/apr/12/musharraf-admits-permitting-drone-strikes

8 Operations in Yemen took place as early as November 2002, when a US drone strike killed sex men, and resumed with a strike in May 2011. See Washington Post, *OUS drone strike is the first since 2002*, available at: http://articles.washingtonpost.com/2011-05-05/world/35264670_1_yemen-expert-al-qaeda-target-drone-strike. The Bureau of Investigative Journalism estimates that there have been between 44 and 54 US drone strikes between 2002 and early 2013. See http://www.thebureauinvestigates.com/category/projects/drones/

9 The Bureau of Investigative Journalism estimates that there have been between three and nine drone strikes by the US in Somalia as of early 2013. See http://www.thebureauinvestigates.com/category/projects/drones/drones-somalia/

operations to capture detainees in the rendition and secret detention programs,[10] the reach of US operations has extended to a wide range of countries and drone operations may be set to expand further with revelations of the establishment of a new drone base in Niger.[11] Whatever the full geographic extent of the targeted killings, there are more than a few instances where they have been carried on territory where the US is not otherwise at war.

Although the Obama administration and its Department of Justice has declined to publicize any legal memoranda setting out what it considers as the legal basis for its targeting killing program, a summary of its position has been exposed in the Department of Justice White Paper on "Lawfulness of Lethal Operation against a US Citizen who is seen to be a an Operational Leader of Al-Qa'ida or An Associated Force."[12] This White Paper was leaked to the US news network NBC and published on its website on 4 February 2013. The White Paper, however, does not contain a full analysis of the question as to whether engagement between the US and "al-Qa'ida or associated groups" constitutes an armed conflict, a question that the Obama administration, like the Bush administration, answers in the affirmative. The administration assumes, in the first instance, that the armed conflict arises from its exercise of the right of self-defense. In respect of the question of the threshold at which an engagement involving force rises to the level of armed conflict, the Justice Department White Paper sidesteps the core issue, but does say:

> "Claiming that for purposes of international law, an armed conflict generally exists only when there is 'protracted armed violence between governmental authorities and organized armed groups', …some commenters have suggested that the conflict between the United States and al-Qa'ida cannot lawfully extend to nations outside Afghanistan in which the level of hostilities is less intense or prolonged than in Afghanistan itself…..[] The Department has not found any authority for the proposition that when one of the parties to an armed conflict plans and executes operation from a base in a new nation, on operation to engage the enemy in that location cannot be part of the original armed conflict, and thus subject to the laws of war governing that conflict, unless the hostilities become sufficiently intense and protracted in these new locations."[13]

This assertion, in its framing of the question as one of geographic scope, irrespective of its merits, seems to beg the broader question: can the operation involving the use of force with al-Qaeda and associated forces constitute an armed conflict under international, notwithstanding the location of the theater of operations?

The Position under International Law

While not entirely uncontested, there is substantial authority setting out the broad parameters for designating forceful engagement as a non-international armed conflict. It is generally well accepted, including by the US, that its targeted killing operations, to the extent that they involve armed conflict, occur in the context of non-international armed conflict. This is so because international armed conflict takes place only between two States.[14]

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[10] According to a recent study by the Open Society Justice Initiative, the program involved the participation in some form of some 54 States, a number of which employed their territory for operational elements of the programs. See Open Society Justice Initiative, *Globalizing Torture: CIA Secret detention and Extraordinary Rendition*, 2013, available at: http://www.opensocietyfoundations.org/sites/default/files/globalizing-torture-20120205.pdf

[11] Washington Post, 21 March 2013, Craig Whitlock, *Drone Base in Niger gives US a strategic foothold in West Africa*, available at: http://articles.washingtonpost.com/2013-03-21/world/37905284_1_drone-bases-unarmed-predator-drones-surveillance-drones

[12] *Supra*, n. 4.

[13] Department of Justice White Paper, *supra* n.4, p. 4.

[14] Article 2, Regulations, Annex to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land; Common Article 2 of the 1949 Geneva Conventions.

The lowest threshold of non-international armed conflict under international law is that which is governed by Common article 3 of the 1949 Geneva Conventions, applying to "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." It should be noted that there is an even higher threshold to establish the existence of non-international armed conflict that would trigger the protections contained Additional Protocol II to the Geneva Conventions, to which the US is not a party. Under terms of Article 1(1), Additional Protocol II applies to conflicts: "which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."

The authoritative International Committee of the Red Cross (ICRC) Commentary to the 1949 Geneva Conventions, by Jean Pictet, does not attempt to define precisely the threshold of Common article 3. It does, however, identify a number of indicators that, while not dispositive, are "useful as a means of distinguishing a genuine armed conflict from a mere act of banditry or an unorganized and short-lived insurrection."[15] Among these are the degree of organization of the military force; whether there is an authority responsible for the acts of that force; whether the acts occur within a determinate territory; whether the armed group has the means of ensuring respect for the Geneva Conventions; and whether it acts as a *de facto* governing entity. [16]

Arguably, the most authoritative exposition as to the requisite elements of an armed conflict comes from the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY), which has had occasion to grapple extensively with the question. In the first case decided by the ICTY, the *Tadic* case, the ICTY emphasized that a non-international armed conflict in the Common article 3 sense exists where "there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[17] According to the Tribunal, "[t]he rules contained in Common Article 3 focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict. In an armed conflict of an internal or mixed character, these closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law."[18] In the *Limaj* case, the ICTY developed its doctrine further, noting that the objectives of an armed group to a conflict are irrelevant to determining the existence of an armed conflict: "The determination of the existence of an armed conflict is based solely on two criteria: the intensity of the conflict and organization of the parties, the purpose of the armed forces to engage in acts of violence or also achieve some further objective is, therefore, irrelevant."[19] The International Criminal Tribunal for Rwanda has assessed the criteria in similar terms, albeit in the broader context of Protocol II. [20]

Does the conflict between the United States and al-Qaeda meet the requisite criteria as to criteria as to intensity and organization? In one sense, the question is not easy to answer, because there exists no commonly agreed factual accounting of the purported conflict, and neither "party" is at all transparent about its operations. The first prong of the threshold test, in respect of the level of organization, is that

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15 ICRC, Pictet Commentary, Convention (IV) relative to the Protection of Civilian Persons in Time if War, at pp 35-36, available at http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=AE2D398352C5B028C12563CD002D6B5C&action=openDocument

16 Ibid.

17 ICTY, *Prosecutor v. Tadic*, Case No. IT-94-1, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), 2 October 1995, para. 70.

18 ICTY, *Prosecutor v. Tadic*, Case No. IT-94-1_T 562, para. 562.

19 ICTY, *Prosecutor v. Limaj*, (Judgment), Case No IT-03-66-T, para. 170.

20 ICTR, *Prosecutor v, Jean-Paul Akayesu*, Judgment, Case No. ICTR-96-4-T, Trial Chamber 2 September 1998.

an armed conflict can only exist between clearly identifiable armed groups and/or State forces which are cohesively organized with a responsible and recognizable command structure and have the capacity to sustain military operations, including by use of military tactics.[21] The very existence of al-Qaeda as an actual organization, at least in recent years, has been called questioned. As Lubell notes:

> "[al-Qaeda's] description ranges from being a distinct group, to a network of groups, or even a network of networks, and in some cases an ideology rather than an entity….[U]p until 2001 it appears that it could be identified as an organized group with a clear leadership and even a fixed location, including training camps and headquarters. The US invasion of Afghanistan precipitated the physical dispersal of the group and the transition towards a decentralized network of many groups and individuals operating on the basis of a shared ideology and, in some cases, past training in the Afghan camps.[...] At best, it appears that if Al-Qaeda is to be described as a distinct entity, perhaps the most appropriate depiction that has been offered is 'murky' with a loosely organized but highly focused network."[22]

The dominant view seems to be that al-Qaeda is not a transnational organization, but rather a loosely connected network. As one ICRC legal advisor puts it: "Basically, Al Qaeda's way of operating probably excludes it from being defined as an armed group that could be classified as a party to a global non-international armed conflict. In accordance with the current state of intelligence, it appears, rather, to be a loosely connected, clandestine network of cells. These cells do not meet the organization criterion for the existence of a non-international armed conflict within the meaning of humanitarian law."[23]

Even if al-Qaeda were to possess the requisite attributes of organizational cohesion, it is doubtful the level of engagement with them by the US would meet the intensity prong of the test, namely, that to constitute an armed conflict, a situation must consist in more than sporadic incidents of violence. There are a number of factors that serve to indicate whether engagement between adversarial forces may rise to the level of armed conflict. According to the ICTY: "The criterion of protracted armed violence has … been interpreted in practice … as referring more to the intensity of the armed violence than to its duration. Trial Chambers have relied on indicative factors relevant for assessing the "intensity" criterion, none of which are, in themselves, essential to establish that the criterion is satisfied. These indicative factors include the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones. The involvement of the UN Security Council may also be a reflection of the intensity of a conflict."[24]

As to the actual intensity of the engagement, outside of the operations in the real armed conflicts of Afghanistan and Iraq, there appears to have been not much fighting in the "war" between the US and al-Qaeda. The US itself evidently has not been the object of a successful international terrorist attack by al-Qaeda or "associates" on its territory since September 2001. With respect to attacks around the world, such as the Madrid bombings in 2004 and the London bombings of 2005, it is unclear whether a single entity can be said to be responsible. In any event, these incidents, as serious as they are, would have to be taken as sporadic episodes and not the type sustained pattern of assault that would constitute armed conflict.

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[21] ICTY, *Prosecutor v. Limaj*, (Judgment), Case No. IT-03-66-T, paras. 135-170. See also *Prosecutor v. Lukic*, Case No. IT-98-32, para. 884.

[22] Noam Lubell, *The War (?) against Al-Qaeda*, in E. Wilmshurst, ed., International Law and the Classification of Conflicts (2012), pp. 425-26 (citations omitted.)

[23] Sylvain Vité, Typology of armed conflicts in international humanitarian law: legal concepts and actual situations, 91 ICRC Review 873, at 93 (March 2009).

[24] ICTY, *Prosecutor v. Haradinaj*, (Judgment), Case No. IT-04-84-T Judgment, para. 49

In sum, the engagement with al-Qaeda appears to meet neither the "organization" nor the "intensity" criterion that would qualify it as an armed conflict within the meaning of Common Article 3 of the Geneva Conventions.

International Human Law and International Human Rights Law

The fact that the conflict does not appear to meet the threshold of armed conflict would suggest that, in principle, the appropriate legal framework is international human rights law and not international humanitarian law. In practical terms, if the rules governing the use of force in under either legal regime were to be scrupulously observed, the result would not necessarily be dissimilar, at least in respect of the engagement of hostilities. But there are very real differences: IHL allows the lethal targeting of persons based on status, rather than simply on conduct, whereas IHRL does not. There are a number of other distinctions concerning detention and other broader and interrelated substantive and procedural protections of international human rights treaties.

Under IHL, a combatant, or a civilian taking direct part in hostilities, may be the target of lethal force. There are, of course, a number of rules and principles constraining the conduct of such operations. Most of these rules are contained in Protocol I to the Geneva Conventions, but the principal ones are also widely recognized as legally binding under customary international law, even in non-international armed conflict. These rules include, among others, the prohibition against direct attacks on civilians and civilian objects;[25] the prohibition against indiscriminate or disproportionate attacks;[26] and the requirement to take precautions to protect civilians and civilian objects.[27] Failure to respect certain of these rules, such as by intentionally launching direct, indiscriminate or disproportionate attacks against civilians or civilian objects, constitutes a war crime, and individual perpetrators will incur international criminal responsibility.[28] In principle, a State is required to provide for remedy and reparation for serious violations of IHL,[29] although in actual terms access to such redress is seldom realized.

Under international human rights law, no person may be lethally targeted solely on the basis of status. The right to life is protected under international human rights law, including under article 2 of the International Covenant on Civil and Political Rights, to which the US is a party. While, as under IHL, the principle of proportionality must be also applied in exercising force in law enforcement operations, in contradistinction to IHL, the use of lethal force in such situations is prohibited save in exceptional circumstances. For instance, the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials prohibit the use of lethal force, except "when strictly unavoidable in order to protect life."[30] In operational terms, this injunction means an objective of arrest/capture, rather than kill. When the unlawful use of force results in a death, it may constitute an extrajudicial, summary or

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[25] Additional Protocol I to the Geneva Conventions, Article 48,51(3) and 52; ICRC, Customary International Law, Vol. I, Rules 1, 6, 7, 8 and 9.

[26] Additional Protocol I, Article 51(4) and (5); ICRC, Customary International Law, Rules 11-14.

[27] Additional Protocol I, Article 57; ICRC Customary International Law, Rules 15-21.

[28] ICRC Customary International Law, Rules 168-170; Rome Statute for the International Criminal Court, article 8(2)(b).

[29] UN Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Adopted by the UN General Assembly (Resolution 60/147 of 16 December 2005); ICRC Customary International Law, Rule 150.

[30] Principle 9, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 112 (1990). For a fuller treatment of the standards in this respect, see the Report to the UN General Assembly of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, UN Doc. A/61/311 (5 September 2006), paras. 33-45.

arbitrary killing and incur the criminal responsibility of those carrying out.[31] Victims of such unlawful killings have the right to remedy and reparation.[32] The question as to whether the protections of the ICCPR, as a jurisdictional matter, extend extraterritorially to all of the targeted killings is not clear,[33] but the European Court of Human Rights has recently extended such protections in respect of a range of extrajudicial killings by United Kingdom in Iraq.[34]

It should be noted, while law enforcement/international human rights law must be considered the appropriate legal regime in respect of the conflict between the US and al-Qaeda, even under IHL, human rights law would not become entirely inoperative. While the question of the complimentary relationship between the two regimes remains in some respects contested and not in any respect the principal focus of this discourse, the essential protections of human rights law do not cease in time of armed conflict, as the International Court of Justice has repeatedly affirmed.[35] According to the UN Human Rights Committee, "[T]he [ICCPR] applies also in situations of armed conflict of which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be especially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive."[36] Critically, a number of human rights bodies, including the Human Rights Committee and the European Court of Human Rights have found violations of right to life protections in respect of lethal operations undertaken in non-international armed conflict.[37]

Policy considerations militate against changing the legal paradigm

The US, in its characterization of its operations against al-Qaeda and associated groups, appears to have stretched the concept of armed conflict well beyond its meaning under international law. Other States so far have not followed suit, declining to situate their counter terrorism efforts within the war paradigm. It is instructive in this respect that in the wake of various terrorism attacks around the world in aftermath of the 11 September, such as the bombings in 2004 in, in 2005 in London, and in 2005 in Bali, the governments of the UK, Spain and Indonesia respectively did not adopt the war-grounded approach United States was implementing. Nor, it would appear, has any other State.

Following the London attacks, Sir Ken MacDonald, the then UK Director of Public Prosecutions addressed the question in a statement in forceful terms: "London is not a battlefield. Those innocents who were murdered on July 7 2005 were not victims of war […]. The fight against terrorism on the

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31 UN Human Rights Committee, General Comment 31, *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN doc. CCPR/C/21/Rev.1/Add. 13 (26 May 2004), para.19.

32 *Ibid*, paras.15-16; UN Basic Principles on Remedy and Reparation, *supra*, n. 28.

33 UN Human Rights Committee, General Comment 31, *supra*, n. 29, para.10: "a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party."

34 *Al-Skeini and others v. the United Kingdom*, European Court of Human Rights, Application no. 55721/07 (7 July 2011).

35 International Court of Justice (ICJ), Advisory Opinion of 8 July 1996, Legality of the *Threat or Use of Nuclear Weapons*, ICJ Reports 1996, para.25; ICJ, Advisory Opinion of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, para.106; ICJ, Judgment of 3 February 2006, *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, para. 119.

36 UN Human Rights Committee, General Comment 31, *supra* n. 32 at para.11.

37 See, *e.g.*, UN Human Rights Committee, *Suarez de Guerrero v. Colombia*, Communication No. R.11/45, 31 March 1982, UN Doc. Supp. No. 40 (A37/40); European Court of Human Rights, *Isayeva v. Russia*, Application No. 57950/00, Judgment 24 February 2005.

streets of Britain is not a war. It is the prevention of crime, the enforcement of our laws and the winning of justice for those damaged by their infringement."[38]

The overreaching security-oriented approaches adopted by many to confronting terrorism in the post-11 September 2001 period have already done immense damage to fabric of the rule of law around the world.[39] The responses have eroded the efficacy of core principles of human rights law and the administration of justice. If States were more generally to accept the elastic war paradigm conceived and adapted by the US to its counter-terrorism efforts, the harm could be exponentially greater. A great many States face challenges of some kind relating to terrorism. If these States were to shift from a law enforcement approach, and instead treat their operations to confront violent threats as global wars, the result would likely be increased international lawlessness, not to mention dire humanitarian consequences, with States arrogating to themselves the right to target those it designates as combatants or persons directly participating in hostilities, wherever they may be situated. The threat is even starker when one considers that for some States the primary sources of violence may types of organized crime other than terrorism, and in some of these instances armed groups may have effective control the streets of city areas. There would be no principled reason why the war paradigm could not be extended to these other threats of organized violence, beyond terrorism.

The invocations and application of the war paradigm has also facilitated many of the numerous abuses and lack of accountability that have hung a dark shadow on US counterterrorism efforts, particularly in the post 11-September 2001 context. According to the International Commission of Jurists' Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights:

> The US stance has caused serious damage to the protections accorded by both international human rights and humanitarian law. The war paradigm has given rise to several problems: there is *inter alia* the false implication that one of the parties to a conflict can invoke the rights and privileges of warfare without affording reciprocal rights to its enemies or accepting the corresponding legal constraints, and the mistaken claim that this can place individuals in a "legal black hole".[40]

States can avoid these threats by firmly situated their counter-terrorism measures in the framework of criminal law enforcement, using police intelligence gathering and international cooperation, and subjecting their conduct to the modest and appropriate constraints of human rights law. Lethal force, in this framework, will only be available when strictly necessary to protect life. That limitation does not wholly preclude the use of drones, which are only an instrumentality, but it would likely restrict the scope and extent of their use. While this kind of limitation places greater constraints on targeting, it will no doubt greater protect "civilians" from the devastating effects of drones. Recourse to the criminal justice system will also create an incentive to arrest terrorist suspects, and bring them to justice through fair trials, which is the only means of providing genuine accountability for terrorist activities. This approach allows for more effective redress for victims of both terrorism and counter-terrorism abuses.[41]

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[38] Ken Macdonald QC, Director of Public Prosecutions, Crown Prosecution Service, Security and Rights, 23 January 2007. Available at http://www.cps.gov.uk/news/articles/security_rights/index.html

[39] See ICJ, *Assessing Damage, Urging Action*, available at: http://www.icj.org/report-of-the-eminent-jurists-panel-on-terrorism-counter-terrorism-and-human-rights/

[40] *Ibid*, p. 64.

[41] See report of the Special Rapporteur on the Promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, UN Doc A/HRC/20/14 (4 June 2012).