

Human Rights Watch

Torture, Former Combatants, Political Prisoners, Terror Suspects, & Terrorists

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Where should we draw the line between war and law enforcement in the fight against terrorism? When is it appropriate to track down and kill terrorist suspects or detain them summarily, and when must they be brought before the criminal justice system? Three American actions over the last year prompt those questions: the killing of an Al Qaeda suspect in Yemen, the detention without charge or trial of an alleged enemy combatant in Chicago, and the flouting of a judicial order against removing terrorist suspects from Bosnia.

The questions arise because the geographic scope of the campaign against terrorism is potentially so expansive. Traditional armed conflict occurs on a reasonably circumscribed battlefield. But US President George Bush has said that the war against terrorism might extend to some sixty countries. Are terrorist suspects in all of these enemy combatants?

The designation matters because it affects the tools that can be used to counter terrorism. If a person is a criminal suspect, he can be arrested and prosecuted. International human rights law permits the use of lethal force against a criminal suspect only if necessary to stop an imminent threat of death or serious bodily injury. But if a person is an enemy combatant, the law of war permits him to be killed summarily, so long as he is not in custody, incapacitated, or surrendering. There is no duty to attempt to arrest or subdue him. If an enemy combatant is detained, the law of war permits him to be held until the end of the armed conflict, without the need to charge or try him.

Summary Justice

So how do we decide where war ends and law enforcement begins? The law of aggression permits a government to take up arms in self-defence, as the US did following the attacks of September 11 2001. Few would quarrel with Washingtons right to pursue Al Qaeda in Afghanistan and deprive it of that territorial base of operations. But does the right of military response extend beyond that traditional battlefield?

For example, US officials charge that Al Qaeda operatives have used Londons Finsbury Park mosque as a recruiting ground. Assuming that the British government consented, does that give the US the right to kill suspects operating there, or to detain them without charge or trial? Most people would probably have qualms about such action. But if Al Qaeda operatives anywhere in the world are enemy combatants, America would be within its rights to shoot or detain them summarily.

America might similarly attack suspected Al Qaeda cells in Hamburg, where several of the September 11 hijackers lived, or even in Buffalo, New York where an alleged Al Qaeda cell was recently exposed. Indeed, assuming it secured the consent of local governments, Pentagon forces might circle the globe taking out enemy operatives or detaining them without due process.

Such an expansive understanding of US war powers would threaten to overturn decades of effort to build and extend criminal justice guarantees that protect us all from abusive state power. The presumption of innocence and the right to a fair trial let alone the right to avoid the death penalty would give way to Washingtons unilateral decision that a suspect was an enemy combatant who could be summarily killed or detained.

That consequence may be unavoidable on the traditional battlefield. Ugly as it is, war gives combatants the right to kill or detain each other. But is war the right way to conceive of the global fight against Al Qaeda, let alone the war against terrorism? Beyond traditional battlefields such as Afghanistan and perhaps western Pakistan, is the war against terrorism a genuine armed conflict? Or is it a rhetorical war a useful device to drum up public support for an important law enforcement effort, but not a justification for suspending criminal justice guarantees?

Justice First

In the campaign against terrorism, governments should not use war powers where law enforcement is possible. Military force might be justified to combat a serious threat from a lawless land, or from a country whose government refuses to cooperate in meeting the threat. But war rules should not apply when there is a reasonable option of arresting and prosecuting a suspect. That is the only way to avoid creating a huge loophole in our human rights and due process guarantees.

This principle permits us to examine the propriety of various US actions in fighting terrorism. In November, for example, the Central Intelligence Agency used a missile to kill Ali Qaed Senyan al-Harhi, an alleged senior Al Qaeda official, as he drove in a remote and lawless area of Yemen controlled by tribal chiefs. Washington accused al-Harhi of masterminding the October 2000 bombing of the USS Cole which killed seventeen sailors.

Based on the limited information available, Human Rights Watch did not criticise the attack on al-Harhi as an extra-judicial execution because his alleged Al Qaeda role arguably made him an enemy combatant, the government apparently lacked control over the area in question, and there was evidently no reasonable law enforcement alternative. Indeed, eighteen Yemeni soldiers reportedly lost their lives in a previous attempt to arrest him.

So far, the United States is not known to have used lethal force outside Afghanistan, Pakistan and the al-Harhi incident. However, Washington has resisted articulating the limits to its war powers. Insight into how expansively it views these powers can be gained from its actions in summarily detaining other Al Qaeda suspects.

A good illustration is the case of Jose Padilla, a US citizen whom the Bush administration claimed had flown from Pakistan to Chicagos OHare airport in May to investigate creating a radiological bomb. Instead of charging him with this serious criminal offence and bringing him to trial, he was seized at the airport and then unilaterally declared an enemy combatant. That designation, it was claimed, permitted him to be held without access to counsel and without charge or trial until the end of the war against terrorism, which may never come.

Should Padilla have been classified an enemy combatant? If he was merely a criminal suspect, and since all agree he posed no imminent threat, at most he could have been arrested, charged and tried. But if he came to wage war as an enemy combatant, as the administration claims, he could have been shot in cold blood in the airport terminal rather than detained.

Most people would probably feel uncomfortable were Padilla to have been summarily shot because most people believe governments should not rely on military force when a criminal justice system is available. But if we are reluctant to start summarily shooting terrorist suspects when they can easily be arrested, we should also be reluctant to designate them as enemy combatants to deny them their right to be charged and tried in a court of law.

Seizing suspects

In October 2001, Washington sought the surrender of six Algerians suspected of planning attacks on Americans in Bosnia. After a three-month investigation, Bosnias Supreme Court ordered the men to be released from custody because of a lack of evidence. When rumours spread of US efforts to seize the suspects anyway, Bosnias Human Rights Chamber issued an injunction against their removal. Yet in January last year, under pressure from Washington, the Bosnian government ignored this legal ruling and delivered the men to American forces. They were then whisked out of the country, reportedly to the detention centre in Guantanamo Bay.

There was no allegation that law enforcement options were unavailable in Bosnia. Indeed, the Human Rights Chamber was established under the US-sponsored Dayton peace accord and includes six local and eight international members. Nor did anyone allege that the Bosnian judicial system was acting politically or inappropriately. Rather, Washington simply didnt like the results of an apparently fair assessment of the evidence it had proffered to justify arrest. The case highlights the danger to criminal justice rights if the United States can unilaterally invoke war powers far from any recognisable battlefield.

Despite its importance for our due process rights, governments have avoided drawing the line between war and law enforcement. As the leader of the campaign against terrorism, Washington has no incentive to articulate the legal limits to its actions. Indeed, it has often been contemptuous of international law on the matter. But allowing the superpower to operate outside the law degrades the international standards on which all of our rights depend. It is only too easy to imagine governments worldwide identifying their own enemy combatants when the rules of criminal justice prove inconvenient. It is time to reaffirm that even war powers must be exercised under law before we find that some of our most fundamental rights have been compromised.

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