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Testimony of Kenneth Roth
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to

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Hearing on "The Law of Armed Conflict, the Use of Military Force, and the 2001 Authorization for Use of Military Force"

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Chairman Levin, Ranking Member Inhofe, other members of the Committee, thank you for the opportunity to testify at this important hearing. My name is Kenneth Roth. I am the executive director of Human Rights Watch, an independent nongovernmental organization operating in some 90 countries worldwide for the purpose of investigating and reporting on human rights conditions and defending basic rights. Human Rights Watch holds governments and others to the standards of international human rights law and, in times of armed conflict, to international humanitarian law, or the laws of war. In this testimony, I will address three main issues: 1.) how the 2001 Authorization for the Use of Military Force (AUMF) should be understood today and whether it should be extended or modified; 2.) what laws should govern drone attacks; and 3.) what should be done about Guantanamo and long-term detention without trial.

The Authorization for the Use of Military Force

When it comes to our most basic rights, there is probably no more important distinction than the line between peace and war. In peacetime, the government can use lethal force only if necessary to stop an imminent threat to life, and it can detain only after according full due process. But in wartime, the government can kill combatants on the battlefield, and it has greatly enhanced power to detain people without charge or trial. So, safeguarding the right to life and liberty depends in important part on ensuring that the government is not operating by wartime rules when it should be abiding by peacetime rules.

Human Rights Watch does not ordinarily take positions on whether a party to a conflict is justified in taking up arms. Rather, once armed conflict breaks out, we generally confine ourselves to monitoring how both sides to the conflict fight the war, with the aim of enforcing international standards protecting noncombatants. In the Latin terms used among legal experts, we focus on *jus in bello*, not *jus ad bellum*.

However, the combination of a declared global war and the newly enhanced capacity to kill individual targets far from any traditional battlefield poses new dangers to basic rights—ones that will only grow as the US role in the Afghan armed conflict winds down. That leaves only al-Qaeda and similar armed groups but without the elements that traditionally limit use of the war power: the control of territory and a recognizable battlefield. To paint the problem most starkly, might a government that wants to kill a particular person simply declare "war" on him and shoot him, circumventing the basic due-process rights to which the target would ordinarily be entitled? Or, might a government intent on wiping out a drug gang simply declare "war" on its members? If a government wants to be less draconian but still avoid the burden of mounting a criminal prosecution, might it declare "war" on drug trafficking and detain without trial any participants it picks up?

These are not fanciful scenarios. Drug traffickers pose a violent threat to many Americans and are almost certainly responsible for more American deaths than terrorism. Already we talk of a metaphorical war on drugs. Why not a real war?

I hope we cringe at that thought. Detested as drug traffickers are, I hope we recoil at the thought of summarily killing or detaining them. But that is the risk if we allow the government unhindered

discretion to decide when to apply war rules instead of peace rules. This threat of an end run around key constitutional rights highlights the need to articulate clear limits to any war related to terrorism.

Some have suggested that mere transparency around the war-peace distinction should be enough—that Congress might authorize ongoing war against terrorist groups present and future so long as the administration states clearly at any given moment the groups with which it is at war. But that open-ended authorization is dangerous, because governments will be tempted to take the easy path of war rules over the more difficult path of respecting the full panoply of rights that prevail in peacetime. We cannot trust that public scrutiny is enough to restrain abuse given how easy it is to vilify alleged terrorist groups.

If a particular group poses such a serious threat that it can be met only with war, focused war authorization can be sought. But an open invitation to live by war rules makes it too easy for the government to circumvent key rights.

Indeed, it is perilous enough when the government entrusted with the power to set aside certain peacetime rights is the United States. But once the US government takes this step, we can be certain that governments with far less sensitivity to rights will follow suit. The Chinas and Russias of the world will be all too eager to seize this precedent to pursue their enemies under war rules, be they "splittist" Tibetans or "subversive" dissidents.

Even without the AUMF, the United States is hardly defenseless against the scourge of terrorism. Since the September 11 attacks nearly a dozen years ago, the United States has vastly enhanced its intelligence, surveillance, and prosecutorial capacities. And, should these tools prove insufficient to meet a particular threat, the right of self-defense still allows resort to military force. However, because of the fundamental rights at stake, war should be an option of necessity, not a blank check written in advance, as some are proposing for a revamped AUMF. Now that that Afghan war is winding down, it is time to retire the AUMF altogether.

Drone Attacks

The problem of excessive reliance on the rules of war for using deadly force is illustrated by the use of drones to kill suspects. Drone attacks do not necessarily violate international human rights or humanitarian law. Indeed, given their ability to survey targets for extended periods and to fire with pinpoint accuracy, drones may pose less of a threat to civilian life than many alternatives. Still, their use has become controversial because of profound doubts about whether the Obama administration is abiding by the proper legal standards to deploy them. For example, killing Taliban and al-Qaeda forces fighting US troops may be lawful in a traditional armed conflict like the one still underway in Afghanistan, but what is the justification for killing people who are not part of these groups in places like Yemen and Somalia? And where does northwestern Pakistan fit?

The Obama administration has offered several possible legal rationales for drone strikes, but with little clarity about the concrete, practical limits, if any, under which it purports to operate. Beyond the risk to people in these countries who face possible wrongful targeting, the lack of clarity denies Congress and

the American public the ability to exercise effective oversight. It also makes it easier for other countries that are rapidly developing their own drone programs to interpret that ambiguity in a way that is likely to lead to serious violations of international law.

One possible rationale for drone strikes comes from international humanitarian law governing armed hostilities. The Obama administration has formally dropped the Bush administration's use of the phrase "global war on terror," but its interpretation of the AUMF as authorizing "war with al Qaeda, the Taliban, and associated forces" looks very similar. This expansive view of the "war" currently facing the United States cries out for a clear statement of its limits. Does the United States really have the right to attack anyone it might characterize as a combatant against the United States anywhere in the world? We would hardly accept summary killing if the target were walking the streets of London or Paris.

John Brennan has said that as a matter of policy the administration has an "unqualified preference" to capture rather than kill all targets. But what are the factors leading the administration to decide that this preference can be met? Will it kill simply because convincing another government to arrest a suspect may be difficult? If so, how much political difficulty will it put up with before launching a drone attack? Will it kill simply because of the risk involved if US soldiers were to attempt to arrest the suspect? If so, how much risk is the administration willing to accept before pulling the kill switch? The truth is that we have no idea. We don't know whether these decisions are being made with appropriate care or not. We do know that other governments are likely to interpret this ambiguity in ways that are less respectful than we would want of the fundamental rights involved.

Moreover, away from a traditional battlefield, international human rights law requires the capture of enemies if possible. As noted, failing to apply that law encourages other governments to circumvent it as well—to summarily kill suspects simply by announcing a "war" against their group without there being a traditional armed conflict anywhere in the vicinity. Imagine the mayhem that Russia could cause by killing alleged Chechen "combatants" throughout Europe, or China by killing Uighur "combatants" in the United States. In neither case is the government where the suspect is located likely to cooperate with arrest efforts. And these precedential fears are real: China recently considered using a drone to kill a drug trafficker in Burma.

Even leaving aside the scope of the "war" in which the United States is engaged, the existence of armed conflict entitles the warring parties to shoot at only the other side's combatants, not civilians. Indeed, under the laws of war, all feasible precautions must be taken to avoid harm to civilians, and in case of doubt a person must be considered a noncombatant. How does the Obama administration square these legal limitations with its alleged use of "signature strikes," that is, its attacks on people whose identities are unknown but who are seemingly deemed to be combatants by virtue of behavior that is shared by people who are not directly participating in hostilities against the United States. For example, in places like Yemen or Somalia, many people carry weapons openly without being part of any combat force, let alone one challenging the United States. Nor does a person become a combatant merely by associating with others who might be planning to attack Americans, given that international humanitarian law recognizes many such people—drivers, cooks, doctors, financiers—as noncombatants. The administration's lack of transparency means we have no idea whether or not in launching drone attacks it is applying a legally defensible definition of a combatant.

There is also the question of whose war the United States is fighting. Most assume that it is targeting only people plotting to attack the United States, but there are reasons to doubt that assumption. The vagueness of the signature-strike criteria means it is quite possible that the people being targeted are at war with the governments of Yemen or Pakistan, not the United States. In one recently reported case, the United States appeared to target someone in Pakistan whom the Pakistani government wanted to eliminate but who was not engaged in any hostilities against the United States; the killing reportedly occurred as a quid pro quo for allowing the CIA to operate its drone program in Pakistan.[1] There is no law barring the United States from fighting other nations' wars, but that is not what most Americans think the drone program is doing.

Even in the absence of a combatant at war with the United States, the US government is entitled to use lethal force in certain limited circumstances under international human rights law. A police officer on the streets of Washington, for example, is entitled to shoot a suspect if it is the last feasible resort to avoid an "imminent" threat to life—such as when a hostage-taker is holding a gun to a victim's head. That same standard might justify targeting people overseas as well (leaving aside questions of sovereignty, which would depend on the consent of the relevant government).

At times the Obama administration has used this language of imminence but it has done so in a way that seems to render it infinitely elastic. The administration has argued that it should not have to wait until the last possible moment to avert a planned attack—a fair point—but in certain circumstances it appears to be lethally striking targets where no reasonable claim of an imminent threat can be made. The alleged use of signature strikes provides perhaps the clearest illustration of the problem. The lack of clarity and transparency surrounding the drone program leaves the impression that people are being targeted for no more than carrying weapons and associating with unsavory people. The administration's unwillingness in many cases to articulate anything remotely resembling an imminent threat makes it seem that human rights standards on policing, insofar as they are being relied upon to justify drone strikes, are being flouted.

Guantanamo

International human rights law prohibits prolonged detention without charge or trial, yet many detainees have been held in Guantanamo for eleven years without charge. For many of them, the administration says it has no plan ever to prosecute. The administration sought to justify these detentions at first by reference to international law governing armed conflict between governments, but the conflict between the United States and Afghanistan ended in 2002. The administration now clings to the AUMF, but the factual predicate for it—US involvement in the conflict with the Taliban and al-Qaeda—is also coming to an end. And, in any event, people detained in the context of an armed conflict between a government and an armed group—such as the current conflict in Afghanistan—should be charged and tried, not detained. The administration's misuse of the AUMF to rationalize prolonged detention without trial in Guantanamo is another reason why the AUMF should not be extended.

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[1] Jonathan Landay, "Obama's drone war kills 'others,' not just al Qaida leaders," McClatchy Newspapers, April 9, 2013; Mark Mazetti, "A secret deal on drones, sealed in blood," The New York Times, April 6, 2013.

Moreover, when it comes to combatants in an armed conflict, the power to detain can easily be linked to the power to kill. If the United States is going to claim the right to detain "combatants" without end on the basis of a global war unconnected to a traditional battlefield, against a non-state enemy that does not control any substantial territory, other nations will undoubtedly make similar claims. And, once governments identify people as combatants, however wrongful that may be, they will inevitably claim the power not only to detain them without charge or trial but also to kill them. Although the United States currently detains many people who are clearly not combatants – those drivers, cooks, doctors and financiers, among others – it should be mindful of how its policies can be interpreted.

The best solution is still to try suspects in regular federal courts, with their entrenched procedural protections designed to provide fair trials. Security concerns can reasonably be handled; for example, if trials in the regular United States Courthouse for the Southern District of New York are deemed too difficult despite its long history of trying dangerous criminals such as drug czars and mafia dons, trials could be held securely and with little disruption on nearby Governor's Island. However, the United States has already tried former CIA- and Guantanamo-detainee Ahmed Ghailani without incident in the regular courthouse for the Southern District of New York.

By contrast, Congress's insistence on using military commissions at Guantanamo has been an unmitigated disaster. The only two convictions obtained after full trials have both been overturned by the United States Court of Appeals for the District of Columbia Circuit; the five other convictions obtained were by plea bargain. During the same time that the military commissions have obtained these seven convictions, federal courts have prosecuted some 500 terrorism suspects. In addition, there are profound and legitimate concerns about the fairness of a system that, among other things, permits the introduction into evidence of coerced statements from witnesses, allows the military to hand-pick the jury pool, and severely compromises the attorney-client privilege.

Roughly half of the Guantanamo detainees have theoretically been approved for transfer to their home or third countries, and those transfers can proceed if the administration certifies that appropriate security arrangements have been made. The administration should accelerate its efforts to make those arrangements.

However, the administration also claims that there remains a category of detainees who are "too dangerous" to release but who cannot be tried because either there is insufficient admissible evidence to prosecute them or their acts did not amount to a chargeable crime. The administration purports to hold these men under the above-described war powers. But even under war rules, the purpose of detention is to keep the enemy from returning to the battlefield. As the US involvement in the Afghan war winds down, it is not clear what war the men released from Guantanamo would return to. And if the fear is that they would join in criminal activity, the answer lies in criminal prosecution, including for such inchoate crimes as conspiracy or attempt, not the "Minority Report" approach of detaining them for crimes that they might at some future point plan to commit.

Given Guantanamo's enormous stain on America's reputation, there is good reason to believe that these continuing detentions are causing more harm than good to America's security and counterterrorism efforts. President Obama himself has stated that keeping Guantanamo open weakens US national

security. And for the same reasons that long-term detention without trial is wrong and counterproductive in Guantanamo, it would be wrong and counterproductive if moved to the United States. That would simply replicate Guantanamo in another locale.

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One of Congress's most solemn duties is to protect human rights, especially the fundamental rights to life and liberty. War is sometimes necessary, but before embarking on that dangerous path, the risk to rights should be weighed carefully. This nation has now been on a war footing for an extraordinarily long time. Security risks will never be eliminated. But, as the Afghan war winds down, we have arrived at the stage where those risks can be managed without the danger to rights that further declared "war" entails. It is time to retire the AUMF and the unlawful practices it has spawned and sustained.