

# Narco-Terror: Conflating the Wars on Drugs and Terror

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## Abstract

Since 11 September 2001, the United States has been at war with the Taliban, an enemy that heavily exploits the drug trade, narrowing the divide between the 'war on drugs' and the 'war on terror'<sup>1</sup> in both rhetoric and tactics, with dangerous implications for human rights. This paper discusses the implications of including drug offenders in the 'war on terror' on fair trial norms, the right to liberty and security of person and the right to life, among other human rights protections. Even before the 2001 attacks on the United States, drug-related offences in countries such as Malaysia and Egypt had been included in emergency legislation meant to deal with threats to the State. Counter-terrorism legislation introduced since launching the 'war on terror' further blurs the distinction between drug-related offences and terrorism, thus leading to the diminution of human rights protections. The 'war on terror' has presented many challenges to international human rights law. Conflating terrorism with new subjects such as drugs therefore has the potential to do further damage to recognised human rights norms.

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<sup>1</sup> There is inevitably some definitional ambiguity with respect to terrorism, the Taliban and the war in Afghanistan. The global 'war on terror' envelops the armed conflict in Afghanistan yet some may contest the Taliban's status as a 'Specially Designated Terrorist Group' as it was classified by the US President in 2002. Furthermore, this paper uses the term 'war on terror' but as some have argued, the 'war on terror' is best understood rhetorically. Thus this paper is not meant to argue that an armed conflict paradigm should be applied to it or that the challenges to human rights norms and civil liberties are legitimate in the 'war on terror' but not in the war on drugs. Rather it is only intended to show that there is a danger in including new actors into this agenda. Furthermore, though still vague in international law, this paper uses the definition for terrorism laid down in United Nations General Assembly Resolution 49/60 (adopted on 9 December 1994), which at para. 3 in the annexed Declaration states that terrorism entails, 'Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.' International law authority, Antonio Cassese, wrote that this resolution represented 'a broad agreement on the general definition of terrorism.' See A. Cassese, *International Law*, 2<sup>nd</sup> ed (Oxford: Oxford University Press, 2005), p. 449.

## 1. Introduction

It must have been a confusing experience for alleged drug trafficker and informer, Haji Juma Khan, to be taken into custody in 2008. For years, the illiterate ‘kingpin’<sup>2</sup> had reportedly met with and provided intelligence to the US Central Intelligence Agency and the Drug Enforcement Administration (DEA) about the Taliban and other traffickers.<sup>3</sup> Though he is believed to have supplied money to the Taliban for protection,<sup>4</sup> it has also been suggested that he worked with provincial council chief and Afghan President Hamid Karzai’s late half-brother, Ahmed Wali Karzai (an accusation Mr. Wali Karzai strongly denied).<sup>5</sup>

Yet in late 2008, Juma Khan was taken off the US payroll and into the custody of federal prosecutors.<sup>6</sup> Instead of his customary shopping trips in Manhattan, Juma Khan was brought to jail to be charged under a 2006 narco-terrorism law, which the prior year had been included in an amendment to the Patriot Act.<sup>7</sup> The law makes it possible to prosecute and impose escalated sanctions against international drug traffickers who support terrorism.

The case illustrates the unpredictable role that drugs play vis-à-vis terrorists and other armed groups. Insurgencies frequently turn to drugs to fund operations<sup>8</sup> and/or reap the political capital that may come with controlling local economies.<sup>9</sup> This is very much the case with the Taliban now. However, that does not mean that drug trafficking is synonymous with terrorism, nor are all drug-related crimes linked to insurgencies. Confusing them can lead to policies and proposals which are not only politically problematic,<sup>10</sup> but contravene international law.

Since the terrorist attacks of 11 September 2001 (9/11), the US government has found itself in conflict with an enemy that heavily exploits the drug trade, yet drug traffickers and insurgents are hardly identical enemies with indistinguishable goals. The case of Juma Khan reflects the fluid role of drugs in a conflict situation.

Charging Juma Khan for funding the Taliban with drug-money may have been an entirely appropriate course of action. However, in the ongoing ‘wars’ on drugs and terror, a criminal prosecution is not the only means available. What if the question was whether or not to target him? Or to detain him without charge as is often done to suspected insurgents and drug dealers?

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<sup>2</sup> United States Attorney Southern District of New York Press Release, ‘Afghan Drug Kingpin Charged With Financing Taliban Terrorist Insurgency’, 24 October 2008. Available at <http://www.justice.gov/dea/pubs/pressrel/pr102408.html>. Last accessed 30 January 2011.

<sup>3</sup> James Risen, ‘Propping Up a Drug Lord, Then Arresting Him’, *The New York Times*, 11 December 2010.

<sup>4</sup> United States District Court Southern District of New York, Sealed Indictment, *United States of America v. Haji Juma Khan*, S1 08 Cr. 621, para. 7.

<sup>5</sup> Risen, ‘Propping Up a Drug Lord, Then Arresting Him’. See fn. 3.

<sup>6</sup> See fn. 5.

<sup>7</sup> § 122, 21 U.S.C. § 960a (2006).

<sup>8</sup> See, for example, G. Peters, *Seeds of Terror: How Heroin is Bankrolling the Taliban and al Qaeda* (Oxford: Oneworld Publications, 2009).

<sup>9</sup> Vanda Felbab-Brown, *Shooting Up: Counter-Insurgency and the War on Drugs* (Washington DC: Brookings Institution Press, 2010).

<sup>10</sup> To see a discussion on the irreconcilability of these ‘wars’, see Amira Armenta, Martin Jelsma and Tom Blickman, ‘Merging Wars: Afghanistan Drugs and Terrorism’, December 2001, Transnational Institute; Martin Jelsma and Tom Kramer, ‘Drug Policy Briefing No. 30 Redefining Targets: Towards a Realistic Afghan Drug Control Strategy’, December 2009, Transnational Institute.

Would it be accurate to characterise Juma Khan as an associate of the Taliban any more than he was an associate of corrupt Afghan government officials or even the DEA?

These questions are not merely theoretical. The United States announced it had placed Taliban-linked drug traffickers on a ‘kill list’,<sup>11</sup> militaries have been engaged in counter-narcotics in Mexico and Brazil and countries like Egypt and Malaysia have included drug offenders in emergency legislation designed to deal with armed opposition groups. Such efforts have weakened human rights protections, which already have been dramatically challenged since 11 September 2001.

This paper examines the conflation of the wars on drugs and terror, particularly since 9/11, and the risks that ‘merging wars’<sup>12</sup> pose to human rights. Section one presents the rhetoric that has emerged since 9/11 linking drugs and terror. States have since attempted to use the United Nations as a vessel for classifying drugs as a ‘threat to international security’, which raised alarms with some governments who expressed concern about further militarisation of drug policy. Nowhere is this form of militarisation more evident than in actual armed conflict situations where the wars on terror and drugs are being waged. Section two focuses on Afghanistan, where the United States argued that drug traffickers with links to the Taliban were legitimate targets. This paper contends that such a strategy violates international humanitarian law. As section three will demonstrate, even in peacetime situations, drugs have been dealt with as a security threat – through the engagement of militaries or the use of emergency laws – which have a disastrous impact on human rights. Such examples illustrate the human rights risks associated with conflating terrorism and drugs.

## 2. Narrowing of the Gap between the Wars on Drugs and Terror

There are myriad examples that illustrate the gradual conflation of the ‘wars’ on drugs and terror. Perhaps the most vivid one is the rhetoric associated with these concepts. The term ‘narco-terror’ – which predates 9/11 – has taken on new meanings. In the United States for instance, once arguably used to describe drug traffickers performing terrorist acts,<sup>13</sup> the term is now defined by the DEA ‘as a subset of terrorism.’<sup>14</sup> The agency argues that narco-terrorism is a tactic

[I]n which terrorist groups, or associated individuals, participate directly or indirectly in the cultivation, manufacture, transportation, or distribution of controlled substances and the monies derived from these activities. Further, narco-terrorism may be characterized by the participation of groups or associated

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<sup>11</sup> Afghanistan’s Narco War: Breaking the Link between Drug Traffickers and Insurgents, A Report to the Committee on Foreign Relations United States Senate (Washington DC 10 August 2009), p. 15.

<sup>12</sup> Armenta, Jelsma and Blickman, ‘Merging Wars: Afghanistan Drugs and Terrorism’. See fn. 10.

<sup>13</sup> For more discussion on this see: Emma Bjornehed, ‘Narco-Terrorism: The Merger of the War on Drugs and the War on Terror’, (2004) 6 *Global Crime* No. 3 and 4, p. 2.

<sup>14</sup> Asa Hutchinson, ‘International Drug Trafficking and Terrorism’ testimony given before the Senate Judiciary Committee Subcommittee on Technology, Terrorism and Government Information, Department of State, Washington DC, 13 May 2002. Available at <http://www.justice.gov/dea/pubs/cngrtest/ct031302.html>. Last accessed 15 January 2011; Portions of which were originally quoted in Bjornehed. See fn. 13.

individuals in taxing, providing security for, or otherwise aiding or abetting drug trafficking endeavours in an effort to further, or fund, terrorist activities.<sup>15</sup>

The US Attorney's Office in New York City merged the units that deal with terrorism and drug cases<sup>16</sup> and as the diplomatic cables revealed by WikiLeaks described, the DEA has turned into a 'global intelligence agency', which is under pressure from foreign governments to use its resources to spy on local insurgent groups and political rivals.<sup>17</sup> In 2006 the US Congress adopted the narco-terror legislation that makes it possible to arrest and charge men like Juma Khan and impose escalated sanctions upon them.<sup>18</sup>

Such enhanced sentences are common in drug cases internationally and the concept of stiffer penalties for 'narco-terrorists' has taken shape in other countries, which are dealing with their own violent threats. Iraq, for example, introduced Decree No. 3 of 2004 following the removal of Saddam Hussein, which prescribes the death penalty for drug offences when committed 'with the aim of financing or abetting the overthrow of the government by force.'<sup>19</sup> This law was passed despite Iraq's ratification of the International Covenant on Civil and Political Rights in 1971<sup>20</sup> and declarations from the Human Rights Committee and other human rights bodies that the death penalty for drug offences is a violation of international human rights law.<sup>21</sup> For example, the Special Rapporteur on extrajudicial, summary or arbitrary executions wrote, 'the death penalty should be eliminated for crimes such as ... drug-related offences.'<sup>22</sup>

The United Nations Security Council has increasingly adopted language linking drugs and terror. In December 2009, the Security Council adopted a non-binding Presidential Statement titled 'Drug trafficking as a threat to international security' that reads: 'The Security Council notes with concern the serious threats posed in some cases by drug trafficking and related transnational organized crime to international security in different regions in the world, including in Africa.

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<sup>15</sup> Hutchinson, 'International Drug Trafficking and Terrorism' see. fn. 13 (portions of which were originally quoted in Bjornehed. See fn. 14.

<sup>16</sup> William K. Rashbaum, *The New York Times*, 'US Attorney Plans Drug Terrorism Unit', 17 January 2010. Available at <http://www.nytimes.com/2010/01/18/nyregion/18terror.html?pagewanted=all>. Last accessed 30 January 2011.

<sup>17</sup> Ginger Thompson and Scott Shane, *The New York Times*, 'Cables Show Expanded Reach of Drug Agency' 25 December 2010, available at: <http://www.nytimes.com/2010/12/26/world/26wikidrugs.html?pagewanted=all>. Last accessed 30 January 2011.

<sup>18</sup> Title 21, Chapter 13, Subchapter II, 960a. See fn. 7.

<sup>19</sup> Amnesty International, 'Unjust and Unfair: The Death Penalty in Iraq' MDE 14/014/2007, April 2007, p. 10.

<sup>20</sup> UN Treaty Collection. Available at [http://treaties.un.org/pages/ViewDetails.aspx?src=UNTSO&tabid=1&mtdsg\\_no=IV-4&chapter=4&lang=en#EndDec](http://treaties.un.org/pages/ViewDetails.aspx?src=UNTSO&tabid=1&mtdsg_no=IV-4&chapter=4&lang=en#EndDec). Last accessed 30 January 2011.

<sup>21</sup> UN Human Rights Committee (HRC), UN Human Rights Committee: Concluding Observations: Thailand, 8 July 2005, CCPR/CO/84/THA, para. 14; UN Human Rights Committee (HRC), Concluding Observations of the Human Rights Committee: the Sudan, 29 August 2007, CCPR/C/SDN/CO/3, para. 19; UN Commission on Human Rights, Extrajudicial, summary or arbitrary executions: Report by the Special Rapporteur, submitted pursuant to Commission on Human Rights Resolution 1996/74, 24 December 1996, E/CN.4/1997/60; UN Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, 29 January 2007, A/HRC/4/20, para. 51-52. See also: Rick Lines, 'The Death Penalty for Drug Offences: A Violation of International Human Rights Law' (London: International Human Rights Association, 2007); Rick Lines, 'A 'Most Serious Crime'? – The Death Penalty for Drug Offences and International Human Rights Law', (2010) 21 *Amicus Journal* 21.

<sup>22</sup> UN Doc. E/CN.4/1997/60, para. 91. See fn. 21.

The increasing link, in some cases, between drug trafficking and the financing of terrorism, is also a source of growing concern.<sup>23</sup>

The classification of drugs as a threat to international security also raises concerns. The Security Council is empowered under Chapter VII to ‘maintain or restore international peace and security.’<sup>24</sup> Chapter VII actions can include ‘complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations’ and could give rise to ‘demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations’.<sup>25</sup>

During the debate, the Venezuelan representative warned that ‘[Drug trafficking] should be dealt with under the General Assembly and other relevant organs of the United Nations. In particular, foreign military bases should not be part of the solution.’<sup>26</sup> Several months later, Venezuela repeated a similar statement at the UN Commission on Narcotic Drugs.<sup>27</sup>

A Presidential Statement linking drugs and terror is still a long way from formally permitting armed action against States in the name of the ‘war on drugs’. However, post-9/11 there have been persistent attempts ‘to apply the existing laws of war to a global war on terrorism’ including rules governing the legitimate use of force.<sup>28</sup> There is far more that can be said on this subject,<sup>29</sup> but it is clear that the ‘war on terror’ tested many experts’ conceptions of armed conflict, including when force can be lawfully used. Thus if counter-narcotics objectives are subsumed under the need to suppress global terrorism, there would seem to be a risk of extending the nebulous limits of the ‘war on terror’ to something even more diffuse. Might some States argue that they have a right to carry out air strikes, aerial fumigation or other counter-narcotics activities in the territory of another if they suspect profits (no matter how far removed from the target State) could be used to fund terrorist activities?<sup>30</sup>

In his book ‘*Reappraising the Resort to Force: International Law, Jus ad Bellum and the War on Terror*,’ Professor Lindsay Moir writes, ‘what has become somewhat imprecisely known as the

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<sup>23</sup> United Nations Security Council Presidential Statement, ‘Peace and Security in Africa: Drug trafficking as a threat to international security’, 9 December 2009. Available at

[http://www.unodc.org/documents/frontpage/SC\\_President\\_Drug\\_Trafficking.pdf](http://www.unodc.org/documents/frontpage/SC_President_Drug_Trafficking.pdf). Last accessed 27 January 2011.

<sup>24</sup> United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Chapter VII; Action with respect to threats to the peace, breaches of the peace, and acts of aggression, Article 39, 41-42.

<sup>25</sup> United Nations, Charter of the United Nations. See fn. 24.

<sup>26</sup> UN Department of Public Information, Security Council Presidential Statement Calls for Stronger International Cooperation with Global, Regional Bodies against Drug Trafficking, ‘Illicit Trade Enriching Terrorists, Anti-Government Forces, Chief of United Nations Office on Drugs and Crime Warns in Briefing’, SC/9807, (8 December 2009). Available at <http://www.un.org/News/Press/docs/2009/sc9807.doc.htm>. Last accessed 30 January 2011.

<sup>27</sup> See CNDblog, ‘CND Day 3 – Venezuela’s Plenary Statement on the Political Declaration and Plan of Action’, 10 March 2010. Available at <http://www.cndblog.org/2010/03/cnd-day-3-venezuelas-plenary-statement.html>. Last accessed 27 January 2011.

<sup>28</sup> William K. Lietzau, ‘Old Laws, New Wars: Just ad Bellum in an Age of Terrorism’ *Max Planck Yearbook of United Nations Law*, Volume 8, Number 1 (2004), pp. 383-455, p. 385.

<sup>29</sup> See L. Moir, *Reappraising the Resort to Force: International Law, Jus ad Bellum and the War on Terror* (Oxford: Hart Publishing, 2011).

<sup>30</sup> While this question does raise concerns about legitimacy it should also be noted that it is not straightforward. There may be some exceptional situations where a State could argue that forceful intervention is legitimate. The question is asked to reflect a concern. Many questions and various scenarios of when force is legitimate are considered in A. Cassese, pp. 339-374. See fn. 1.

‘war on terror’ has served as catalyst (or perhaps, in some cases, the excuse) for a number of States to seek a loosening of the relevant legal constraints’ on the resort to force.<sup>31</sup> It is the imprecision of the term ‘war on terror’ which makes its expansion to new objectives, like counter-narcotics, so alarming. Such a drift risks multiplying challenges to existing legal frameworks that are said to have occurred in the name of counter-terrorism after 9/11.<sup>32</sup> This is made possible by the fact that the expressions ‘war on drugs’ and ‘war on terror’ are legally meaningless.<sup>33</sup> A state of armed conflict does not exist every time ‘war’ is used as a rhetorical device. The ‘war on terror’ was an abstraction of armed conflict, thus attaching the ‘war on drugs’ to this term is an abstraction of an abstraction.

Legitimate responses to both terror and drugs rest in the ‘murky interstices’ of various bodies of international law – including human rights law and international humanitarian law, depending on the context.<sup>34</sup> After all, a drug trafficking cartel or terrorist organisation can indeed qualify as a party to an armed conflict, provided the situation meets the relevant criteria.<sup>35</sup> Such determinations are based on numerous factors,<sup>36</sup> but the substances or commodities exploited by the actors tend not to be defining elements in these matters.<sup>37</sup> This was articulated by the International Criminal Tribunal for the former Yugoslavia when it stated with regards to an internal armed conflict in Kosovo, ‘the determination of the existence of an armed conflict is based solely on two criteria: the intensity of the conflict and organisation of the parties, the purpose of the armed forces to engage in acts of violence or also achieve some further objective is, therefore, irrelevant.’<sup>38</sup>

The global ‘war on terror’ envelops the actual armed conflict in Afghanistan, in which drugs are a significant factor. Yet even if a situation rises to the level of armed conflict, equating those involved with drugs with those participating in hostilities – whether such participation is terrorist-related or not – has potentially catastrophic consequences. Historically, insurgents have

<sup>31</sup> Moir, *Reappraising the Resort to Force*, p. 1. See fn. 29.

<sup>32</sup> Joan Fitzpatrick, ‘Speaking Law to Power: The War Against Terrorism and Human Rights’, (2003) *European Journal of International Law* 14( 2), p. 245.

<sup>33</sup> International Committee of the Red Cross, ‘Statement: When is a war not a war? - The proper role of the law of armed conflict in the ‘global war on terror’’ (16 March 2004). Available at <http://www.icrc.org/eng/resources/documents/misc/5xcmnj.htm>. Last accessed 9 June 2011.

<sup>34</sup> Fitzpatrick, ‘Speaking the Law to Power’, p. 245. See fn. 32.

<sup>35</sup> While this is a complicated question, the Geneva Conventions and Additional Protocol I – which apply to international armed conflicts – come into effect in the event of ‘declared war or of any other armed conflict [between States] even if the state of war is not recognized by one of them’ as well as ‘all cases of partial or total occupation of the territory of a [State], even if the said occupation meets with no armed resistance.’ See Crimes of War Project, ‘International vs. Internal Armed Conflict’, by Steven R. Ratner. Available at <http://www.crimesofwar.org/a-z-guide/international-vs-internal-armed-conflict/>. Last accessed 18 June 2011. For non-international armed conflict the relevant criteria are that ‘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.’ ICTY, *Prosecutor v. Duško Tadić* (Decision on the Defence Motion Appeal for Interlocutory Appeal on Jurisdiction) [‘Tadić Appeal on Jurisdiction’] IT-94-AR72, Appeal Chamber (2 October 1995), para. 70; Article 8 (2) lit. f), Rome Statute of the International Criminal Court (last amended January 2002), 17 July 1998, A/CONF. 183/9; See also: International Law Association, The Hague Conference (2010), *Final Report on the Meaning of Armed Conflict in International Law*, p. 2; International Committee of the Red Cross, How is the Term ‘Armed Conflict’ Defined in International Humanitarian Law, Opinion Paper, March 2008.

<sup>36</sup> Tadić Appeal on Jurisdiction, para. 70. See fn. 35; Rome Statute, Article 8 (2) lit. f). See fn. 35.

<sup>37</sup> See: Patrick Gallahue ‘Mexico’s ‘War on Drugs’ – Real or Rhetorical Armed Conflict?’ (2011) 24 *Journal of International Law of Peace and Armed Conflict* 39-45.

<sup>38</sup> *Prosecutor v. Limaj et al.* (Trial Judgment), IT-03-66-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 30 November 2005, para. 170.

turned to a number of illegal enterprises to fund their operations including, but by no means limited to, human smuggling,<sup>39</sup> pillage,<sup>40</sup> illicit trade in resources<sup>41</sup> and of course drugs. Yet in the crime-war nexus there has always been a strong effort to distinguish the two (though that has been difficult in many contemporary crises). For example, in the former Yugoslavia, armed groups used their control over the black market to fund operations and amass enormous wealth. However, at no point was the partisan peddler selling looted goods out of the boot of his car confused with paramilitaries raiding villages. This distinction is all-important to who could be considered a legitimate target.

Whereas the ‘war on drugs’ has been described as ‘inextricably linked’ to terror,<sup>42</sup> treating them as identical phenomena can lead to policies and practices that are deeply problematic. Yet since 11 September 2001, some of the tactics and even the language of the ‘war on drugs’ and terror have started to become indistinguishable.

### 3. Targeted Killing of Drug Traffickers

An example of how tactics in armed conflict can be affected by conflating drugs with participation in actual hostilities occurred in Afghanistan in 2009 when the United States pitched a plan to target drug traffickers for assassination. When the initiative was first leaked, it drew criticism from German lawmakers who openly questioned its legality.<sup>43</sup> Although the US revamped the proposal<sup>44</sup> limiting the ‘kill list’ to only those ‘drug traffickers with proven links to the insurgency’,<sup>45</sup> the proposal still garnered criticism from human rights authorities.<sup>46</sup>

The UN Special Rapporteur on extrajudicial, summary or arbitrary executions wrote: ‘[t]o expand the notion of non-international armed conflict to groups that are essentially drug cartels, criminal gangs or other groups that should be dealt with under the law enforcement framework would be to do deep damage to the [international humanitarian law] and human rights frameworks.’<sup>47</sup> In response, the then Executive Director of the United Nations Office on Drugs

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<sup>39</sup> *The Associated Press*, ‘Arrival of Tamils in Canada raises smuggling concerns’, 13 August 2010; *The National*, ‘Tamil Tigers use human smuggling in bid to rearm’, 23 August 2010.

<sup>40</sup> Christopher Stewart, *Hunting the Tiger: The Fast Life and Violent Death of the Balkans’ Most Dangerous Man*, (New York: St. Martin’s Press, 2008), pp. 143, 162-163, 201.

<sup>41</sup> Jeffrey Gettleman, ‘No Winner Seen in Somalia’s Battle with Chaos’, *The New York Times*, 2 June 2009. Available at [http://www.nytimes.com/2009/06/02/world/africa/02somalia.html?\\_r=1&emc=eta1](http://www.nytimes.com/2009/06/02/world/africa/02somalia.html?_r=1&emc=eta1). Last accessed 30 January 2011

<sup>42</sup> Steven C. McCraw, Assistant Director Office of Intelligence, US Federal Bureau of Investigation, Testimony before the Senate Judiciary Committee, Washington DC, May 20, 2003. Available at <http://www.fbi.gov/news/testimony/international-drug-trafficking-and-terrorism>. Last accessed 30 January 2011.

<sup>43</sup> Matthais Gebauer and Susanne Koebl, ‘Orders to Kill Angers German Politicians’, *Spiegel Online*, 29 January 2009. Available at <http://www.spiegel.de/international/world/0,1518,604430,00.html>. Last accessed 30 January 2011.

<sup>44</sup> Dapo Akande, ‘US/NATO Targeting of Afghan Drug Traffickers: An Illegal and Dangerous Precedent?’, *EJIL: Talk*, 13 Sep 2009. Available at <http://www.ejiltalk.org/usnato-targeting-of-afghan-drug-traffickers-an-illegal-and-dangerous-precedent>. Last accessed 30 January 2011.

<sup>45</sup> A Report to the Committee on Foreign Relations United States Senate, p. 15. See fn. 11.

<sup>46</sup> In addition to mentioned, see for example Patrick Gallahue, ‘Targeted Killing of Drug Lords: Traffickers as Members of Armed Opposition Groups and/or Direct Participants in Hostilities’, (2010) *International Journal on Human Rights and Drug Policy* 1(1).

<sup>47</sup> Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. A/HRC/14/24 Add. 6, 28 May 2010, para. 56.

and Crime stated ‘[m]ajor traffickers should be reported to the Security Council and brought to justice – not executed in violation of international law.’<sup>48</sup>

One of the more shocking elements of the proposal is that it was made at all. If indeed drug traffickers’ support for the Taliban is purely monetary, it has been established that funding an insurgency is not an activity that would deprive people in the territory of an armed conflict of their civilian status.<sup>49</sup> Thus to target such people would be a breach of Article 51(2) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), which states that ‘[t]he civilian population as such, as well as individual civilians, shall not be the object of attack.’<sup>50</sup> The principle of distinction, as formulated under this article, has reached the status of customary international law.<sup>51</sup>

If these traffickers were to take up arms on behalf of the Taliban, then they would be legitimate targets only because they are directly participating in hostilities. Their status as traffickers would be irrelevant.<sup>52</sup> The only conceivable interpretation to legitimise the United States’ actions would be to argue that these traffickers, through their drug-related activities, were somehow directly participating in hostilities. How one could arrive at such a conclusion is difficult to imagine. When one domestic jurisdiction examined the question of targeted killing and participation in hostilities, it concluded that providing financial assistance would not qualify as direct participation. In that case, in which the Israeli Supreme Court upheld the government’s policy of targeted killing under certain limited circumstances, it added the caveat that such targets must exclude those ‘who aid the unlawful combatants by general strategic analysis, and grants them logistical, general support, including monetary aid’.<sup>53</sup>

In 2009, the International Committee of the Red Cross published its ‘Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law’. While not legally binding, the document was intended to be a good-faith interpretive tool, which had been produced in consultation with a panel of legal experts.<sup>54</sup> The document provides three cumulative conditions required for an act to be considered direct participation in hostilities, including threshold of harm, direct causation, and belligerent nexus. It is futile to argue that drug traffickers meet any of these conditions.<sup>55</sup> Drugs simply do not inflict a necessary degree of harm towards military operations or civilians to meet the threshold of harm.<sup>56</sup> Nor do illicit – and even dangerous – narcotics meet the standards to qualify as direct causation. The gap between

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<sup>48</sup> United Nations Office on Drugs and Crime, *Afghanistan Opium Survey 2009 Summary Findings*, Sept 2009, commentary by the executive director.

<sup>49</sup> Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, International Committee of the Red Cross, May 2009, p. 34; *The Public Committee Against Torture in Israel v. the Government of Israel*, HCJ 769/02, 11 Dec 2005, paras. 2, 35.

<sup>50</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 Jun 1977) 1125 UNTS 3, entered into force 7 Dec 1979.

<sup>51</sup> *Prosecutor v. Struger* (judgment) IT-01-42-T, Trial Chamber II, 31 January 2005, para. 220; L. Doswald-Beck & J.M. Henckaerts, *Customary International Humanitarian Law: Rules Vol. 1*. (Cambridge University Press: UK, 2005); J.M. Henckaerts, ‘Study on customary international humanitarian law: a contribution to the understanding and respect for the rule of law in armed conflict’, 857 *International Review of the Red Cross* 175, 2005, p. 189.

<sup>52</sup> Gallahue, ‘Targeted Killing of Drug Lords’, p. 8. See fn. 46.

<sup>53</sup> *The Public Committee Against torture in Israel v. The Government of Israel*, para. 37. See fn. 49.

<sup>54</sup> Melzer, ‘Interpretive Guidance on the Notion of Direct Participation in Hostilities’, p. 10. See fn. 49.

<sup>55</sup> Gallahue, ‘Targeted Killing of Drug Lords’, p. 8. See fn. 46.

<sup>56</sup> See fn. 55.

the trafficking of drugs and the harm caused by Taliban military operations is simply too great to be considered ‘direct’.<sup>57</sup> And even though it could be argued that there is a belligerent nexus between the drug traffickers and the Taliban, it would be difficult to prove in some objective sense that the act of drug trafficking is intended to support the insurgency versus some other probable motive such as greed.<sup>58</sup>

The UN Special Rapporteur on extrajudicial, summary or arbitrary executions wrote:

financial support, advocacy, or other non-combat aid, does not constitute direct participation ... [D]rug trafficking is understood as criminal conduct, not an activity that would subject someone to a targeted killing. And generating profits that might be used to fund hostile actions does not constitute [direct participation in hostilities].<sup>59</sup>

The militarisation of the ‘war on drugs’, especially in an actual conflict situation, has proven to be deeply damaging to established legal principles. Despite the legal insignificance of the term ‘war’ – be it on terror or drugs – there are potential consequences for established principles of international humanitarian law if suddenly drug related acts are proclaimed to be tantamount to militant violence or membership. Criminal suspects are not legitimate targets for assassination in either war or peace. Yet even in non-armed conflict situations, governments have tried to limit their human rights obligations by placing drugs alongside other threats to the State.

#### 4. The ‘War on Drugs’ and Human Rights Limitations

Some of those civil liberties that have been compromised in the ‘war on terror’ by broadening derogation standards, namely fair trial and liberty and security of person,<sup>60</sup> also risk being weakened in States’ fights against drugs. Governments such as Egypt and Malaysia have used emergency laws that exist to ‘balance rights against imperative needs of security’ to limit human rights protections<sup>61</sup> while others like Brazil have employed their militaries in their drug wars despite appeals by human rights bodies to address law enforcement issues through civilian police forces.

Some of these emergency laws and practices predate 9/11. Perhaps, however, they should serve as cautionary examples for those who argue for unlimited escalation in the fight against drugs.

In Egypt, drug offenders have been included in draconian emergency laws that were first introduced in 1967, which include provisions for arrest without warrant, detention without charge or trial, bans on public assembly and free rein for searches.<sup>62</sup> Then Prime Minister Ahmad Nazif defended the laws by saying that the government ‘commits itself before the

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<sup>57</sup> Gallahue, ‘Targeted Killing of Drug Lords’, p. 10. See fn. 46.

<sup>58</sup> Gallahue, ‘Targeted Killing of Drug Lords’, p. 10. See fn. 46.

<sup>59</sup> UN Doc. A/HRC/14/24 Add. 6, paras. 56, 68. See fn. 47.

<sup>60</sup> Fitzpatrick, *Speaking Law to Power*, p. 243. See fn. 32.

<sup>61</sup> See fn. 60.

<sup>62</sup> Human Rights Watch, *Egypt: Cosmetic Changes Can't Justify Keeping Emergency Law*, 12 May 2010. Available at: <http://www.hrw.org/en/news/2010/05/12/egypt-cosmetic-changes-can-t-justify-keeping-emergency-law>. Last accessed 30 January 2011.

representatives of the nation to not utilise the extraordinary measures made available under the emergency law except to confront the threat of terrorism and narcotics.’<sup>63</sup>

These emergency laws also allow suspected drug traffickers to have their cases referred to specialised courts<sup>64</sup> with inadequate due process safeguards. Amnesty International describes these courts as follows:

A parallel system of emergency justice, involving specially constituted “emergency courts” and the trial of civilians before military courts, has been established for cases deemed by the authorities to affect national security. Under this system, safeguards for fair trial, such as equality before the law, prompt access to lawyers and the ban on using evidence extracted under torture, have been routinely violated.<sup>65</sup>

What is worse is that these courts can and do pass death sentences.<sup>66</sup>

In Malaysia, drug offenders are included (along with those who act ‘in a manner prejudicial to the national security or economic life of Malaysia’)<sup>67</sup> in preventative detention laws that allow police to detain suspects for 60 days without charge.<sup>68</sup> After 60 days, the Home Ministry must issue a detention order, which entitles the detainee to a hearing. Authorities may still order that ‘suspects [be held] without charge for successive two-year intervals with periodic review by an advisory board, whose opinion is binding on the minister.’<sup>69</sup> According to the US Department of State’s Bureau of Democracy, Human Rights and Labor, ‘the review process contains none of the procedural rights that a defendant would have in a court proceeding. Police frequently detained suspected narcotics traffickers under [the Dangerous Drugs Act] after courts acquitted them of formal charges.’<sup>70</sup> Civil society organisations have also reported that ‘the continued use of administrative detention and other restrictive legislation [has been used] to arbitrarily arrest and detain, and deny the right to a fair trial and other human rights.’<sup>71</sup> More than 1,600 people were detained under this act between 2007 and 2008.<sup>72</sup>

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<sup>63</sup> Human Rights Watch, Egypt. See fn. 62.

<sup>64</sup> US Department of State (25 February 2009) 2008 Country Reports on Human Rights Practices – Egypt. Available at <http://www.state.gov/g/drl/rls/hrrpt/2008/nea/119114.htm>. Last accessed 30 January 2011.

<sup>65</sup> Amnesty International, Egypt - Systematic Abuses in the Name of Security, 11 April 2007, MDE 12/001/2007, p. 2.

<sup>66</sup> Amnesty International, Egypt, p. 2. See fn. 65.

<sup>67</sup> US Department of State, (25 February 2009) Human Rights and Labor, 2008 Country Reports on Human Rights Practices – Malaysia. Available at <http://www.state.gov/g/drl/rls/hrrpt/2008/eap/119046.htm>. Last accessed 30 January 2011.

<sup>68</sup> Law of Malaysia, Act 316, Dangerous Drugs (Special Preventive Measures) Act (1985); UN Human Rights Council (27 October 2008) Summary Prepared by the Office of the High Commissioner for Human Rights, in accordance with Paragraph 15(c) of the Annex to Human Rights Council Resolution 5/1 – Malaysia. A/HRC/WG.6/4/MYS/3, p. 6.

<sup>69</sup> US Department of State, Human Rights and Labor. See fn. 67.

<sup>70</sup> US Department of State, Human Rights and Labor. See fn. 67.

<sup>71</sup> UN Human Rights Council, Summary prepared by the Office of the High Commissioner for Human Rights, in accordance with paragraph 15(c) of the Annex to Human Rights Council Resolution 5/1 - Malaysia, 27 October 2008, A/HRC/WG.6/4/MYS/3, para. 25.

<sup>72</sup> US Department of State Human Rights and Labor. See fn. 67.

The earliest preventative detention laws in Malaysia were passed during a declared state of emergency following the 1969 riots.<sup>73</sup> Yet these laws continue several decades after they have been passed and, given the enduring nature of illegal drugs in nearly every society, it is deeply concerning that they could be used as pretence to declare what essentially amounts to an indefinite or ‘permanent emergency’.<sup>74</sup>

Some governments in the Americas have long struggled with armed groups that profit from the drug trade while simultaneously engaging in terrorist acts. While there are numerous examples of a dangerous mix of war, drugs and terror pre-2001, greater attention was placed on terrorism following September 11. Rather than diverting attention from drugs to a separate activity (i.e., terrorism), in some cases it merely intensified the ‘securitisation’ of drugs since opposition groups were already heavily involved in the narcotics trade.<sup>75</sup>

In its 2003 ‘Declaration on Security in the Americas’, the Organization of American States added drug trafficking to a virtual laundry list of security challenges.<sup>76</sup> Following its adoption, concern was expressed that ‘given the current context of the region and the concept of terrorism promoted by the United States, the implementation of this new multidimensional concept constitutes a risk of increasing the securitization of the region’s problems and, consequently, militarization as a response to confront them.’<sup>77</sup>

While it may be an overstatement to attribute all the subsequent actions to the declaration, there were some extreme responses to drugs following its adoption. For example, in 2004, Brazil empowered the military to carry out police functions in the ‘war on drugs’ and passed a law that permits the air force to shoot down aircraft suspected of trafficking drugs.<sup>78</sup> This law presents serious concerns with respect to the prohibition on extrajudicial summary or arbitrary executions.<sup>79</sup> After all, pilots alleged to be carrying drugs are criminal suspects subject to arrest and prosecution, not execution without trial. As written above, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions said of targeted killing of drug traffickers in Afghanistan, ‘[D]rug trafficking is understood as criminal conduct, not an activity that would

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<sup>73</sup> Human Rights Watch, *Convicted Before Trial: Indefinite Detention Under Malaysia's Emergency Ordinance*, 24 August 2006, C1809. Available at <http://www.unhcr.org/refworld/docid/4517cda34.html>. Last accessed 7 June 2011.

<sup>74</sup> Fitzpatrick, *Speaking Law to Power*, p. 251. See fn. 32. A term the author used with respect to terrorism. Malaysia is not a party to ICCPR but as an example it also seems to test the ‘exceptional and temporary nature’ principle necessary in order to invoke Article 4(1) of the International Covenant on Civil and Political Rights allowing derogation from a State party’s obligations. UN Human Rights Committee (HRC), CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency, 31 August 2001, CCPR/C/21/Rev.1/Add.11, para. 2; UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

<sup>75</sup> The term ‘drug securitisation’ and the concept are discussed further by many authorities including Transform Drug Policy Foundation, *International security and the global war on drugs: The tragic irony of drug securitisation* (February 2011); See also: G Chillier and Laurie Freeman, ‘Potential Threat: The New OAS Concept of Hemispheric Security’ Washington Office on Latin America (July 2005).

<sup>76</sup> Organization of American States, ‘Declaration on Security in the Americas’, OEA/Ser.K/XXXVIII CES/DEC. 1/03 rev.1, 28 October 2003, Sec. II, para. 4(m).

<sup>77</sup> Chillier and Freeman, ‘Political Threat’, p. 8. See fn. 75.

<sup>78</sup> International Crisis Group (ICG), *Latin American Drugs II: Improving Policy and Reducing Harm*, 14 March 2008, Latin America Report No 26, p. 32; Chillier and Freeman, p. 4. See fn. 75.

<sup>79</sup> Article 6 UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171; Article 4 Organization of American States, *American Convention on Human Rights*, ‘Pact of San Jose’, Costa Rica, 22 November 1969.

subject someone to a targeted killing.<sup>80</sup> These comments seem equally relevant to Brazil. Regrettably, the government of the Dominican Republic has reportedly considered similar measures.<sup>81</sup>

If Afghanistan represents an attempt to incorporate the ‘war on drugs’ into an ongoing armed conflict, then Colombia moved in the opposite direction. The Colombian government recast its internal armed conflict (with armed groups who profited from the drug trade) as a ‘war on terror’. In fact, Álvaro Uribe, President from 2002 to 2010, denied the existence of an armed conflict at all in his country, instead referring to the crisis as a matter of terrorism.<sup>82</sup> As the emphasis shifted from armed conflict to terrorism,<sup>83</sup> President Uribe put drug control under the purview of the military and Plan Colombia —a multi-billion dollar anti-drug aid package from the United States— branched out from counter-narcotics to embrace counter-terrorism:

After the 9/11 attacks the US, for the first time, allowed the Colombian government to use all past and present counterdrug aid to wage war against the insurgents. Colombian guerrilla groups and paramilitaries alike were being referred to in the same breath as international terrorist organisations linked to Al Qaeda.<sup>84</sup>

While Uribe succeeded in reducing crime and weakening opposition groups, Human Rights Watch has noted that this success was ‘marred by egregious human rights violations’.<sup>85</sup> US officials have nevertheless supported Uribe’s policies as a model for other States ‘struggling with a similar confluence of drug trafficking, corruption, and terror’ such as Afghanistan and Mexico.<sup>86</sup>

The regional organisation entrusted with promotion and protection of human rights has been wary to mix responses to violence and drugs. The Inter-American Commission on Human Rights has cautiously reminded States not to ‘confuse the concepts of public security and national security’.<sup>87</sup> In 2009, it wrote:

The Commission has observed that in some cases, the armed forces ‘continue participating in the investigation of crimes – in particular in cases related to drug-

<sup>80</sup> UN Doc. A/HRC/14/24 Add. 6, para. 68. See fn. 47.

<sup>81</sup> Freedom House, *Freedom in the World 2010 - Dominican Republic*, 3 May 2010. Available at <http://www.unhcr.org/refworld/docid/4c0ceaf6c.html>. Last accessed 8 June 2011.

<sup>82</sup> Chillier and Freeman, ‘Potential Threat’, p. 7. See fn. 75. New President Juan Manuel Santos changed course in early 2011 suggesting the country was in the midst of an internal armed conflict sparking criticism from Uribe. See *El Espectador*, ‘EE.UU. respalda decisión de Santos de admitir conflicto armado’, 6 May 2011. Available at <http://www.elespectador.com/noticias/politica/articulo-267792-eeuu-respalda-decision-de-santos-de-admitir-conflicto-armado>. Last accessed 8 June 2011; Jim Glade, *Colombia Reports*, ‘Uribe and Santos clash over conflict terminology’, 5 May 2011. Available at: <http://colombiareports.com/colombia-news/news/16058-uribe-and-santos-clash-over-conflict-rethoric.html>. Last accessed: 16 July 2011.

<sup>83</sup> Chillier and Freeman, ‘Potential Threat’, p. 7. See fn. 75.

<sup>84</sup> Jason Vauters and Michael L.R. Smith, ‘A Question of Escalation from Counternarcotics to Counterterrorism: Analysing US Strategy in Colombia’ (2006) *Small Wars and Insurgencies*, 17(2), 163-196, p. 171.

<sup>85</sup> Human Rights Watch, *Death and Drugs in Colombia*, 2 June 2011. Available at <http://www.unhcr.org/refworld/docid/4dec82db2.html>. Last accessed 8 June 2011.

<sup>86</sup> Human Rights Watch, ‘Death and Drugs in Colombia.’ See fn. 85

<sup>87</sup> IACHR, Report on the Situation of Human Rights in Mexico, OEA/Ser.L/V/II.100, Doc. 7 rev. 1 (September 24, 1998), para. 403.

trafficking and organized crime – immigration control, and civilian intelligence tasks.’ If a democratic system of government is to function properly, these kinds of activities should be the purview of the civilian police force, subject to the necessary scrutiny by the legislature and, if need be, the judicial branch.<sup>88</sup>

Despite the fact that it can be difficult to differentiate those groups engaged in political violence and those committed solely to drug trafficking, the Commission has been more careful to distinguish the two. When Colombia passed a ‘Peace and Justice Law’ to demobilise armed groups,<sup>89</sup> the Inter-American Commission complained that ‘procedural benefits would not appear to be confined to crimes directly related to the armed conflict; instead, perpetrators of common crimes like drug trafficking might eventually one day try to avail themselves of the benefits provided under this law.’<sup>90</sup>

Terrorist violence plagues numerous societies and many of its perpetrators engage in other crimes like drug trafficking. The desire to treat them as indistinguishable has presented a precarious challenge to human rights.

At least one country argued that ‘de-securitisation’ was necessary in order to undertake a human rights-based approach to drug policy. At a High Level Meeting at the Commission on Narcotic Drugs in 2009 Ecuador argued that it is ‘De-securitisation of drug policy which allows us to address the problem from the perspective of health and human rights.’<sup>91</sup>

The application of methods used to deal with security threats in the war on drugs is tempting for many governments. These methods – many of which violate the right to life, fair trial and the liberty and security of person – have been a prominent feature in the war on terror. Thus efforts to render counter-narcotics objectives indistinguishable from the so-called ‘war on terror’ pose an enormous threat to human rights. The examples of Afghanistan, Malaysia, Egypt, Colombia and Brazil demonstrate just what is at stake.

## 5. Conclusion

As of mid-2011, Haji Juma Khan was awaiting trial and reportedly working on a plea bargain that newspapers speculated would keep his incongruous ties to the Taliban and US authorities ‘out of the public record’.<sup>92</sup> While the narco-terror legislation under which he is charged is controversial,<sup>93</sup> the case of Juma Khan is a comparatively civilised way to deal with those who engage in drugs and terrorism. Other responses are significantly more concerning.

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<sup>88</sup> Inter-American Commission on Human Rights (IACHR), Report on Citizen Security and Human Rights, 31 December 2009, OEA/Ser.L/V/II. Doc. 57, para. 104.

<sup>89</sup> Juan Forero, *The New York Times*, ‘New Colombia Law Grants Concessions to Paramilitaries’, 23 June 2005. Available at <http://www.nytimes.com/2005/06/23/international/americas/23colombia.html>. Last accessed 7 June 2011.

<sup>90</sup> Annual Report of the Inter-American Commission on Human Rights 2005, OEA/Ser.L/V/II.124 (27 February 2006), para. 16.

<sup>91</sup> Transform Drug Policy Foundation (April 2011) ‘Drug policy that promotes security: The paradox of de-securitisation.’ Available at <http://www.tdpf.org.uk/IISS%20paper%20dk3.pdf>. Last accessed 9 June 2011.

<sup>92</sup> Risen, ‘Propping Up a Drug Lord, Then Arresting Him’. See fn. 3.

<sup>93</sup> See for instance John E. Thomas, Jr., ‘Narco-Terrorism: Could the Legislative and Prosecutorial Responses Threaten Our Civil Liberties?’ (2009) *Washington and Lee Law Review* 66(1881).

While Juma Khan illustrates how terrorists may indeed exploit the drug trade, the temptation to merge the wars on drugs and terror must be resisted. Examples from recent history prove that this can present enormous challenges to international law. It merely extends the ambiguous ‘war on terror’ to an even more diffuse issue – one that is generally undeserving of emergency laws or military attention.

The ‘war on terror’ has been fraught with human rights concerns, such as challenges to fair trial norms, the right to liberty and security of person and the right to life. Even before 9/11, many governments had restricted the enjoyment of similar rights of drug offenders using emergency laws. Capital drug laws exist in many States and drug suspects have been subject to unfair trials in specialised courts or detention without due process guarantees by numerous governments, despite the forceful criticism of human rights advocates.

As the nexus between the rhetoric and tactics of the wars on drugs and terror narrows, a number of troubling proposals have emerged that are incompatible with international human rights and humanitarian law. In conflict situations, drug offenders—even those that provide financial support to insurgencies—are not legitimate targets. Engaging military forces in law enforcement functions is not always appropriate<sup>94</sup> and applying specialised systems of justice to people accused of drug crimes is immensely problematic to due process norms and other international human rights obligations. Introducing the death penalty for drug traffickers, as has occurred in Iraq for instance, is at odds with interpretations of the right to life by numerous human rights bodies, including the UN Human Rights Committee.<sup>95</sup>

It seems fairly obvious that drugs and terror are distinct phenomena. Though the two may be linked, they should not be treated as identical. To do otherwise is to tread into dangerous territory for fair trial norms, the right to liberty and security of person and the right to life, among other human rights and humanitarian law protections.

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<sup>94</sup> Though this is probably best determined on a case by case basis.

<sup>95</sup> UN Doc. CCPR/CO/84/THA, para. 14. See fn. 21; UN Doc. CCPR/C/SDN/CO/3, para. 19. See fn. 21.