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The Paradigm of “War on Terror” and Human Dignity

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Abstract: When people across the world saw two jet airliners hit the Twin Towers of New York on September 11, 2001, it never occurred to them that the officials of the United States might be working out a new global paradigm to fill the security gap. Only a few hours after the September 11 attacks, US President George W. Bush spoke of a new watershed in international law. Five years later, the new offspring reached its maturity in the form of the law of military commissions. New foundations were laid in the paradigm of “War on Terror” and in the struggle between security and human dignity, wherein the latter lost. Under this paradigm, new entities named “unlawful enemy combatants” were created, which had no rights and dignity whatsoever. Torture, as the strongest lever against human and humanitarian rights, was allowed against them. Loud voices were raised by the civil society against such violations to remind the international community of the huge cost of their widespread use. But these failed to have an impact. Consequently, only diplomatic approaches and emphasis on laws

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respecting human and humanitarian rights could be effective in guiding aberrant governments back to the legal fold.

Introduction

Unlike war crimes, which is an independent legal topic in national and international law, the war on crime or the same war on terror—is more anything else than a political catchphrase. The campaign against crimes that affect public opinion (drugs, organized crime, bribery, extortion and terrorism) is accompanied by tools such as compassion for victims, harsh response to criminals and zero tolerance. For the same reason, these matters are inadvertently presented in the form of unrealistic pictures to justify harsh responses in the public opinion, which is not something new. A similar strategy to some extent has been widely practiced at different times in history of European countries such as Britain, Italy, Germany, Spain and France. (Delmas-Marti, 2004:285-307) However, in light of the 9/11 attacks on the US soil (Journal of International Criminal Justice, 2006:891-1180) , the strategy put aside ethics in war and turned it into an obsolete paradigm.

Before the Sept. 11 attacks, the three paradigms dominating the war on terror (political, legal and war) paid little attention to the paradigm of human rights. (Qorban-Nia, 2004:141-168) The main reason could have been obligations toward human rights and respect for governments. However, just a few hours after the Sept. 11 attacks, US President George Bush gave his first emotional speech and officially embraced the paradigm of war by using the term "War on Terror" (Hoffman, 2006:131-155).

The starting point for such a change in the United States was to state that terrorist attacks on the Twin Towers were the same as a military invasion which, under the name of "war on terror", paved the way for a new paradigm with new foundations, such as "unlawful enemy combatants", new organizations (not a civil or a military court, but military commissions), and a new system of values (despite the Abu Ghraib prison scandal). The law of military commissions prohibited the use of torture in limited cases in October 2006, allowing the US president to redefine the Geneva conventions.

The new paradigm was gradually endorsed by many other countries, be it democratic or non-democratic. As a consequence, the war on terror has apparently turned into a "war on human rights"! To prove such a claim, it suffices to take a closer look at a number of resolutions and laws ratified in certain western countries. For instance, in international law, the right to defense has gradually become the right to preemptive defense and preventive defense. Before the Sept. 11 terrorist attacks, terrorism used to be a domestic issue but later became a global phenomenon.

Under the circumstances, each and every country has been allowed to adopt its own set of defense tools—even if they are absolutely callous. Also, since these tools proved to be effective, they were considered lawful. "The torture of suspected terrorists is permissible as a tool in the global war on terror." (Jessberger, 2005:1059-1073), (Gaeta, 2004:785-794) However, this paradigm has two fundamental weaknesses: it goes against the penal law and principles of human rights.

Under the stated features of the paradigm of war on terror, the tendency has been to militarize the domestic penal law and turn it into a penal law against enemies (Plazzo, F., 2006:666-686), (Garrigos-

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Kerjean, 2006:189-214), (Batarrita and Alvarez Vizcaya, 2006:215-236). At the same time, the paradigm has distanced itself from the objective guarantees in the international law, moving toward nationalization of inhuman treatments—despite being banned by the international human rights law as well as the principles of human rights. In the international and domestic laws, there is no state between war and peace. In any of these conditions, the human rights law and/or the human rights govern (Amir Arjomand :23-27).

Militarization of Domestic Penal Law

This paradigm has come to be known as "militarization" because the concern over the slogan of "war on crime" has made relations between the penal law and the law of war rather nontransparent. Under the circumstances, the new paradigm has been created poorly. Instead of creating a complete and solid legal system, it has adopted the mindset of war, turning legal tools into warfare. In the words of Francesco Plazzo, all penal systems gradually changed or came up with new definitions to explain and portray the "enemy" (Amir Arjomand :23-27).

Once there is no support whatsoever for the penal laws or even international human rights, there will be real dangers for the effectiveness of penal laws. For this reason, high courts in certain countries are still trying to protect themselves against such a new current.

A) Basis for the Logic of War

An attempt to allude to the logic of war will have a fundamental consequence i.e., de-penalization of legal procedures (De-judicializing). In general, the logic behind the war tends to shift power and during this power shift, instead of having police investigations being supervised by judiciary bodies, intelligence services carry out the duty of interrogating suspects under army supervision.

Also, military courts or even military commissions—and not civilian courts—take the responsibility of detaining, prosecuting and convicting suspects. Even if we adhere to an independent and unbiased trial or legal procedure (the German-Roman system) or the rules of fair trial (the common law system), the realities in Europe in general and in the United States in particular point to the fact that the judiciary systems have, indeed, remained de-penalized since September 11, 2001.

When the liberal ideas of Anglo-Saxons, which are based on distrust toward centralized government, are compared with those of the Roman-German, which support a powerful state, the extremist nature of the new approach becomes ever more evident. Such a difference forced Antoine Garapon to declare that the American version of democracy has become a victim of securing itself, and that legalization of torture has become inevitable and transcends the law rooted in firm ethical principles (Garapon, 2006:2041-2077).

More to the point, the development of the British legal system—which just like the United States has its roots in the prosecution system—shows that political elements (the Labor Party and the Conservative Party), or more specifically legal elements,

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should never ignore the impacts of international law. Britain has included the European human rights conventions in its laws, whereas the United States considers as irrelevant documents the ratifications of Inter-American Commission on Human Rights (IACHR)[1], the UN Subcommittee on Promoting and Supporting Human Rights, as well as the reports of UN Subcommittee on Prevention of Torture (May 2006) and the Human Rights Committee (July 2006). [2]

Whatever the results, the point is that the legal US system has managed to come up with the paradigm of war on terror to present an all-embracing picture of the danger of the legal justice system collapsing in a democratic system. It has also managed to demonstrate this by creating military commissions instead of sanctioned military or civil courts (Amann, 2006). Although the directive issued on November 13 (two months after the September 11 attacks) states that all military commissions shall convene in the presence of jury, no executive guarantees have been considered for this purpose in none of the executive bylaws so far. This deficiency forced two public prosecutors, who were representing the US government in military commissions, to resign in 2004.

Also in 2006, a top-ranking US Navy officer commissioned to represent a detainee in a military commission told members of the commission: "Unfortunately, what I would like to know is this: What are the governing rules and regulations here?" (Amann, 2006)

Even if the case for hearing has been specified, it is necessary for the US High Court to redefine the law of military commissions—though some of the negative aspects of this law cannot be concealed.

B) Innovations of Military Commissions Act

The Military Commissions Act[3] was ratified four months before the US Supreme Court voted in favor of a law that says human rights do not apply to detainees suspected of terrorism in light of Hamdan's legal case against Donald Rumsfeld.[4] It also announced that Article 3 of the Geneva Convention apply to the situation in Afghanistan only. The verdict was issued after a number of federal courts in similar cases said torture should never be used during interrogations.[5] The courts were able to issue such verdicts because all detentions and trials had taken under the direct order of the president and without the Congress approval. For this reason alone, the US government quickly ratified the Military Commissions Act in light of the growing number of verdicts and the growing possibility of trials for the army personnel by these tribunals.

After the ratification of the act, the paradigm of war on crime and terror entered a new phase. Under the Military Commissions Act, the US Congress maintained that "no foreign unlawful enemy combatant subject to trial by military commission under their chapter may invoke the Geneva conventions as a source of rights.[6]

Similarly, the term "unlawful enemy combatant" refers to: "(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its coalition partners who are not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces)". Or "(ii) a person who, on or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the president and the secretary of defense".[7]

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Under this description, firstly, anyone who has been accused of being an unlawful enemy combatant by the president or the secretary of defense will have no basic human rights whatsoever. He will be sent to the detention centers run by the military commissions, even if during his lifetime he has never held a weapon in his hands and has never been in contact with any terrorists! Secondly, if a person offers his services to the terrorists without being aware of their intentions—such as giving them a ride on his cab—he will be first detained as an unlawful enemy combatant and then tried after interrogations and military investigations. The interesting point is that a similar case took place in Afghanistan.[8]

Even if a person offers financial support to a charity organization for Afghan children, and later it is realized that the charity was in fact a sponsor of Taliban or Al-Qaeda, he will still be detained as an accessory to the terrorist groups and kept under inhuman conditions. (Romero, 2006)

This law has also taken into account any possibility of clashes with the international law. In the section related to rights, it introduces the president as the only person qualified to interpret the Geneva conventions.[9]

Another point is that in this above-board endorsement, there is absolutely no executive guarantee for carrying out torture. Even in an article that talks about prevention of torture, it implicitly authorizes it. Under Article 984R, if a suspect has been detained by the military commissions on the pretext of torture, there is no legal barrier to the person's torture.[10]

This law not only reaches the international law, especially the human rights law, but also breaches the US Constitution, especially

when it states that the detainees could be kept indefinitely. Other objections raised by the US legal community include making the substantial laws retroactive (Cerone,2006), and changing the definition of war crimes and giving it other meanings (Joanne, 2006).

If such objections are combined with international support, a huge gap could be created in the way of institutionalizing such a law.

C) Huge Gap in the Rule of Law

From the beginning, the Bush administration did not know how to categorize the September 11 attacks. However, it did know whether it should be considered an act of war by a trans-national terrorist group supported by a number of governments or a criminal act by Osama bin Laden in collaboration with 19 highjackers and their colleagues. This doubt between the definitions of “war” and “crime” also created doubts regarding the rights of terrorists. As a result, they were considered both an enemy (the logic of war without the support of civil rights) and a criminal (the logic of crime, non-inclusive of international human rights).

Consequently, they were named “unlawful enemy combatants” with no recourse to the legal system. Since 2004, the supreme courts of the United States and Britain have been trying to once again force the “war on crime” to observe the domestic and international penal rights. However, they needed to win the war against lawmakers (parliament and the government) by setting up a paradigm that was legally acceptable. At the same time, they had to deal with numerous problems to make the situation of terrorist forces transparent.

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Just before the final verdict for Rasul, Padila and Hamdi in 2004[11] (who had the right to appeal like other citizens and non-citizens), the Detainee Treatment Act was ratified on September 30, 2005. At first, the law seemed to accept the decisions made by the Supreme Court to ban harsh and inhuman acts against detainees in the US or any other place under the jurisdiction of the US government. However, in practice, the law remained vague because it did not say anything about what should be banned and whether those who break the law should be prosecuted.

In addition, once Bush signed the law, he maintained that it could only be enacted if deemed necessary by the executive authorities. In return, he gave rise to many unanswered questions: Can the president be torturer in chief? (Koh, 2006:1154-1155) The famous verdict on Hamdan in 2006, which was related to the Geneva Convention, also faced legal challenges in light of the Military Commissions Act in October 2006. The new act allowed the president to not only interpret this particular law, but the international human rights law (Geneva conventions) as well.

Unlike the Congress or the government, the process in the Supreme Court showed respect for human rights and fairness. Hence, it did try to some extent compensate for the deviation made by the government. This is while the occupying regime of Israel has never bothered to follow such a rule and adopted a new approach instead. Its supreme court[12] passed a verdict in favor of the Gaza Strip's blockade by restricting humanitarian aid and food supply to this particular region. So, it went a step further than the US by allowing collective punishment of civilians for the offences of a handful of people.

On January 30, 2008, it passed a verdict—by three top judges—that claimed that since the Gaza Strip is under the rule of a "murderous terrorist group", the government has the right to restrict fuel and electricity supply to this region as part of an "economic embargo" (Knickmeyer, 2008: A14).

The interesting point is that 1.5 million people are living in this area and the court decided to punish the so-called terrorist group by collectively punishing the entire civilian population. It goes without saying that legal responsibility is also part of military commissions and the entire population of a region cannot be punished collectively because some terrorists are living among them. Of course, in practice, the US Army has also done just that (Conchiglia, 2004).

Now, it is also possible to compare this situation in Britain. In 2004, the House of Lords rejected the anti-terrorism law ratified in November 2001 since it differentiated between the British and non-British citizens and went against the European human rights conventions. Instead, another development came to the fore. Terrorism Prevention Act on March 11, 2005 allowed detention and punishment of all citizens, irrespective of their nationality. Later, the House of Lords decided to support the law and banned the use of information obtained through torture as admissible evidence (Thienel, 2006:401-409).

However, international obligations and a judiciary system based on international law restricted the exercise for the British Parliament much more than the one for the US Congress. For instance, they can now easily refer to the European human rights conventions because under the Human Rights Act of 1998, this convention has been quoted and enacted in British courts since 2000.

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However, domestic or international guarantees and support are in no way sufficient for the institutionalization and strengthening of judiciary process and legislation. There is a growing need for setting up a new paradigm to find out whether these crimes have military or legal aspects.

As for the current processes, an example could be the International Crime Tribunal of former Yugoslavia (ICTY) which agreed to civilians bringing lawsuits against military personnel (ICTY Judgement, 2000:180). This court based its case on Article 51 (Note 3) of the First Protocol of Geneva Convention, which states that "civilians will be supported in this chapter unless they directly or indirectly take part in armed conflicts". [13] Based on the same view, the court stated: An unlawful civilian combatant is one who has directly taken part in armed conflicts. Such an interpretation can also be made of different articles of the Geneva Convention and its additional protocols. However, it is not accurate or sufficient to resolve the issue.

To resolve the issue, some have tried to come up with different analyses to trim down its ambiguities. For instance, Michel Rosenfeld states that none of the verdicts issued by the US or British high courts between 2005 and 2005 presents a credible answer. He believes that the situation created by terrorism neither matches the crisis or an emergency pertinent to the enactment of the law of war, nor a normal situation falling under the penal law. He names this new situation "stress" instead (Rosenfeld, 2006:2079-2150).

In explaining stressful situations, Rosenfeld differentiates between the paradigm of war on terror and the legal-policing paradigm that is at times confused with the "war on crime". To justify his idea, he states that it is necessary to balance threat and response as well as security and freedom, adding that this paradigm—which has

dynamically adjusted itself to the requirements and problems of war on terror—must resolve the situation case by case. This seems to be an attractive theory because it avoids the impossible choice between the "logic of war" and the "logic of peace".

However, in practice, it can only be partly acceptable as it makes a very sentimental definition of war. More to the point, it allows domestic bodies to assess its proposed principles, but based on its own observation—which is very much in line with the constitution of the countries—it fails to consider the difference between the countries regarding the convergence of international law and even considers it inconsequential. There is a huge difference between Britain that has European and international commitments and the US, a superpower that only respects the law on the basis of its own domestic laws.

In other words, the proposed method based on balancing security and freedom has tried to fill the legal gap, but still faces the problem as a domestic and national issue. It also fails to give any answer concerning the possibility of a clash between values. The problem of striking a balance between security and freedom for human beings cannot be easily overlooked.[14]

Mireille Delmas-Marty has proposed an interesting theory in which he tries to reduce the number of criticisms raised against Rosenfeld's idea. He believes that the paradigm of war on terror respects the international law and could prove to be useful since it demonstrates the necessity of resolving the dual conflict between war and peace—just like the conflict between war and other crimes. Nevertheless, Delmas-Marty reminds us that such a paradigm can only be considered an archetype. In his opinion, the definitions of war crimes or the war on crime are not helpful in resolving the conflict

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between war and peace in the international community. On the contrary, by strengthening the "paradigm of crimes against humanity", the definition of humanity could be redefined as a value and accepted as a cornerstone for the legal system (Delmas-Marti, 2007: 584-598).

Despite the numerous advantages of this theory, the principles of his proposed paradigm continue to face reservations and it is not clear whether the custodians of the paradigm are national or international. Seven years since the collapse of the twin towers in New York, it is time serious efforts are made to strike some kind of balance between freedom and security.

Sadly, despite years of continuous efforts, the dispute over using torture and/or its legality persists. This is because the paradigm of war (on crime or terrorism) overlooks the danger of ignoring a value-based society in the process of a complete nationwide ban on inhuman treatments.

Re-Globalization of Values

The call for a ban on torture in regional and international laws demonstrates the respect for human dignity. If only one human right were to have global importance, it has to be equality of human dignity. This is also stated in Article 1 of the Human Rights Charter. In 2004, the publication of pictures showing US soldiers abusing Iraqi prisoners (Amann, 2005:2084-2141) raised the issue of globalizing a ban on torture.

In the war on terror, states used their own methods and tools to govern with little or no respect to the principles of human rights.

“Perhaps a greater danger than the return to torture in treatments is the effort to justify torture through legal channels. This is something that should not even be thought of or spoken of. (Jessberger, 2005:1060)”

From the ethical viewpoint, the issue is much more sensitive. On the one hand, it lays emphasis on the system of human rights so as to include a compulsory and statutory ban on torture and inhuman acts that go against human dignity not only in the human rights law but also in the laws of international human rights at the regional and international levels (Ranjbaran, 2005:147-184). On the other hand, in the penal laws (national or international), the war on terror, despite having no specific definition, has come to the fore in 12 international conventions[15] as well as several regional treaties calling for its prevention without allowing the use of torture.

In return, the international penal law, which does not specifically use the term terrorism, focuses on crimes against humanity, war crimes and genocide, and has rules that could perhaps be termed as “preventive torture” or “preventive and legal defense” for the sake of saving lives.[16] But such a definition or view cannot be correct, because it goes against the principles of the Rome Statute on Human Rights.[17] As for war crimes, a very important point has been taken into account: violent actions with the sole purpose of creating terror and fear among civilians are deemed to be war crimes (ICTY Judgemnet, 2003).

The common law, however, suffers from even more ambiguities that were exacerbated by the events that came after the September 11, 2001, attacks on the US soil. Once these operations were described as “a blow to global peace and security” and the state under attack was given the right to defense, the UN Security Council and the

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General Assembly paved the way for the legalization of war on terror. The ban on inhuman acts likewise became an internal affair that could be assessed independently by each and every state in the absence of international human rights tribunals.

In the face of the paradigm of war crimes that has globalized the ban on inhuman acts, the paradigm of war on terror might even nationalize these values or norms. This is because it can develop the definition of the right to defense without any redlines, allowing the governments to legalize torture—unless, as pursued by the UN General Assembly, the relationship between terrorism and torture is defined (in tandem and not in contrast) as "the war on terror and the ban on inhuman acts".[18]

A) Extending the Definition of "Right of Defense" to "War on Terror"

Resolutions 1368 and 1373 of the UN Security Council on September 12 and 28 in 2001 state that the September 11 terrorist attacks on US soil "just like any other international terrorist act, pose a great threat to the international peace and security." Resolution 1368 "reaffirms the inherent right of individual or collective defense." It has also been reaffirmed in its French text as an inherent right (Reaffirmant le droit naturel de legitime defense, individuelle ou collective). [19]

The definition of "preemptive defense" which was used by the US to justify its invasion of Iraq in 2003 (that also faced serious opposition from other nations) cannot be justified by the above-mentioned statement in general. Because: "The UN Charter bans

countries from indulging in such defense for the simple fact that it could be abused." (Cassese, 2005:1341)

All things considered, this subject matter has been reviewed by the High-Level Panel on Threats at the UN Security Council.[20] The panel has come to the conclusion that preemptive defense could always be foreseeable. To differentiate between the right of interference against a certain or imminent threat (UN Document, 2004: 189) (Preemptive Self-Defense) and the right of interference against an absolute and simple threat (Preventive Self Defense) the panel has come to the conclusion that international law recognizes the first solution and that there are conditions (such as proportionality) in such right. As for the second interference, if there were absolute justifications and reasons for carrying out preventive military operations (such as the threat of a nuclear attack by terrorists), and if there is sufficient evidence to back that up, they will have to be through the UN Security Council and approved by all member states threat (UN Document, 2004: 190).

Since there is this possibility that such right could be abused by the great or even smaller powers, many advocates of international law are against this idea but at the same time stress that it is necessary to build up on the definition of right of defense if terrorists gain access to atomic weapons and weapons of mass destruction (Cassese, 2005:1341). They also propose that the UN Charter must be amended to specifically define preemptive defense, plus set the exact preconditions and circumstances for enjoying such right before putting it in the charter. The conditions they have proposed include solid evidence, the proportionality of response to the threat, as well as establishment of an institution to examine these conditions and circumstances.[21]

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The provocative photos that were published from the Abu Ghraib Prison in Iraq showed that the problem does not end with the definition of the right of defense; rather the very nature of reaction under the name of right of defense needed to follow global regulations and norms. The international law states that human rights must be respected, adding that there is a difference between "the right to live" (which has no exception but if somehow related to defense, even murder is allowed) and "the right to human dignity" (which bans any kind of torture or inhuman act). Such a point should be part of the amendments made to the UN Charter that: Torture should never be used as a right of defense against terrorist acts (UN Document 2006).[22]

Just as importantly, many countries instead of pursuing and prosecuting foreign offenders on their own soil, expedite them to their countries of origin without knowing whether they could be tortured or not. This clearly draws attention to the extension of diplomatic guarantees on the sideline of international law. This could also be disputed, as it rids the governments of the national view on the campaign against terrorists and assumes global responsibility (Human Rights Watch, 2006). This subject matter also highlights the limits to the classical international law which has inevitably cast its shadow over the paradigm of war on terror. Indeed, realism will force us all to justify defense actions against terrorist attacks. This policy, however, could be simultaneously discussed as a fundamental international issue in the war on terror. And it is precisely here that the definition of war is in no way appropriate in this campaign simply because global terrorism requires global justice.

To overcome malaises that have come to the surface during the process of defining the war on terror, including affirmative defense

(which the International Crime Court (ICC) is not eligible to review), the only way of finding a solution has to be paying greater attention to the values. In other words, to legitimize defense, only its proportionality with the attack is not necessary, rather, defense has to be based on the accepted values and norms by the international community. This includes the equality of human dignity for all human beings.[23]

Justified defense cannot be reviewed as a separate issue from the globalization of crime and the reaction against it. Preemptive defense, likewise, cannot be prescribed without paying attention to the globalization of values related to ban on terrorism and torture.

B) Reconstruction of Relationship between War on Terror and Torture

The relationship between the war on terror and torture—although with difficulty—was for the first time built during discussions on human rights. This is because frameworks related to international obligations continue to be restricted unlike regional obligations that enjoy executive guarantees. For instance, the 2002 report by the Inter-American Commission on Human Rights states that torture and similar treatments are banned under all circumstances. Long before that, the European Convention on Human Rights (ECHR) had also stated in this respect that the member-states have no right whatsoever to take measures that might endanger democracy on their soil under the pretext of the right to fight espionage or terrorism (ECHR, 1978:49).

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In the earlier verdicts of this convention, just as justifications for inhuman treatments were on the rise in the campaign against terrorist acts, it was maintained that these conditions could in no way undermine the ban on torture (ECHR, 1961:49).[24] In 1996 and during the Chahal (ECHR, 1996) [25] hearing, the ban on torture under all circumstances was again emphasized. According to its verdict, the court stressed that governments should be determined to fight terrorist acts and, despite the behavior of the offender, any inhuman treatment, torture and similar conduct are banned. The court stressed that governments have no right whatsoever to extradite foreign suspects to their countries of origin if there is a possibility of their inhuman treatment.

Under the circumstances, the European human rights court considered and stressed diplomatic methods as a guarantee for banning torture. However, at the international level, the reports and consultancies offered by the UN Human Rights Commission, the Human Rights Committee and the Committee on Prevention of Torture are not binding in principle. Therefore, the international courts of justice have taken matters into their own hands and state their own approvals. For instance, the International Crime Tribunal in former Yugoslavia has said in one of its verdicts that: "The ban on torture for the governments is considered a common law or erga omnes and this means the obligations that each and every member of the international community has committed itself to it. In addition, the violation of such obligations by any member of the international community would mean the violation of the rights of other members. This gives them the right to demand and reprimand. They will also have the right to demand a stop to such violations." (ICTY Judgment, 1998: 151)

Based on the view of the International Crime Tribunal of Yugoslavia, “This principle has gradually become a binding law and even jus cogens which has the highest rank in the international law, even above the Law of Treaties and the Common Law.” (ICTY Judgment, 1998: 153)

The verdict likewise states that the ban on torture is one of the most fundamental standards in the international community and the member-states must stress it for its preventive effect and declare that the ban on torture cannot be breached.

The verdict also states another interesting point with regard to the paradigm of war on terror. In fact, the logic behind the verdict cannot be denied, since the ban on torture has a jus cogens value(Ranjbaran, 2005:147-184). Therefore, any administrative or judicial law that negates it should be scrapped (Ranjbaran, 2005:155). This indicates the restrictions imposed on the power of the state, unlike any other law of the United Nations. Still, the principles upheld by the international crime courts have respectively been re-stressed between 2004 and 2006 in the resolutions of the UN General Assembly.

Under the resolutions of “Human Rights and Terrorism”[26] and “Protection of Human Rights and Fundamental Freedoms While Countering Terrorism”,[27] the emphasis is on international cooperation among democratic institutions and protection of security and peace in the war on terror. At the same time, it has been declared that one of the main preconditions for such measures will have to be their alignment with the international law, in particular human rights, refugees and human rights laws. Just as importantly, it has been reiterated that some of these rights cannot be breached under any circumstances UN General Assembly Resolution 158, 2006).

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Such recommendations for fundamental human rights were repeated in several resolutions of the UN General Assembly and during the process of devising a global strategy to counter terrorism (UN Document 2006). The reemphasis weakened the position of the United Nations, suggesting that the world body only gave recommendations instead of obliging the member-states to respect the international law. Perhaps this explains why the UN changed its tone after revelations about prisoner abuse at Abu Ghoraib Prison in Iraq in 2004. For the first time in 2005, the UN Security Council vehemently stressed the need to respect the international law, especially concerning human rights, in the war on terror (UN Security Council Resolution 1625, 2005).

Given the above-mentioned points, it can be safely concluded that language and rhetoric alone cannot lead to a global consensus on banning torture. The September 11 attacks, the Abu Ghraib prisoner abuse, Guantanamo Bay Prison in Cuba, widespread insecurity in Iraq, the Gaza blockade by the occupying regime of Israel and the massacre of innocent Palestinian women and children are some of the images that cannot be easily erased from the memory of the world public opinion.

The international community for several years now has been watching and putting up with these barbaric and inhuman treatments. It is about time the international community clearly defined the theoretical principles for some of the most fundamental issues such as the ban on torture and used the means to implement them. At the global level, though, the consensus is that the existing structures and organizations are too weak to take matters into their own hands and have an impact. This explains the unique and indispensable position

of national rights institutions, especially if they have officially recognized these global values and norms as a binding stricture.

Conclusion

In summation, it is necessary to pay attention to a number of issues:

1. The paradigm of the war on terror can only be presented as a legal plan once it respects the conventional international norms and values such as the ban on torture and inhuman treatments, and also obliges to tag on certain rules. Inhuman treatments have gradually become redlines in the world and the costs of crossing them, if not in the short run, will have negative and unanticipated impacts on civil law in the long run.

2. Governments should realize that: When devising a new legal phenomenon, they will inevitably have to choose one of the two axes of human rights or the human rights law as conventional criteria.

International legal institutions and judicial systems should consider in their ratifications and verdicts that they have no right to indulge in inhuman treatments for justifying their campaign against crimes. As stressed in the Statute of Rome, no inhuman treatment is allowed against those who have been accused of committing crimes against humanity and genocide (the worst crimes ever known to human beings).

3. Based on the human rights law, there is no free zone or black hole in which human rights and inhuman treatments could be committed. Also, under no reason, is it possible to officially recognize in the

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international legal system what happened in places such as the Guantanamo Bay, Abu Ghraib and Gaza.

Therefore, governments are duty-bound to use diplomatic channels to remind the violating states of their duties. They could implement the famous rule of "indictment or trial" (aut dedare aut judicar) in order to force the deviating state to organize fair trials with juries for those accused of carrying out terrorist acts.

4. If the global community continues to put up with the inhuman treatments of certain states, it might as well help develop the paradigm of war with three branches of power across the world. To justify their invasions, some powers have taken advantage of the global war on terror and managed to get approval for military operations through resolutions issued by the UN Security Council.

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- UN Security Council Resolution 1625, September 14, 2005**.**

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Notes

[1] Resolution of 12 December 2001; Report on Terrorism and Human Rights, OEA/Ser. L/v/11.116.Doc.5.ev.lcorr, 22 October 2002 (Prohibiting Military Trials for Civilians).
[2] Resolution 2005/14 "Human Rights and Unilateral Coercive Measures".
[3] Military Commissions Act, Sept. 2006.
[4] Hamdan v. Rumsfeld, http://en.wikipedia.org/wiki/hamdan_v.Rumsfeld.
[5] United States Court of Appeals for the District of Columbia Circuit, Khaled v. United States of America, 8 Sept. 2005. And Also: Lakhdar Boumediene v. George W. Bush, 22 March 2006.
[6]Military Commissions Act, 948b. (G): "No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva conventions as a source of rights."
[7] Military Commissions Act, 948a. (1) (A): The term unlawful enemy combatant subject to trial by military commission under this chapter means: "(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who are not a lawful enemy combatant (including a person who is part of the Taliban, Al-Qaeda, or associated forces". Or "(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President and the Secretary of Defense".
[8] Syed Abbasin was detained in April 2002 in Gardiz. He had unknowingly taken several Taliban members from Kabul to Khost on his cab. After his detention, he was subjected to sleep deprivation, continuous interrogation, and kept in shackles in Bagram and another base in Kandahar. He had no access to any lawyer or a court under Chapter 3 of the Geneva Convention. After being transferred to the Guantanamo Base in Cuba, he was kept there for almost a year. During his last ten months, he was never interrogated. In April 2003, he was released without any charges or trial. He and his family members suffered a lot because of this ordeal, which could have never happened in the first place if the standards of international human rights law and the human rights law had been respected by his captors. (As quoted by Paul Hoffman, "Human Rights and Terrorism", p. 145.)
[9] Military Commissions Act, 950w. SEC.6. (3) (A): "As provided by the Constitution and by this section, the President has the authority for the United States to interpret the meaning and application of the Geneva Conventions and to promulgate higher standards and administrative

regulations for violations of treaty obligations which are not grave breaches of the Geneva Conventions”.

[10] 948r. “(b) A statement obtained by use of torture shall not be admissible in a military commission under this chapter, except against a person accused of torture as evidence that the statement was made.”

[11] Rasul v. Bush and Hamdi v. Rumsfeld.

[12] Using the term “Supreme Court” to refer to this entity does in no way mean recognizing any other state, except Palestine. This simply helps examine the verdicts passed by the lawyers and the fact that their verdict has been irrational.

[13] For more information, see: (Rogers, 2003: 53-54, 151-152)

[14] To learn more about these ambiguities, see: (Brodiver et al. 2004)

[15] For the list of these conventions, see: http://untreaty.un.org/French/Terrorism.asp

[16] See Article 31 (1), Notes C and D of the Articles of Association of International Crime Court.

[17] Under Article 21 (3) of the Rome Statute, the understanding and implementation of articles of association should not go against recognized norms in human rights.

[18] See: UN General Assembly Resolution 60/158 on February 28, 2006 entitled: Protection of Human Rights and Fundamental Freedoms While Countering Terrorism.

[19] The English text states: “Reaffirming the Inherent Right of Individual or Collective Self-Defense”. The French text states: “Reaffirmant le droit naturel de legitime defense, individuelle ou collective”.

[20] This high council was established in 2003 by Kofi Annan to propose solutions to complex issues regarding the threat to global peace and security. For more information, see: http://www.unausa.org/site/pp.asp?c=fvKRI8MPJpF&b=401476

[21] In preemptive defense, the government uses force to deter any possible future attack by another state. In the preventive defense, there is no imminent threat and the government has the right to use force against any potential threat. It also adopts an offensive rather than defensive approach. Those in favor of the second type of defense in the US are of the opinion that the best defense is a good defense. Of course, the supporters of both types of defense have tried to justify their views based on the UN Charter’s articles 2, 42 and 51.
For more information, see: (Mojarrad, 2007: 26-48); (Ashlaqi, 2007: 71-80).

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[22] Also see: (Ranjbaran, 2005)
[23] Article 1 of the Universal Declaration of Human Rights states: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience, and should act towards one another in a spirit of brotherhood."
[24] Also see: Ireland v. United Kingdom, Judgment of 28 January 1978, p. 49
[25] Also see: Ocalan v. Turkey, Judgments of 12 March 2003 and 12 May 2005.
[26] "Human Rights and Terrorism" (A/RES/58/174 and 59/195).
[27] "Protection of Human Rights and Fundamental Freedoms While Countering Terrorism" (A/RES/58/187 and 60/158)