The Paradigm of the War on Crime

Legitimating Inhuman Treatment?

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Abstract

Since 11 September 2001, a new paradigm has developed in criminal law. Parallel to the idea of the ‘war on terror’, a paradigm based around ‘war on crime’ has emerged. Inevitably, however, a paradigm of war leads to abandoning scientific approaches based on a legal-moral vision (crime, guilt and punishment) in favour of a merely pragmatic vision, which associates national security with social defence. Based on an unclear concept of dangerousness, presumed by simple membership in a group labelled ‘enemy’, the goal is to neutralize, or even eliminate, the criminal/deviant. When combined with a denial of international protections, deconstructing national criminal law thus runs the risk of pushing a black hole through the rule of law. Many have criticized such a paradigm; however, the author points out that the paradigm of the war on crime (and more generally the war on terror), provided that it respects international law, can be useful, because it shows the need to overcome the binary opposition between war and peace, as well as between war crimes and ordinary crimes. Nonetheless, it must be clear that this paradigm can only be one of transition. To overcome the war–peace dichotomy in a global community and to reconstruct the relationship between terrorism and torture, neither a ‘war crimes’ nor a ‘war on crime’ paradigm is truly sufficient. Only through the amplification of a paradigm of ‘crime against humanity’ (itself unstable and evolving but free from the war metaphor) can we reconstruct humanity as a value and make it the cornerstone of any legal system.

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1. General

Unlike war crimes, which constitute a legal category in national as well as international law, the ‘war on crime’ is first and foremost a political slogan. Targeting crimes that move public opinion (drugs, organized crime, bribery and terrorism), it is often accompanied by compassionate references to victims and strong language regarding criminals and zero tolerance. As such, it has become a metaphor designed to popularize harsh repressive measures. But it is not a recent phenomenon. Democratic European countries such as the United Kingdom, Italy, Germany, then Spain and France, to cite the main examples, have deployed this strategy more or less explicitly, depending on the era. However, it took the shock of September 11 to free the war metaphor from ethical constraints and transform it into a paradigm.

Considered the equivalent of an act of armed aggression, the terrorist attacks on the Twin Towers were the starting point for the implementation in the United States, under the name ‘war on terror’, of an entirely new paradigm: new vocabulary (unlawful enemy combatants), new institutions (neither ordinary nor military courts, but military commissions), new value system (despite the Abu Ghraib prison scandal, the Military Commissions Act of October 2006, which is more restrictive than the War Crimes Act of 1996, limits the prohibition against torture to the most severe cases and gives the president of the United States authority to interpret the Geneva Conventions).

This new paradigm has been progressively adopted by most countries, democratic or not, and seems to lead straight from the war on crime to a ‘war on human rights’.

For example, self-defence has been enlarged to include preemptive, or even preventive, defence. But if each country is allowed to determine the methods of defence, all means, even the most inhuman, are legitimated, in the name of effectiveness: ‘there is growing evidence that torture of suspected terrorists is already an element of the global war on terrorism.’ This paradigm, therefore, embodies a two-fold rupture with criminal law and human rights law. By borrowing elements from the law of war, it tends to militarize national criminal law, turning it into a criminal law of the enemy.

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prohibitions enshrined in both international humanitarian and human rights law, to *renationalizing* inhuman treatment.

2. Militarizing National Criminal Law

‘Militarizing’ because the strength of the slogan ‘war on crime’ lies, in fact, in blurring the lines between criminal law and the law of war. A new paradigm is thus constructed, but is incomplete: rather than creating a complete and coherent system, borrowing from the logic of war tends to transform the legal instrument into a weapon. As Francesco Palazzo points out, the entire penal system is then progressively deformed, or deconstructed, as the concept of ‘enemy’ is broadened.6 When the guarantees offered not only by criminal law, but also by international humanitarian law, are denied, such deconstruction poses the very real danger of pushing a ‘black hole’7 through the rule of law, despite supreme court efforts to plug it up.

A. Borrowing from the Logic of War

Borrowing from the logic of war leads to two consequences: de-judicializing the procedure and de-individualizing the offender.

De-judicializing, because the logic of war entails a transfer of powers: the power to investigate, usually entrusted to police services checked by judicial authorities, is transferred to the secret services controlled by the army, while the powers to place someone in detention, to find guilt and pronounce a sentence, are transferred from ordinary to military courts, or even to military commissions. Whether one considers the principle of judicial independence and impartiality or the rules of a fair trial, the effect in Europe and, more clearly, in the United States since 11 September 2001, is indeed that of de-judicialization of the criminal justice system.

This effect may seem more radical when compared to the Anglo-American liberal ideology based on the distrust of the centralized state — with one consequence being the so-called accusatory criminal procedure, in which private actors may play an important role — than in the Roman-Germanic, state-dominant context, which favours a so-called inquisitory procedure directed by public actors. This difference has led Antoine Garapon to suggest that American democracy is the victim of ‘its own protections’; that the legalization of torture is the inevitable consequence of a hyper-legalism rooted in a rigid morality that will accept no transgressions.8 Contrasting this rigidity to the

6 Palazzo, *supra* note 5.
more accommodating French model, Garapon sees the war paradigm as the paradoxical effect of a culture that is more virtuous and better protects freedoms.

And yet, the different evolution of the British system, also of liberal inspiration and endowed with a procedure based on the accusatory model, shows that one should not underestimate either the political factors (a labour government on the one hand, republican on the other), or the legal factors, and more precisely, the impact of international law. While the United Kingdom has incorporated the European Convention on Human Rights (EConvHR) into its positive law, the resolutions of the Inter-American Commission on Human Rights (IACHR)\(^9\) and the UN Sub-Commission on the Promotion and Protection of Human Rights,\(^10\) as well as the observations of the Committee against Torture (May 2006) and the Human Rights Committee (July 2006) have remained a dead letter in the United States.

Whatever the reasons, it is a fact that American law provides the most complete illustration of the danger of deconstructing the criminal justice system of a democratic state by instituting a war-on-crime paradigm and, more precisely, by establishing administrative military commissions distinct from true criminal courts, be they ordinary or military.\(^11\) The executive order of 13 November 2001 announced that trials by military commissions would be ‘full and fair’, but the implementing regulations omitted to set out any protective rules. Such disorder ensued that in 2004, two prosecutors charged with representing the United States before the commissions preferred to resign. In 2006, a lieutenant colonel in the Marines, detailed to represent one of the detainees, told the Commissioners: ‘What I desperately want to know here is: What are the rules?’\(^12\) Whether it concerns organizing the hearings, the choice of an attorney or the rules of evidence, it took the Supreme Court’s intervention for the rules to be set out in legislation, even if not made perfectly clear, and the rule of law partially saved. But only partially, because no attempt has been made to address the other aspect of borrowing from the logic of war: the de-individualization of the offender, be it with respect to finding guilt or deciding on sentencing.

In effect, the war-on-crime paradigm shares this important characteristic with war crimes: the rapport between the criminal and the norm is

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12 Ibid., at 42 (electronic version).
inversely proportional. In line with Hannah Arendt’s observation on Eichmann’s normality — ‘much more terrifying than all the atrocities put together’ — Hélène Dumont has underscored the fact that war criminals ‘are obedient rather than deviant, as we willingly represent criminals to be.’ Obedient, and sometimes heroes in the eyes of their countrymen and women. Thus, like military leaders, the Basques of the ETA, or members of other liberation movements, will benefit from the valorizing dynamic created by the vocabulary of war, but in a domestic, rather than international, criminal justice context. Because the logic of war is not accompanied, as one might expect, by an internationalization of law. The changes it brings about are limited to domestic law, reflect a shift in focus from the guilt of the criminal (deviation from normativity) to the dangerousness of the deviant (deviation from normalcy). This shift characterizes, in turn, a move away from the liberal or authoritarian models of criminal justice, which separate the two concepts, towards the totalitarian model, which combines them.

In sum, the paradigm of war leads to abandoning the dogmatic, juridico-moral vision (crime, guilt and punishment) in favour of a pragmatic vision associating national security with social defence. Based on an imprecise concept of dangerousness, which is presumed by simple membership in a group labelled ‘enemy’, the goal is to neutralize, or even eliminate, the criminal/deviant. When combined with a denial of international protections, deconstructing national criminal law thus runs the risk of pushing a black hole through the rule of law.

**B. A Black Hole in the Rule of Law?**

Initially, the Bush administration was undecided as to how to classify the September 11 attacks: should they be considered as acts of war, committed by a group of transnational terrorists sponsored by states, or as criminal acts committed by Osama Bin Laden, the 19 hijackers and their accomplices? This uncertainty as to the distinction between war and crime led to uncertainty as to the legal status of the terrorist: considered both an enemy (logic of war, no domestic legal guarantees) and a criminal (logic of crime, international humanitarian law inapplicable), the terrorist, labelled ‘unlawful combatant’, was placed beyond the reach of the law. Since 2004, however, the Supreme Courts of two countries (the United States and the United Kingdom) deeply committed to the ‘war on terror’ have tried to reintroduce guarantees taken from both criminal and international law. However, in their attempt to thereby contribute to the construction of a paradigm compatible with the rule of law, they have been caught up in a sort of power struggle with the legislator.

(government or parliament) and have had trouble clarifying the status of the terrorist combatants.

Shortly after the decisions in *Rasul, Padilla* and *Hamdi* (2004), which require that all detainees, citizens and non-citizens alike, have access to at least some ‘neutral’, if not necessarily judicial, review of their status, the Detainee Treatment Act of 30 December 2005 was adopted in the United States. At first glance, this statute seems to extend the Supreme Court’s decisions by prohibiting cruel, inhuman or degrading treatment of any person detained by the United States or under the control of the United States government, whatever their nationality or place of detention [section 1003(b)]. In reality, however, the impact of this text, which is not retroactive, remains uncertain, as nothing indicates the contents of the prohibition it institutes or the penalty for violating it. In addition, when he signed the text into law, President Bush suggested that its implementation could be subordinated to executive discretion. In response, he drew the obviously still-unanswered question: ‘Can the President be Torturer in Chief?’ 16 The *Hamdan* decision of June 2006, which refers to the Geneva Conventions, also met with a legislative riposte, in the form of the Military Commissions Act of October 2006. This statute does give the President discretion to interpret the law — not the act itself, but international humanitarian law (the Geneva Conventions).

The scenario is comparable in the United Kingdom. In 2004, the House of Lords held that the antiterrorism law of November 2001 violated the EConvHR by discriminating between British citizens and non-citizens. 17 The response was quick in coming: The Prevention of Terrorism Act of 11 March 2005 broadens the repressive regime to cover all persons, regardless of their nationality. Later in 2005, the House of Lords would again have to issue a reminder regarding the protections guaranteed by the rule of law, this time by censuring the use, as evidence, of information gained through torture. 18 However, the British Parliament’s margin of manoeuvre is much more limited than that of the United States Congress due to the international commitments of the United Kingdom, and the judges arguments are more directly drawn from international law. In particular, they may now rely on the EConvHR, which has been directly applicable since the adoption of the Human Rights Act of 1998, which became effective, quite opportune, in 2000.

But reintroducing guarantees, even international ones, is not enough to stabilize jurisprudence and legislation. A new, coherent paradigm must be constructed to characterize this criminality that is neither civilian nor military, as the Supreme Court of Israel tried to do in its decision of December

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2006 on targeted killings. In that decision, the Court explicitly refused to consider the terrorists as outlaws:

... unlawful combatants are not beyond the law; they are not outlaws. God created them as well in his image; their human dignity as well is to be honoured; they as well enjoy and are entitled to protection, even if most minimal, by customary international law.

It thus derives the obligation to recognize a third category, between civilians and combatants, and tries to define a true status for civilians who are unlawful combatants by looking for the fundamental principles of this status in international law (Protocol 1 to the Geneva Conventions, which was not ratified by Israel but is considered as representative of customary law).

Emphasizing that the International Criminal Tribunal for the former Yugoslavia (ICTY) was content to define a civilian as the opposite of a combatant, the judges invoke Article 51(3) of Protocol 1, which states that ‘[c]ivilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities’. From this, the Court derives the following definition: a civilian unlawful combatant is one who takes part in hostilities, directly, for such time as he or she does so. The subject of a long explanation, this definition is difficult to apply: one must abandon an all-or-nothing logic in favour of a more subtle and uncertain gradation, which in turn requires looking to the principle of proportionality and its application in international customary law. The analysis, therefore, includes several examples ranging from ICTY and International Court of Justice (ICJ) case law to that of regional courts. To show that ends do not justify the means (and giving us another example of the international dialogue among judges), the Israeli Court does not hesitate to cite both the European and Inter-American Courts of Human Rights.

The positive contribution of this decision is the definition of this ‘third category’ between civilians and combatants. Building on both national and international law, the Court begins to construct a paradigm that differs from both national criminal law and the law of war. But this contribution is limited: in the end, the judges come back to the notion of a balance between security and liberty, which, without a supranational check, is an issue of purely national discretion.

19 HCJ 769/02 The Public Committee against Torture in Israel v. Gov’t of Israel et al., judgment of 13 December 2006.
20 Ibid., § 25.
21 ICTY Judgment, Blaškić (IT-95-14-T), Trial Chamber, 3 March 2000, § 180.
22 See Public Committee against Torture v. Israel, supra note 19, § 30.
23 ICTY Judgment, Kupreškić (IT 95-16-T), Trial Chamber II, 14 January 2000.
26 ECHR, McCann et al. v. United Kingdom, judgment of 27 September 1995 (condemning the killing of two IRA members by the British police).
It is, therefore, interesting to compare this decision with Michel Rosenfeld’s theoretical postulate published shortly before the decision came down. Noting that none of the decisions rendered between 2004 and 2005 by the Supreme Courts of the United States, the United Kingdom or Israel provided an entirely satisfactory response, Rosenfeld insists that the situation born of terrorism corresponds neither to a state of crisis or emergency calling for the application of the law of war, nor to an ordinary situation to which criminal law applies. Instead, he suggests calling this new situation a time of ‘stress’.\(^\text{28}\) To illustrate his point, he cites the opinion of Lord Hoffmann who, recalling that the United Kingdom survived the Second World War, emphatically insisted that terrorism does not threaten the life of the nation: ‘Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al Qaida.’\(^\text{29}\)

In response to situations of ‘stress’, Rosenfeld suggests distinguishing the paradigm of the war on terror from that of police power law, which is sometimes associated with the ‘war on crime’. Characterized by its reference to the need for proportionality between threat and response and by balancing security and liberty, this paradigm, which he conceives as a ‘dynamic one, evolving and adapting to the needs and problems of the war on terror’, would allow situations to be resolved on a case-by-case basis.

It is an attractive theory, because it avoids the impossible choice between the logic of war and the logic of peace, but it is only partly convincing, precisely because it retains the war metaphor with its heavy emotional charge. Moreover, like the Israeli Court, it leaves the proposed principles to the discretion of each national court, and his analysis, which is purely constitutional, downplays the importance of the differing degree to which international law is incorporated into different countries’ national law. Yet, these differences are radical among the United Kingdom, which is bound by both European and global international commitments, Israel, which is very stingy with its ratifications of international conventions but takes care to prove its good will by respecting international customary law and the United States, a superpower that equates the rule of law with the guarantees provided by its own constitution. In other words, the method proposed, which is based on balancing security and liberties and may have inspired the Israeli Court’s decision, avoids the black hole, but remains essentially national and provides no answer for eventual value conflicts. This is particularly worrisome in the context of the renewed debate — one we had thought long over — on the use, or even legitimization, of torture. Because inherent in the paradigm of war (on terror or on crime) is the danger that, in renationalizing the prohibition on inhuman treatment, we renounce the construction of a community of values.


3. Renationalizing ‘Universal’ Values

A. General

Torture is prohibited by international, regional and worldwide conventions. This prohibition, therefore, expresses the recognition, on a planetary scale, of the equal dignity of every human being. If ever a value of a universal nature existed, it is surely, then, the equal dignity enshrined in Article 1 of the Universal Declaration of Human Rights (UDHR). The publication in 2004 of photographs revealing certain aspects of the American treatment of prisoners in Iraq\(^3\) called the universalism of this prohibition into question in a brutal way. In the name of feasibility, the war on terror would entail the sovereign appreciation by each state of acceptable combat methods, regardless of the numerous instruments designed to protect human rights: ‘perhaps more alarming than the reports on factual recourse to torture itself are the attempts to justify torture legally . . . [T]he unthinkable is not only being thought but openly discussed’.\(^3\)

Morally sensitive, the issue is legally complex, arising right where various, highly diverse normative ensembles intersect. On one side lies the human rights regime: the prohibition of torture, an extreme form of inhuman or degrading treatment, is guaranteed not only by human rights instruments, but also by international humanitarian law, including norms that are at once regional and global, general and specific, binding and non-binding. On the other side lies national and international (interstate) criminal law: the repression of terrorism is guided, in the absence of a comprehensive definition, by 12 international conventions\(^3\) and various regional instruments that organize interstate cooperation to prevent and punish certain specific acts qualified as terrorist crimes, but without addressing the issue of torture. Conversely, international criminal law (supranational), which does not directly target terrorism but addresses war crimes and crimes against humanity, could be interpreted as allowing so-called preventive torture (designed to save lives) as an affirmative defence similar to self-defence, the defence of others or necessity [Article 31(1)(c) and (d) ICCSt.]. But this interpretation cannot be retained, as it contradicts the rule of interpreting the ICC Statute in accordance with human rights [Article 21(3) ICCSt.].\(^3\)

This is an important point in view of the recent penalization, as a war crime, of acts of violence committed with the ‘primary purpose of spreading terror among the civilian population’.\(^3\) Treated in Article 3 of the ICTY statute as a violation of the laws and customs of war, ‘[t]error as a crime within

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31 Jessberger, supra note 4, at 1060.
33 See Jessberger and Gaeta, supra note 4.
34 ICTY Judgment, Galić (IT-98-29-T), Trial Chamber I, 5 December 2003, § 133 (Nieto Navia, J., dissenting).
international humanitarian law was made effective...by treaty law’.\(^{35}\) However, the ICTY does not consider itself bound to decide the question whether or not ‘the crime of terror also has a foundation in customary law’.\(^{36}\) Customary law is all the more uncertain as everything has happened since 11 September 2001 as if the situation were the opposite. By qualifying the terrorist attacks as a threat to international peace and security and thus authorizing the self-defence of the aggressed state, the UN Security Council and General Assembly made it possible to legitimize the war on terror, while the prohibition of inhuman treatment may find itself renationalized as each state decides, in the absence of a world court of human rights, on the means and the strength of the counter terrorist response.

Contrary to the paradigm of war crimes, which universalizes the prohibition of inhuman treatment, the paradigm of the war on terror may thus lead to a renationalization of values: expanding the concept of self-defence to terrorism, without circumscribing it by a reference to common values, can indirectly lead to leaving it up to each state to legitimate torture. Unless, as the General Assembly is trying to do, we reconstruct the relationship between terrorism and torture around common values by associating, instead of contrasting, the fight against terrorism and the prohibition of inhuman treatment.\(^{37}\)

B. Expanding Self-defence to Terrorism

The resolutions adopted by the UN Security Council on 12 and 28 September 2001 (S/RES/1368 and 1373, respectively) are unambiguous: the terrorist attacks of September 11, ‘like any act of international terrorism, constitute a threat to international peace and security’. Resolution 1368 then recognizes the ‘inherent right of individual or collective self-defence’, which is not only reaffirmed in Resolution 1373, but even qualified, in the French version at least, as a ‘natural right’.\(^ {38}\) Preventive defence, however, which the United States had pushed for to justify the strikes against Iraq in 2003 but which met with strong resistance, particularly in France, was finally not invoked: ‘[i]t seems correct to conclude that this form of self-defence is still prohibited by the Charter, particularly given the risk of abuse’.\(^ {39}\)

The issue has nonetheless been discussed, and the High-level Panel organized by the Security Council considers that preventive self-defence is already possible. Distinguishing between the right to intervene in the event of an

36 Ibid.
37 See, namely, GA Res. 60/158 of 28 February 2006, ‘Protection of human rights and fundamental freedoms while countering terrorism.’
38 Compare the English version, which reads, ‘Reaffirming the inherent right of individual or collective self-defence . . .’ with the French: ‘Réaffirmant le droit naturel de légitime défense, individuelle ou collective . . .’
imminent or proximate threat (anticipatory self-defence)\textsuperscript{40} and the right to intervene based on pure threat (preventive self-defence), the Panel claims that international law recognizes the first, provided several conditions (namely, proportionality) are met. As to the second: ‘if there are good arguments for preventive military action’ (for example, in the case of terrorists armed with a nuclear weapon), ‘with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to’.\textsuperscript{41} Fearing possible abuse on the part of major and medium-sized powers, Antonio Cassese has expressed reservations about this analysis, but recognizes that it is no doubt necessary to expand the notion of self-defence today, when technology, particularly nuclear technology, can put weapons of mass destruction in the hands of terrorists. He, therefore, proposes to modify the Charter to authorize preventive self-defence, but only after defining more precisely the conditions for, and limits on, its exercise, such as proof of threat or proportionality of the riposte, and providing for arbitration procedures and reparations in the event of a violation.

But Abu Ghraib illustrates that the problem is not only one of self-defence, but also of the response itself, that is, the substantive requirements of self-defence with regard to universal values. International instruments for the protection of human rights admit of a major difference between the right to dignity that underlies the non-derogable prohibition against torture and inhuman or degrading treatment and the right to life, which does not preclude killing in self-defence, as long as proportionality is respected. This reminder is necessary if the Charter is going to be modified specifically to allow self-defence against terrorist attacks, since torture is developing in the context of counterterrorism measures.\textsuperscript{42} In particular, numerous governments, instead of pursuing and trying foreign suspects themselves, prefer to transfer them to their country of origin or to a third country, despite the risk of torture. Thus, on the fringes of international law, the practice of ‘diplomatic assurances’ has developed. This highly contestable practice, which consists of promises designed to free the transferring state from liability,\textsuperscript{43} illustrates the difficulties arising from the internationalization of terrorism and the insufficiency of purely national responses. At the same time, it highlights the limits of classical international law, to which the war-on-terror paradigm inevitably leads. To be sure, realism invites us to consider certain terrorist attacks as aggressions justifying an act of defence, but it must also lead to tackling head on the issue of the globalization of the struggle against terrorism. This is why the concept of war is too limited: global terrorism calls for global justice.

\textsuperscript{41} Ibid., § 190.
\textsuperscript{42} See ‘Torture in the context of counter-terrorism measures’, in Torture and other cruel, inhuman or degrading treatment, Note by the UN Secretary-General, UN Doc. A/61/259, 14 August 2006.
\textsuperscript{43} Human Rights Watch, Questions et réponses à propos des «assurances diplomatiques» contre la torture, November 2006.
To overcome the problems encountered in trying to define terrorism, including its affirmative defences (which blocked the attribution of jurisdiction to the ICC), the only course to take seems to be to agree on values: it is not enough for the defence to be proportional to the attack, it must also be compatible with the values that found the global community, beginning with the equal dignity of all human beings. This dignity is violated not only by a blind terrorism that takes its victims by chance, totally depersonalized, but is also buffeted by counter-terrorism measures when these are accompanied by torture or other inhuman or degrading treatment, or by these terrifying global spectacles such as the arrest, then execution, of Saddam Hussein.

Self-defence cannot be separated from the globalization of crime and of repression. But preventive defence cannot be permitted without, at the same time, reaffirming the universalism of the values underlying the prohibitions against both terrorism and torture.

C. Reconstructing the Relationship between Terrorism and Torture

A relationship, albeit a difficult one, between terrorism and torture was first established through human rights litigation. Because enforcement mechanisms are still limited at the global level, however, the main binding applications are regional. For example, both the 2001 resolution of the Inter-American Commission mentioned above and this Commission’s ‘Terrorism and Human Rights’ report of 2002 remind states that the American Convention on Human Rights prohibits torture and similar treatment in all circumstances. Much earlier, however, the European Court on Human Rights (ECHR) confronted this dilemma:

The Court, being aware of the danger such a law poses of undermining or even destroying democracy on the ground of defending it, affirms that the Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate.44

In its very first decisions regarding cases in which terrorism had been raised as an exceptional circumstance justifying derogatory measures (under Article 15’s escape clause), the Court emphasized that this clause does not apply to the prohibition of torture and inhuman or degrading treatment.45 In 1996 in the Chahal46 case, it issued a strong reminder regarding the absolute prohibition on torture:

The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading

44 ECHR, Klass v. Germany, judgment of 6 September 1978, § 49.
45 ECHR, Lawless v. United Kingdom, judgment of 1 July 1961; Ireland v. United Kingdom, judgment of 28 January 1978.
46 ECHR (Grand Chamber), Chahal v. United Kingdom, judgment of 15 November 1996; see also Öcalan v. Turkey, judgments of 12 March 2003 and 12 May 2005.
treatment or punishment, irrespective of the victim’s conduct. . . . Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion. . . . In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration.47

In this regard, the ECHR examined diplomatic assurances as guarantees against torture and rejected them, as it was ‘not persuaded that the above assurances would provide Mr Chahal with an adequate guarantee of safety.’48 Such human rights litigation remains limited, however, to just two regions (Europe and Latin America).

At the global level, the observations and recommendations of the UN Commission on Human Rights, the Human Rights Committee and the Committee against Torture are not binding. It, therefore, falls to the international criminal tribunals (ICTs) to lead the way, and they were the first to affirm that:

the prohibition of torture imposes upon States obligations erga omnes, that is, obligations owed towards all the other members of the international community, each of which then has a correlative right. In addition, the violation of such an obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued.49

The major consequence, according to the Tribunal, is that this ‘principle has evolved into a peremptory norm or jus cogens, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even ‘ordinary’ customary rules’ (§ 153). It considers that the prohibition against torture, having ‘now become one of the most fundamental standards of the international community’, must ‘produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate’ (§ 154) and esteems that this dissuasive effect must be sought both at the individual and the interstate level.

But it is precisely at this level that the principle can run into the paradigm of the war on terror. The reasoning is irrefutable: if the prohibition against torture has jus cogens value, it must ‘internationally de-legitimise any legislative, administrative or judicial act authorising torture’ (§ 155). Indeed,

[it] would be senseless to argue, on the one hand, that on account of the jus cogens value of the prohibition against torture, treaties or customary rules providing for torture would be null and void ab initio, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law.

48 Ibid., § 105.
49 ICTY Judgment, Furundžija (IT-95-17/1-T), Trial Chamber, 10 December 1998, § 151.
If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects discussed above and in addition would not be accorded international legal recognition’ (§ 155).

This is certainly a limitation of state sovereignty, which is why this case law has no equivalent in the more general context of the United Nations. However, the principles set out by the ICTs were recalled in four resolutions adopted one after the other by the General Assembly between 2004 and 2006: ‘Human rights and terrorism’ (A/RES/58/174 and 59/195) and ‘Protection of human rights and fundamental freedoms while countering terrorism’ (A/RES/58/187 and 60/158). For example, while Resolution 60/158 (28 February 2006) acknowledges that counter-terrorism measures make an ‘important contribution . . . to the functioning of democratic institutions and the maintenance of peace and security . . .’, it conditions this contribution on the measures’ being ‘consistent with international law, in particular human rights law and refugee and humanitarian law’. It then reaffirms that certain rights are non-derogable, no matter what the circumstances.

These reminders are repeated in the General Assembly resolution regarding the United Nations global counter-terrorism strategy,50 but the effect of all the repetition seems to be to emphasize the weak position of the United Nations, which can only recommend, rather than impose, respect for international law. Nevertheless, the tone changes in 2004, following the revelations regarding Abu Ghraib. The issue is no longer, as in 2001, one of combating terrorism ‘by all means’, but of taking measures that are ‘consistent with international law, in particular human rights’, which are cited explicitly for the first time in the Resolution of 14 September 2005 (S/RES/1625).

In sum, language alone cannot give rise to a universal prohibition, it takes visual shock: transmission in real time across the globe burns images into our collective memory. Be it the Twin Towers in New York, the cages in Guantánamo, the humiliated prisoners of Abu Ghraib or, more recently, the arrest and execution of Saddam Hussein, images can create a feeling of belonging to the same humanity. We are ‘all Americans’, as the headline of the Le Monde read on 12 September 2001. Now, a few years later, we are ‘all Iraqis’, as, for a long time now, we have all been Israelis and Palestinians. In other words, we are all part of this world community that is being built on the refusal to tolerate inhuman treatment.

But pictures are not enough either. It is the role of law to give us the conceptual tools to found a true prohibition of inhuman treatment, then to make it enforceable. In the end, it is the same process as that which we recently saw in France: after emotions were stirred by pictures of homeless people huddled in their tents, we are working to create the legal means necessary to render the right to housing enforceable, that is, a mechanism that will enable the poorest of the poor to obtain housing. At the global level, we know how weak the normative and institutional mechanisms are. This is why national

law and national institutions continue to be absolutely necessary — provided, of course, that they include and respect the hard core of shared values that we call non-derogable rights.

In conclusion, two observations are in order:

(1) Provided it respects international law, the paradigm of the war on crime, or on terror, can be useful, because it shows the need to overcome the binary opposition between war and peace, as between war crime and ordinary crime. But this need is not only circumstantial (by reference to circumstances of ’stress’ slipped between the exceptional circumstances of states of emergency or crisis and daily life), it is also structural, linked to the globalization of criminal and anti-criminal practices and the universalization of values, because inhuman treatment begins to be perceived as a universal prohibition.

(2) However, this paradigm can only be one of transition. To overcome the war–peace dichotomy in a community spread over the planet and to reconstruct the relationship between terrorism and torture, neither war crimes, nor the war on crime, are sufficient paradigms. We must, through the paradigm of the crime ’against humanity’, itself unstable and evolving but free of the war metaphor, construct humanity as a value.