Chapter II

End Justifies the Means? – Post 9/11 Contempt for Humane Treatment

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1. Introduction

In 1928 Supreme Court Justice Louise D. Brandeis warned:

Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious.1

Nearly eighty years after, one wonders how deeply relevant are those words in the context of the United States led “global war on terror.” Many Americans and foreigners alike are perplexed, if not outraged by the practices introduced and implemented as a part of anti-terrorism measures aftermath the September 11, 2001 terrorist attacks. Sadly, the US is not the only state that conducts its counter-terrorist operations with sometimes subtle but persistent disregard of international legal standards and a respect for the human dignity, considered only an awkward impediment in the war against terrorists, where security is the overriding factor.

From the accounts of the widespread practice of arbitrary arrests all over the world, the approved and systematic use of torture either directly or by proxy, the use of inhumane detention conditions as a part of the “non-cooperation” punishments for detainees, accounts of humiliation and de-dignifying treatment of prisoners including desecrations of religious symbols to the five-year or longer incarcerations without any or appropriate judicial oversight, not to mention learning about charges, getting a lawyer or getting a trial for that matter – we faced the whole spectrum of

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violations of international standards. Even rough estimations of “war on terror” detainees indicate that as many as 70,000 persons\textsuperscript{2} could be imprisoned all over the world, including children and women and it is very likely they all experienced some of these practices at some point of time. These estimations can only be rough as the U.S. and other states’ authorities have failed to inform the public on exactly how many detainees they keep in custody, whether in Afghanistan, in Iraq, or in the various states all over the world.

Traditionally, the counter-terrorism measures adopted by the states, internationally or nationally, were positioned in the law enforcement domain, where the dominating legal framework was that of human rights standards. Even if in numerous cases, the scale and intensity of violence emanating from the terrorist attacks might have reached a threshold of armed conflict (like in Chechnya or in the Northern Ireland conflicts), it was only the U.S. government declaring a campaign against the terrorist organizations and networks, like Al Qaeda in 2001, a first one to regard this fight as an armed conflict. Although a disputed determination, this view was subsequently recognized by the U.S. Supreme Court in the \textit{Hamdan} case.\textsuperscript{3} The Justices, arguably, agreed with the government that the laws of armed conflict were not only relevant in the war with Taliban authorities in Afghanistan (a part which is rather uncontested) but also in an ongoing fight against Al Qaeda and other terrorist organizations and networks.\textsuperscript{4} The Court recognized this conflict as non-international in character by relying on a literate reading of Article 3 in conjunction with Article 2 common to all four 1949 Geneva Conventions.\textsuperscript{5} The controversial reading of Article 3, thus far interpreted in a spirit and intention to be applicable in the civil wars, colonial or religious conflicts; being now also relevant


\textsuperscript{3} Hamdan v. Rumsfeld\textsuperscript{548}, U.S. 196, (June 29, 2006).

\textsuperscript{4} \textit{Id.} at 69ff.

\textsuperscript{5} Article 3 common to all four 1949 Geneva Conventions, see infra note 7. The Article in parts reads as follows:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’ by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;…

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;’