The Obligation of States to Comply with Imperative Normes of International Law in the Context of International Security Insurance

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The initiating of serial conflicts at the beginning of the XXI century — Afghanistan (2001), Iraq (2003), then Arab „spring" and „asymmetric" warfare initiated by Russia in Ukraine, resulting in the occupation of the Crimea, the establishment of the so-called Daesh state and antiterrorism fight in the Near East changed the concept of „armed conflict," and the experts had to expose their opinion on the applicability of humanitarian international law in the context of the „war against terrorism". We cannot deny the fact that international security is unimaginable in non-compliance with imperative rules, such as those within jus in bello. In front of the danger from the side of new forms of „warfare", which by its features attempt to introduce a new paradigm in international relations, where the international community has proven to be not ready to respond promptly to those who partially or completely ignore the recognized war laws and customs, proposed a component part of customary international law.
***Key words**: international security, armed conflict, antiterrorism fight, prisoner of war, torture, transitional justice.*

Obligaţia statelor de a respecta normele imperative de drept internaţional în contextul asigurării securităţii internaţionale
Declanșarea unor conflicte în serie la începutul secolului XXI — Afganistan (2001), Irak (2003), apoi „primăvara" arabă și războiul „asimetric" declanșat de Rusia în Ucraina, soldat cu ocuparea Crimeii, instituirea așa numitului stat Daesh și lupta antiterro din Orientul Apropiat au schimbat conceptul de „conflict armat", iar experţii au trebuit să se expună referitor la aplicabilitatea dreptului internaţional umanitar în contextul „războiului contra terorismului". Or, nu putem nega faptul că securitatea internaţională este inemaginabilă în nerespectarea unor norme cu caracter imperativ, cum sunt cele din cadrul jus in bello.
În faţa pericolului din partea noilor forme de „războaie", care prin caracteristicile sale încearcă să introducă o nouă paradigmă în relaţiile internaţionale, comunitatea internaţională s-a dovedit a nu fi pregătită pentru a da un răspuns prompt celor ce ignoră parţial sau totalmente legile și obiceiurile de război recunoscute, a propos parte componentă a dreptului internaţional cutumiar.
***Cuvinte-cheie**: securitate internaţională, conflict armat, luptă antiterro, prizonier de război, tortură, justiţie tranziţională.*

Introduction

Characterizing different aspects of international security, we need to take into account the specifics of the collective security system, in particular interdependence with other implemented law institutions, both at nationally and internationally level, such as antiterrorism fight, combating torture or national reconciliation through the mechanisms of transitional justice. Only such an approach will allow the creation of an image in the context of a pragmatic vision of the issue of international security assurance, inclusive through the diversification of instruments offered by contemporary international law.

If we take as an example the torture widely applied in the context of security assurance, inclusively in times of armed conflict, then we must recognize that the level of applicability of torture by state bodies depends largely on the level of „civilization" of the society, to which joins the tolerance of torture cases by decision factors in each particular situation, although we have some reservations at this chapter. Who would have supposed, for example, that the German nation, whose level of „civilization" never got any doubts, would have admitted a Nazi regime in the middle of the XX century? Another example is the case of the former Yugoslavia. At the end of the XX century, terrible crimes were committed in the center of Europe only comparable to those in the Middle Ages, characterized by religious, inter-ethnic wars, inquisitions, etc. What would be the arguments, for example, in the case of Srebrenitsa massacres from 1995?! This is why this criterion cannot be the only one. Another argument would be the ECHR jurisprudence, following which, we can see that cases of torture are committed not only in the „new" independent states and those which have recently escaped from the totalitarian communist regimes, but also in such states as France, Great Britain, Italy, etc., states considered as a cradle of democracy and where the human rights are ensured at the highest level.[1]

The status of people held in the context of antiterrorism fight under international law provisions

The new conditions in which the states emerged at the beginning of the XXI century led to the need for an appropriate approach of the „playing rules" applicable in the context of regional and global security assurance. The fact that the main actors, which traditionally were the states, have changed, have had raised more discussions about the need to revise the normative framework which regulate the international security system. At the same time was observed the tendency to interpret the international law norms, especially those applicable during armed conflicts in their detriment. In our opinion, the derogation from the regulatory framework that regulates,

1 Gamurari V. Rolul mecanismelor justiției tranziționale în procesul de prevenire și combatere a torturii. In: Materialele conferinței internaționale științifico-practice „5 ani de la crearea Mecanismului Național de Prevenire a Torturii în Republica Moldova". Chișinău. 29.07.2012. Chișinău: Tipografia „Elan Poligraf". 2013, p. 63.

for example, the status of war prisoners, the prohibition of torture application etc., makes, contrary, the international security system more fragile. Namely, through these tendencies we try to approach the proposed subject. In addition, we briefly refer to the institution of transitional justice, which comes with certain mechanisms for the reconciliation of those societies that have gone through war, unconcerned of the term used by state authorities or even at the international level.

There were different reactions from the states. For example, USA has implemented an exceptional legal framework — Global War on Terror. This expression has sparked many discussions, including the difficulties that this expression creates for international humanitarian law.[2] If we refer to its construction and research goals, we find that these are contrary to the principles underlying international human rights law and international humanitarian law.[3]

Exceptional conditions introduced by these states, far from constituting a momentary suspension of common law rules, are in reality aimed at rebuilding national and international law in the face of the need to combat terrorism. To notice, that what constitutes a tacit acceptance of the exceptional state is, in principle, a disturbing situation that violates at least one rule in force.[4]

We must also take into account the standards created in Western Europe, USA, Eastern Europe, Middle East, which cannot be considered the same, although they have the core of human rights that is universal and imperative. Thus, for example, the US Supreme Court has applied international law and, in particular, international humanitarian law in a few cases that reflect Global War on Terror in an unusual way. For example, from the point of view of international law, the discussion on Guantánamo detainees focused on two points. First, the refusal to apply the Geneva Convention III and, secondly, the constant refusal of the presidential administration to enforce international human rights law. Thus, the Supreme Court, examining the mechanisms at Guantánamo, uses international humanitarian law in an original but also questionable manner. Furthermore, it ignores the international human rights law, which has raised many questions from European experts, who are at odds with the standards established by the European Convention on Human Rights and ensured by the European Court of Human Rights.

In 2004, the Supreme Court issued a number of important decisions to allow Guantanamo detainees, among other categories of detainees in the war on terror, to refer federal jurisdictions. But it did not pronounce on the status of the prisoners. Only with the adoption of the Hamdan judgment on 29 June 2006, the Court will bring the first elements of the „war" against terrorism for Human Rights and ensured by the European Court of Human Rights.

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2 Mary Ellen O'Connell. International Law and the „Global War on Terror". Paris: Pédone, 2007.

3 Gamurari V. Statutul prizonierului de război în contextul conflictelor armate contemporane: studiu în baza conflictelor din Afganistan, Irak, Ucraina și Siria (*partea I*). In: Studii Juridice Universitare. ULIM. № 3-4. Anul VIII/2015, p. 11.

4 Idem, p. 12.

Several years after USA transferred to its military base at Guantanamo Bay, Cuba, around 130 people detained in Afghanistan following the Liberté Immuable operation, their number rose to 625 at a certain time.[5] After a period of uncertainty, the US authorities have clarified their position on the legal status of detained persons and judicial treatment.[6]

Thus, without details, the US administration preferred to qualify these persons as being held under the President's Military Order on September 13, 2001.[7] According to the text, it is the US President who determines by himself that individuals suspected of being members of Al-Qaeda can be captured and transferred to Guantanamo. On February 7, 2002, the US authorities said they had two categories of detainees: the Taliban members of the Afghan armed forces and Al-Qaeda terrorists. USA has announced that although these were not war prisoners, Taliban militants will benefit from some provisions of the 1949 Geneva Convention on the Treatment of Prisoners of War. And, on the other hand, Al-Qaeda's members, in the Washington administration's view, are not war prisoners nor people who could benefit from the provisions of the convention. Thus, for USA, Al-Qaeda constitutes a foreign terrorist group, whose members are „enemy combatants", a term in principle unused by international humanitarian law. Subsequently, on 21 March 2002, the US Defense Department adopted the Military Commission Order Nr. 1,[8] which provided for the implementation of military commissions empowered to judge not only Al-Qaeda members, but equally any person involved in committing acts of international terrorism against USA, including those who help terrorists.

Despite the American authorities' explanations of the legal status of these guards at Guantánamo, several experts have begun to ask questions about the legal basis for the situation, including the effects that will follow. The situation was even more complicated when it was found that among the detainees there were and still are citizens of Western states, such as France or the United Kingdom, their destiny remaining uncertain. The subject of an article published by a French expert was to take stock of the political, diplomatic and legal actions taken by the French authorities. As well as other interested parties, in relation to its nationals detained at US military base by the US Armed Forces.[9]

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5 Communiqué de presse Guantánamo, 13 ans après, 8 janvier 2015 http://www.amnesty.be/je-veux-m-informer/actualites/article/guantanamo-13-ans-apres (consulted on 15.10.2017).

6 Gamurari V. Statutul prizonierului de război în contextul conflictelor armate contemporane: studiu în baza conflictelor din Afganistan, Irak, Ucraina și Siria (*partea I*), p. 13.

7 Military Order of November 13, 2001, Detention, Treatment and Trial of Certain Non-Citizen in the War Against Terrorism, 66FR57833 (November 16, 2001). Secretariatul de stat pentru apărare www.defenslink.mil (consulted on 15.10.2017).

8 Military Commission Order Nr. 1, Procedures, for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, March, 21, 2002. Secrétariat d'Etat a la Défense www.defenslink.mil (consulted on 15.10.2017).

9 Benbekhti Nabil. Les actions entreprises à l'égard des ressortissants français détenus a Guantanamo Bay. Actualité et Droit International, mars 2004 http://www.ridi.org/adi (consulted on 15.10.2017).

The September 11, 2001 attacks in New York, Washington and Pennsylvania marked the spirits deeply. Everything was granted to considerate to be the ground zero, from which it is said „until September 11" and after „September 11". The involvement of these attacks has influenced the international law, particularly in terms of the position of the US government.

Just the day after the tragic events on September 11, 2001, several specialists met to disagree with the American position that the respective terrorist acts were considered acts of war.[10] It is true that further developments have fallen from the intensity of speeches in this direction. This is due to the position of the UN Security Council which, through the adoption of Resolution 1368 of 12.09.2001, described terrorist acts as „a threat to international peace and security", thus recognizing the right to legitimate individual or collective defense in accordance with Article 51 of the UNO Charter.[11]

In response, the US military intervention followed in Afghanistan, as several UN and UN Security Council resolutions confirmed the direct link between Al-Qaeda and the Taliban government in Afghanistan, which convinced experts that the situation created is an international armed conflict regulated as a consequence of the Geneva Conventions of 1949. Under these conditions, the US authorities' treatment against the prisoners in the conflict, who were later held at the American base at Guantanamo, raises several questions, as certain international humanitarian law provisions are violated. In turn, the Military Order from 13 November 2001, according to its content, merely confirms that detained persons will not benefit from the status of prisoner of war within the meaning of Geneva Convention III of 1949.[12] The content of the nominee document has awakened more discussions among experts, the position of the majority being express — this contradicts the Geneva Convention III.[13]

The question of the status of Guantanamo-detained people is basically proposing USA to deny any applicability of international humanitarian law despite its clear compatibility. Geneva Convention III on the Treatment of Prisoners of War is the only applicable in this case because neither Afghanistan nor USA have ratified the Additional Protocol from 1977 on the Protection of Victims during International Armed Conflict. Article 2 of the Geneva Convention III provides for the conditions of application, stipulating:

„In addition to the provisions which are due to enter into force at peacetime, this Convention shall apply in the case of declared war or any other armed conflict

10 A se vedea dezbaterile pe Forum-l European Journal of International Law http://www.ejil.org/forum_WTC/index.html (consulted on 15.10.2017).

11 Rezoluţia Consiliului de Securitate al ONU nr.1368 (2001) http://www.un.org/fr/documents/view_doc.asp?symbol=S/RES/1368(2001) (consulted on 15.10.2017).

12 Text disponibil în comunicatul de presă al Casei Albe, la adresa http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html (consulted on 15.10.2017).

13 Young S. United States Military Commissions: A Quick Guide to Available Resources, disponibil pe site-l LLRS.com la adresa http://www.llrx.com/features/military.htm (consulted on 15.10.2017).

arising between two or more of the High Contracting Parties, even if this occupation does not meet either a military resistance. The Convention shall also apply in all cases of total or partial occupation of a territory of a High Contracting Party, even if this occupation does not encounter any military resistance. If one of the conflicting Powers is not a party to this Convention, the Powers which are Parties to it shall, however, remain bound by it in their mutual relations. In addition, they will be bound by convention to the above-mentioned Power, if it accepts and applies its provisions".

Thus, the presence of armed conflict is the only condition for the applicability of the Geneva III Convention. In the case under consideration, even if the Taliban government has never been recognized by USA, the US intervention in Afghanistan authorized by UN Security Council Resolution 1368 can be considered as fulfilling this condition, given that according to the ICRC „any dispute between two states and provoking the intervention of the armed forces is an armed conflict within the meaning of Article 2 [common to the four Geneva Conventions], even if one of the Parties contests belligerence".[14]

Accordingly, on the basis of paragraphs 1 and 3 of this article, everything suggests that the Taliban army combatants are war prisoners. As far as non-Afghan Al-Qaeda members are concerned, paragraph 2 should also ensure their status as prisoners of war. The interpretation of this paragraph by the ICRC is not hindered by this application, as according to it:

a) that the Government or the Responsible Authority as declared by this organization has notified the Occupying Power in a way that allows it to receive communications and to respond, the entry into combat of this organization is equivalent to a distinctive sign carried by its members;
b) that members of this organization are to be placed under the orders of a responsible chief; to wear in a consistent manner a fixed distinctive sign, recognized at a distance; to open arms; to comply with the laws and customs of war and treat the nationals of the Occupying Power in their power under this Convention.[15]

And when the doubt about granting the status of prisoner of war for Al-Qaeda members might arise, the Article 5 of the Geneva Convention III, as I mentioned earlier, stipulates:

„If there is any doubt about the fitting into one of the listed categories in Article 4, namely of persons who have committed an act of belligerence and who have fallen into the hands of the enemy, such persons will benefit from the protection of this Convention, pending their status by a competent Tribunal".

14 A se vedea comentariile CICR asupra articolului 2 al Convenţiei de la Geneva IV disponibil pe site-l CICR http://www.cicr.org/dih.nsf/e6e558c87e3c38c44125673c0045870a/cd118c90b2fd0c27c12563bd002cef5d?OpenDocument (consulted on 15.10.2017).

15 A se vedea comentariile CICR asupra articolului 4 al Convenţiei IV de la Geneva, disponibil pe site-l CICR http://www.cicr.org/dih.nsf/e6e558c87e3c38c44125673c0045870a/1f36b9280bfafc63c12563bd002caa2f?OpenDocument (consulted on 15.10.2017).

More questions arise in interpreting the notions of „doubts" and „competent Tribunal". As far as the latter is concerned, the ICRC states that:

„In Geneva, in 1949, a first amendment substituted the expression of responsible authority for a more precise destination of a military tribunal. This change is justified by the fact that decisions that could have the most serious consequences should not be left to the appreciation of only one person, often of a rather modest degree. A tribunal was qualified to be informed; those who participate in the fight without knowing the law are, in principle, liable to judicial punishment for premeditated murder or attempted murder and the punishment may be up to the capital execution. This solution, which obviously cannot stand outside of a criticism, bringing of one person in front of a military tribunal may eventually lead to serious consequences, such as deprivation of benefit from the provisions of the Convention. Equally, the editors brought a new amendment to the Stockholm text, stipulating that people whose situation is uncertain will be handed over to a „competent tribunal" and not to a military tribunal.[16]

On the contrary, with regard to the notion of „doubts", the ICRC does not give any indication. This silence is probably the basis for the interpretation made by the USA, which at the same time cannot be justified.

If USA allows a competent Tribunal to rule on the status of Al-Qaeda members and that this court refuses the qualification of war prisoner, then they benefit from the guarantees provided by the IV Geneva Convention on the protection of civilian persons during time of armed conflict. Meanwhile, there might arise another problem on this occasion. An American jurisdiction could interpret the transfer of Al-Qaeda members from Afghanistan to Guantanamo as a grant of protection under the IV Geneva Convention. Thus, if it is accepted that this applies in the case of an international armed conflict on the territory of Afghanistan, the situation that will exist on the USA territory will be quite different.

The US base is under the jurisdiction of US applicable norms on the territory of USA. An American jurisdiction could therefore decide that the common Article 3 to those four Geneva Conventions cannot be applied, since there is no international armed conflict and no internal armed conflict on the US territory. In this way, these detainees will not even benefit from any guarantee of humanitarian law, and their rights will be reviewed.

The Bush administration argued that Taliban regime combatants are protected by the III Geneva Convention and at the same time, cannot be applied the status of war prisoners. As a consequence, for Al-Qaeda policemen is refused to apply the provisions of this convention, as they are considered to be a „foreign terrorist group".[17] This interpretation returns to what prevailed recently, and which was con-

16 A se vedea comentariile CICR disponibil pe site-l CICR http://wwwcicr.org/dih.nsf/e6e558c87e3c38c44125673c0045870a/23f9160864fe85c12563bd002cad94?OpenDocument (consulted on 15.10.2017).

17 Fact Sheet. Status of Detainees at Guantanamo. Press Release of the White House of February 7, 2002 available at http://www.whitehouse.gov/news/releases/2002/02/print/20020207-13.html (consulted on 15.10.2017).

sidering all prisoners, including Afghans and strangers, as „illegal combatants" or „detained on the battlefield." Such a qualification is not recognized by the Geneva Conventions, it gives a particular view of American law. The USA Supreme Court has defined this notion, apropos, with regard to the Nazis infiltrated on US territory during the Second World War.

ICRC does not share this interpretation, as it is evident from a press release of February 9, 2002:

„The International humanitarian law provides that members of armed forces, as well as members of policemen forces, who are part of armed forces, who are captured by an adversary in an international armed conflict, are protected by the III Geneva Convention. Given that the USA and ICRC position differ as referred to the applicable procedures for determining whether the prisoners have or have not the status right of prisoner of war. In this context, the USA and ICRC will continue the dialogue on this issue".[18]

The ICRC communicate also states that „it remains firmly convinced that conforming with the international humanitarian law does not constitute under any way an obstacle to the fight against terror and crime. The international humanitarian law confers to the holder power the right to prosecute in justice the war prisoners or any other offense committed earlier or during hostilities." In this way, allowing all Guantánamo detainees to benefit from the status of prisoner of war by applying international humanitarian law will not prevent the USA from judging them for common law offenses, if they will be found guilty before or during hostilities, subject to compliance with Article 99 of the III Geneva Convention[19] and, in general, Chapter III of this Convention.

The interpretation that has made by the Bush administration is exactly the same as the previous American positions. Thus, if the international law seems to be very clear, the USA refuses to apply it, jeopardizing the coherence of a universally recognized system. It seems that the subsequent judicial proceedings in relation to Guantanamo detainee prisoners only confirm this American will to disregard its international commitments, and moreover, we can speak of a possible violation of our own Constitution.[20]

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18 CICR, Communiqué de presse 02/11 du 9 février 2002, disponible sur le site-l de CICR http://www.cicr.org (consulted on 15.10.2017).

19 Articolul 99 prevede: „no prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed. No moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused. No prisoner of war may be convicted without having had an opportunity to present his defence and the assistance of a qualified advocate or counsel".

20 Pellet Sarah. De la raison de plus fort ou comment les Etats-Unis ont (re)invente le droit international et leur droit constitutionnel. Actualité et Droit Internationale, juin 2002 http://www.ridi.org/adi (consulted on 15.10.2017).

The Military Order of November 13, 2001, issued by the President Bush, which allows the obedience of detainees at the base of Guantanamo in the jurisdiction of the exceptional military tribunals (military commissions), addresses constitutional and international issues in relation to the obligations USA have assumed. We will try to analyze these violations of a *pacta* are *servanda* in our opinion.

In the opinion of the US authorities, the Guantanamo Bay base detainees are „illegal combatants" and do not benefit the status of prisoners of war. In such situations, it appears that they should be viewed as „civilians". Either they have no way of appealing that would allow them to contest their elementary rights and are subject to military tribunals.[21] On January 16, 2002, the former High Commissioner for Human Rights, Ms. Robinson, stated that the legal status of the detainees and their right to have them recognized the status of prisoner of war, in case they contested, should be determined by a competent court under the provisions of Article 5 of III Geneva Convention. The responsibility of bringing together a „competent court" within the meaning of the Geneva Conventions, in order to determine their status, falls within the competence of the USA Government.[22]

The states whose nationals are detained in Guantanamo Bay are entitled to exercise their diplomatic protection and to demand from the USA to respect the common law. Depending on the indictments, which had to be expressly defined, they could demand their extradition to judge them on their own territory. At that time, the attitude of these states remained rather prudent. Thus, for example, during the second visit made by a representative of *Quai d'Orsay* at the end of March 2003 with the scope to verify the identity of the detainees, he reminded that France is asking a judicial process on its own territory and in no way a military tribunal. Pakistan has taken diplomatic steps alongside the USA to affirm that the detainees were inferior combatants. A representative of the German Government said that prisoners should be questioned and that they should be released and not detained at Guantanamo Bay. The United Kingdom of Great Britain and Northern Ireland has also made diplomatic demarches.[23]

In a report adopted on this subject, the UN General Assembly denounces the fate of detainees in Afghanistan and Guantanamo Bay, including minors, whom USA described as „illegal combatants", including the treatment that has been applied to

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21 Sébastien Botreau-Bonneterre. Le contrôle par les juridictions américaines de la guerre globale contre le terrorisme : aspects internationaux. In : CRDF, Nr. 6, 2007, pp. 101-112 https://www.unicaen.fr/puc/images/crdf0609botreau.pdf (consulted on 15.10.2017).

22 Weckel Philippe. Le Statut incertain des détenus sur la base américaine de Guantanamo. RGDIP. Nr. 2, 2002, pp.357-369.

23 Doc. 9817 26 Mai 2003. Droits des personnes détenues par les Etats-Unis en Afghanistan et sur la base de Guantánamo Bay. Rapport Commission des questions juridiques et des droits de l'homme. Rapporteur: M. Kevin McNamara, Royaume-Uni, Groupe socialiste, para. 16 http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=10166&lang=fr#P128_16409 (consulted on 15.10.2017).

them. The assembly estimated that people should be considered as „war prisoners" or at least USA should have allowed a „competent court" within the meaning of III Geneva Convention to decide on their status. Nor do they benefit of any guarantee of their rights. The General Assembly, reminding the USA about their responsibility to handle prisoners correctly, the request to place facilities in places where they are detained in accordance with rules recognized by international law and authorized by State observers, and the ICRC to has access to it. It encourages states to take demarches to help their illegally detained nationals by all means and to request their extradition.

On the occasion of 10 years anniversary of functioning for Amnesty International center of detention, there has made public the Guantánamo report: „A Decade of Damage to Human Rights", by which brings light towards the illegal treatment of prisoners in Guantanamo, noting that this detention center constitutes another attack on human rights.[24]

The report is stated that „withholding from the closure of Guantanamo Bay detention center, the USA government leaves a toxic legacy from the point of human rights".[25]

Guantanamo has become a symbol of systematic human rights abuses through the USA responses to the attacks from September, 11 2001. According to the opinion of several international human rights organizations, the USA Government has trampled the fundamental rights together with the first transfers of prisoners.

Antiterrorism operations in the context of the imperative nature of the obligation to ban the torture

From the beginning we should note that the uncertainties about antiterrorism and torture measures are prior to the attacks from September 11, 2001. At the same time, the original response to the attacks was the efforts made to create an international legal regime to combat the terrorism. Consequently, all states were mandated to adopt anti-terrorism measures and anti-terrorism legislation in line with UNO Security Council resolution No 1373 from 2001.[26] This resolution and evolutions at national level taken in parallel have reviewed the security systems and led to the adaptation and review of legislation on security and anti-terrorism fight in several states.[27] These evolutions have favored the guarantees and protections,

24 Communiqué de Presse d'Amnesty International : Guantanamo, une décennie d'atteintes aux droits humains. 11 janvier, 2012 http://www.reopen911.info/News/2012/01/11/communique-de-presse-damnesty-international-guantanamo-une-decennie-datteintes-aux-droits-humains/ (consulted on 15.10.2017).

25 Idem.

26 Security Council of the United Nations Resolution nr. 1373 (2001) „Threats to international peace and security caused by terrorist acts" http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1373(2001) (consulted on 15.10.2017).

27 REDRESS, Des mesures extraordinaires, des conséquences prévisibles : La législation sur la sécurité et l'interdiction de la torture, septembre 2012, p. 5 http://www.redress.org/downloads/publications/130204FinalSecurityLegilationReportFrench.pdf (consulted on 15.10.2017).

thus, involving a growing vulnerability of individuals suspected of participation in terrorist acts.

In particular, the American administration's response after the attacks from September 11, 2001 was a certain number of uncertainties and gives a negative example, compromising the absolute prohibition of torture, attempting to argue the denial of this ban. It is characterized by:

- — questioning the absolute prohibition of torture, consulting whether it can be applied to persons suspected of terrorism;
- — revising the definition of torture, excluding the sad practice of *waterboarding* from the concept of torture, arguing that some obligations, such as failure to return, would not be applied to this category of persons;
- — The search for removal of detainees from the protection of justice (especially in Guantanamo Bay detention centers);
- — limiting the critical position of public opinion and access to justice, in particular giving confidentiality to information and focusing on national security assurance;
- — the implementation of a sophisticated program in agreement with other states, by which the terrorism suspects will be redirected for being interrogated and subject to cruel treatment, in particular torture for the same deeds;
- — granting effective impunity on persons responsible for acts of torture, thus giving them the opportunity to apply it.[28]

The Special Report on the promotion and protection of human rights and fundamental freedoms in anti-terrorism fight has described the main elements of the US Restriction Program as follows:

On September 17, 2001 President Bush authorizes CIA to implement a secret detention program, requiring the placement of clandestine detention centers, called „black centers" on the territory of other states, with the cooperation of public officials of these states. Approximately during the same period, he authorizes CIA to make „extraordinary restitutions", which provided the secret transfer of prisoners outside any legal proceedings of extradition or expulsion, allowing them to be questioned as being under the formal protection of public officials of other states, including to countries where torture was known to be applied. At the beginning of August 2002, Justice Department's Office of Legal Council authorized a series of psychological and mental abuses on terrorist suspects under the name of „fortified interrogation techniques". Since then, the Bush administration has publicly recognized the *waterboarding* practice upon „high added value detainees" under the personal authority of the President.[29]

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28 Comité des droits de l'homme, Observations finales : États-Unis d'Amérique, Doc. ONU CCPR/C/USA/CO/3, 15 septembre 2006, paras. 11-21 et Comité contre la torture (CAT), Conclusions et recommandations : États-Unis d'Amérique, Doc. ONU CCPR/C/USA/CO/3, 15 septembre 2006, paras. 25-26.

29 Raportul Raportorului special asupra promovării și protecției drepturilor și libertăților fundamentale ale omului în lupta antiteroristă, Ben Emmerson, "Framework Principles for

On May 10, 2005 in a memorandum from the American Justice Department's Office of Legal Council, the authorized treatments were divided into three big categories: „conditionality techniques", „correction techniques" and „coercive techniques".[30] Conditionality techniques were designed to demonstrate to the detainee that he has no control over basic human needs. These include nudity, eating and sleep deprivation. The aim behind the correction techniques constitutes in particular, the correction, to make the detainee to wake with a start or to achieve another objective of obtaining the results from the prisoner. More specifically — applying facial slaps or abdominal slaps and immobilizing the head (facial hold) or taking the person from the collar (attention graps) — all are part of these techniques. Coercive techniques place the detainee in an even more stressful mentally and psychologically situation. These measures include walling tests, long-term keeping of the person to the wall, cold water spraying, and the use of stress positions; where these methods can be used equally in association with correction or conditionality techniques. These techniques have been recognized by the European Committee for prevention of torture as „categorically leading to the violation of the torture prohibition and inhuman or degrading treatments".[31]

Torture and ill-treatment in situations of high tension (armed conflicts) and the role of transitional justice in the reconciliation of post-conflict societies

The first major category of transitional justice objectives is the legal prosecution, in other words, of some criminal proceedings before a tribunal against persons suspected of committing international crimes. The forms, functions and mandate of the prosecution vary substantially. These pursuits may have a wide margin, targeting individuals prosecution for international crimes or a narrower segment, focusing on the leaders or the most important responsible persons. The International human rights law obliges the states not to admit the impunity and states that governments „will establish complete, independent and impartial investigations that will examine violations of human rights and international humanitarian law and will take concrete measures against guilty persons, in particular in the field of criminal justice, ensuring

securing the accountability of public officials for gross or systematic human rights violations committed in the context of State counter-terrorism initiatives , Doc. ONU A/HRC/22/52, 1er mars 2013, para. 15.

30 CIA, „ Background Paper on CIA's Combined Use of Interrogation Techniques ", Central Intelligence Agency, à l'attention de Dan Levin, Office of Legal Counsel, Department of Justice, 30 December 2004 (prezentat la 24 august 2009), p. 4 http://www.aclu.org/files/torturefoia/released/082409/olcremand/2004olc97.pdf (consulted on 15.10.2017).

31 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Report to the Lithuanian Government on the visit to Lithuania carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 14 to 18 June 2010, CPT/Inf (2011) 17, 19 mai 2011, para. 66.

that those responsible of serious crimes from the point of view of international law, to be prosecuted, judged and convicted".[32]

The Criminal conviction as a prosecution tool is considered to be the most effective assurance against future crimes against human rights. These procedures aim to produce an effect to intimidate, to provide a public denunciation of criminal behaviors, and to bring a direct and individual form of responsibility to the guilty persons. They also come to contribute to restoring public authorities' confidence in the implementation of the legal framework.

At the same time, achieving these goals may face certain difficulties due to several factors. In post-conflict situations, the prosecution as a measure of transitional justice may be confronted with specific obstacles: insufficient financial or human resources, a corrupt judicial sector, the application of the „winner's justice", as well as the simple difficulty of a large number of potential victims and guilty individuals, amounting to hundreds, thousands or even hundreds of thousands.

Amnesties could play a critical role, either by eliminating legal prosecution, with option title, or by assigning a form of legal prosecution strategy. Amnesties grant some immunity to a group of people for a specific type of offenses. The amnesty is considered as a useful tool to convince the parties to the conflict to accept negotiations and to convince the combatants to be disarmed and demobilize themselves. There are some types of amnesty, such as that which provides for great ample general amnesty for all offenses and violations of human rights, for all combatants or more restricted amnesties, which grant immunity for less serious offenses, such as illegal possession of weapons. Major amnesties may play a role of legal framework minimizing, giving the impression that international crimes may be committed without responsibility. From the point of victims, these amnesties are considered to be cynical and in order to response to the expectations, they can help victims to implement their own justice. In Transitional Justice Report for 2004, Kofi Annan, the United Nations General Secretary, noted that „there exist a tendency within the international community to redirect from the tolerance of impunity and amnesty towards the creation of some principles of international law".[33]

The Secretary-General's report rejects „any amnesty for the acts of genocide, war crimes or crimes against humanity, including those attributed to international, ethnic, sexual crimes, and it intended to ensure that no amnesty previously granted constitutes any obstacle in the prosecution by a court created or recognized by the United Nations".[34]

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32 Gamurari V. Rolul mecanismelor justiției tranziționale în procesul de prevenire și combatere a torturii, p. 64.

33 Ensemble mis la jour des principes pour la protection et la promotion des droits de l'Homme par des actions pour combattre l'impunité. Doc. ONU E/CN.4/2005/102/Ad.1, Principe 32 http://www.algerie-disparus.org/cfda1/images/pdf/principes_impunite_2005.pdf (consulted on 15.10.2017).

34 Gamurari V. Rolul mecanismelor justiției tranziționale în procesul de prevenire și combatere a torturii, p. 65.

The efforts undertaken by national prosecution courts may have an important function in the implementation process of the individual criminal responsibility institution in relation to the serious crimes against human rights and they are therefore preferable, as they are capable of moving local capacities and are generally more responsible and credible at the local level. International and internationalized (hybrid) tribunals constitutes another important source in the prosecution process for international crimes. The creation of international tribunals in the situations where the national courts are not willing or are unable to prosecute the presumed culprits, constitute a revolutionary step in the process of implementing the responsibility for serious human rights violations, war crimes and crimes against humanity. For example, the International Criminal Tribunal for the former Yugoslavia (1993), the International Criminal Tribunal for Rwanda (1994) and the Special Court for Sierra Leone (2001).[35]

The search for criminal responsibility through processes is considered as one of the most important means of transitional justice. The uncertainty was that the danger of legal prosecution would derail the agreements and would prevent combatants from taking part in a disarmament, demobilization and reintegration program (DDR) and/or would be an obstacle for the efforts to reintegrate former combatants into communities. Some discrepancy between the legal prosecution and the DDR program seems to be inherent, given that the DDR requires co-operation of former combatants, while prosecutors strive to keep war criminals in their level of responsible for the acts committed during the conflict. The poor or incomplete information that reflects the efforts of legal prosecution could contribute to the presence of tension in this respect. The former combatants are often poorly informed about the mandate of a legal prosecution process and ignore the fundamental principles of international humanitarian law. They can suppose that all war crimes will make the object of the prosecution and that all former combatants will be subject to arrest. That is why the administrators of DDR program often strive to separate DDR from the effects of legal prosecution. In Rwanda, for example, the Demobilization and Reintegration Commission refused to give access to its demobilization camps for investigators of the International Criminal Tribunal for Rwanda.[36]

A similar situation took place in Sierra Leone where, after receiving authorization from the National Committee for Disarmament, Demobilization and Reintegration, the representatives of the Special Court Working Group for Sierra Leone tried to meet with the former combatants in the cantonment, in order to inform the latter about the Court's mandate. The representatives of the Working Group were denied the access to the camp by a Nigerian captain, a representative of the Economic Community of West African States, in which opinion, an eventual dialogue on the subject of the Special Court for Sierra Leone could cause former combatants to refuse the participation in the DDR program.[37]

35 Idem.

36 Idem.

37 Idem.

The legal prosecution may have a negative effect, in particularly in relation to the demobilization or release of children associated with the armed forces and groups. The International law provides that children under 18 years accused for international crimes can be legally prosecuted, but at the same time they address governments to search for other options. Children require a special treatment, because they are enforced in army, often without awareness of the role they will have. In the case of children who have committed international crimes, depending on context and situation, would be applicable mechanisms of transitional justice, other than legal prosecution.

At the same time, the prosecution could equally bring a positive contribution to the DDR program. The missions of prosecutors and administrators of DDR program are undoubtedly contrary to each other, if we are referring directly to disarmament and demobilization period, but the prosecution may influence the nominated phases, eliminating interventions in the process. For example, several experts argue that the indictment of President Charles Taylor by the Special Court for Sierra Leone in 2003 has enabled the successful consolidation of peace process from Accra and the launch of the DDR program in Liberia. Among other things, according to the experiences of several post-conflict countries, there is a desirable potential for cooperation between transitional justice and the DDR program at the stage of reintegration, as the prosecution mandates focus on top-level criminals, as an example is given the Sierra Leone case. The legal prosecutions may lead to a reduction of the impunity culture, which usually includes former combatants and contributes to the restoration of the supremacy of law. The prosecutions permit the individualization of culpability for specific criminals and warns the public perception that all former combatants who have committed international crimes are guilty, thus facilitating the reintegration process. Ensuring the community about the fact that the authors of the worst international crimes will not benefit from DDR program or reintegration into society, which may lead to improving credibility prospects between former combatants and other citizens.

In the following context, we will bring the example of a society that has recently liberated itself from an authoritarian political regime, events that favored the chain initiating of a series of riots in the spring of 2011, known as the „Arab spring". It is about Tunisia.

The activists and members of civil society from Tunisia have often invoked the subject by which were asking for the establishment of a transitional justice for examining the crimes committed under the Ben Ali and Bourguiba regimes.[38]

In this regard, the Tunisian Center for Transitional Justice, chaired by the militant Sihem Ben Sedrine, has organized a colloquium on the theme „Verdict for

38 Justice transitionnelle, transposer le droit pénal international en Tunisie http://www.gnet.tn/temps-fort/justice-transitionnelle-transposer-le-droit-penal-international-en-tunisie/id-menu-325.html (consulted on 15.10.2017).

Transitional Justice in Tunisia", the works of which took place from 9 to 10 December 2011. On the last day more workshops were organized one of which was titled „The fight against impunity: national and international criminal justice", which has met several national and international experts in the field of justice and criminal law.

Brenda Hollis, a prosecutor at the International Criminal Court, said in his speech that Tunisia would adopt all the laws stipulated by the international law to fill that void space that reflects the attacks on the life and the psychic integrity of individuals and will be promoted by the persons who rule. This nominated void space includes crimes against humanity, genocide, human rights abuses and torture. In her opinion, if the Tunisian law will provide the amnesty, it will have to exclude the crimes against humanity, genocide and torture.[39]

We note that in international criminal law is missing the principle of immunity and amnesty. Everyone suspected of having committed a crime at the level of a political regime or ideologically motivated groups is likely to be legally prosecuted. As it is often mentioned by experts, these notions are not taken into account by national law.

Returning to the case of Tunisia, we warn that Judge Farhat Rajhi has confirmed the absence of such incrimination in the Tunisian law. According to the report „Crime against humanity, war crimes and torture are not taken into account in Tunisia. There is an article in the law sanctioning torture with 6 years of freedom deprivation, while for the act of robbery is provided the 20-year deprivation."[40] The judge acknowledges the presence of gaps in national law which need to be rebalanced.

Persons who can be prosecuted by an extraordinary tribunal are the persons who committed the crime, those who gave the order, the accomplices and the persons who are part of the organization. Equally, the military soldiers are responsible for the acts committed by their subordinates. According to the opinion of Tunisian expert Saïd Ben Gharbia, exposed to an international commission in Geneva, the process is not transparent and fair and additionally, the appeal is not usually provided and the military courts tend to hide the crimes committed. He suggested the integration of a number of notions into Tunisian national law in order to discourage potential criminals.[41] We can assume that among these, it is listed the possibility of legal prosecution of persons with responsible functions, the use of military courts only for sanctioning the general cases and not for the crimes against humanity and human rights. In order for transitional justice to be effective, it must be guaranteed that these crimes will not be favored and states will recognize and compensate crimes against individuals and give them the right to memory. We note that justice must be impartial and independent of the state apparatus.

However, despite the fact that at the national level, most of the time, the law criminalizes the attacks on physical integrity and states are also parties to several

39 Idem.

40 Idem.

41 Idem.

international conventions that protect fundamental human rights and freedoms, the application of these texts is insignificant under the conditions of a totalitarian regime.

That is why several experts insist on the necessity of reforming justice. In their view, it is impossible the establishment a transitional justice without the prior assurance of a transparent and impartial justice and the training of those judges. It is necessary for authorities to be in a position to provide the necessary elements and sufficient means to ensure a fair investigation. In principle, there exists a wide body of jurisprudence in several states that could help the legal body of the transition states in order to improve their competencies.

We have to admit that all these discourses are being nullified in the circumstances in which the new power does not want the establishment of a genuine transitional justice, being satisfied only with taking the criminal schemes of the previous regime, camouflaging the so-called reforms through the desire of a political rebellion with the former administration.

The practice applied to the torture is particularly marked when the tension level is high or when the law and order have been jeopardized. These situations deserve a special approach, reflecting on the nature of torture and talking about providing evidence and protection.[42]

The jurisprudence of international criminal tribunals, reports which come from several committees of investigations and NGOs, as well as other sources, show that torture and other forms of inhuman treatment are widespread during the armed conflicts.[43] The facts reported by experts from countries that are or have been through armed conflicts, such as Afghanistan, Colombia, Libya, DR Congo and Russia (the case of Chechnya) confirm this reality.[44] While the Committees for truth and reconciliation in countries such as Sierra Leone have sought to draw lessons from the past experience, the violence regretfully does not cease in other countries.

The practice of torture during armed conflicts is characterized by a number of independent peculiarities: (i) it occurs in a situation that can be defined either as an emergency state, or as anarchy and insecurity, or both; (ii) the identity of the authors is not always clear; (iii) the authors of torture are often non-elderly actors or their status is not always clear; (iv) the authors of torture can equally be victims or may

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42 «La justice pour les victimes de la torture dans le monde. Droit, pratique et évolutions nécessaires». Octobre 2013 http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=52fa28dd4 (consulted on 15.10.2017).

43 A se vedea în special rapoartele Comisiilor de anchetă a ONU asupra regiunii Darfur, conflictul din Gaza, Libia, Siria, Cote d'Ivoire. În egală măsură a se vedea Panelul de experţi al ONU asupra Sri Lanka (UN Expert on Sri Lanka), disponibile la adresa www.ohchr.org (consulted on 15.10.2017).

44 REDRESS, La torture en Afrique : Le droit et la pratique, septembre 2012, p. 5 ; REDRESS, Torture in the Americas: Law and Practice, juin 2013, pp. 14-15 ; REDRESS, La torture en Europe : Le droit et la pratique, septembre 2012, p. 12 ; REDRESS, Torture in the Middle East and North Africa, août 2013, pp. 8-9.

be both victims and authors of torture, such as the case of child soldiers; (v) The methods of torture used are often extremely brutal and harsh, such as large-scale practiced rape or mutilation, in the conditions when the authors of the torture act in the absence of any constraint and aim to create a climate of fear or revanchism, so that victims are dehumanized; (vi) Individuals or groups of victims are often taken to be a target in the scope for their identity; as a member of a particular group, which emphasizes their vulnerability, which results in the lack of protection, because the institutional and legal systems are weak or are collapsed; and (vii) the prosecution attempts applied in order to make justice and to determine the persons responsible are most often confronted with serious political, security and evidence obstacles.

Sexual violence, in particular, continues to be widespread during armed conflicts, being enforced by both statist and non-statist actors. This type of violence attracts a greater attention; for example, UNO reports, human rights jurisprudence, cases examined by international criminal tribunals, but also media coverage.[45]

At the same time, the lack of protection and impunity subsists in the meantime, because institutional and normative developments, particularly at international level, have not yet been effectively enforced in practice. A significant measure was adopted by the DR Congo through the establishment of a mobile court program in 2010. This program plays an important role in the follow-up of sexual violence, but its field of appliance also covers offenses and includes both civil and military courts. The trials initiated by these courts have succeeded in establishing the responsibility of some authors, which seems to be viewed with good eyes by the local population and also by international observers,[46] even if there are still issues related to corruption, lack of resources and issues concerning equality in access to justice.[47]

The increased participation of the armed forces during the operations carried out outside the state of origin, whether on the basis of an individual mandate or a collective within multinational forces, has increased the number of abuses from the side of military. There are many examples where peacekeeping forces are involved in acts of sexual exploitation and sexual abuse,[48] foreign forces participated in the torture of civilians, a.o. The large number of complaints filled by Iraqi nationals against the

45 OCHA Policy Development and Studies Branch, The Nature, Scope and Motivation for Sexual Violence Against Men and Boys in Armed Conflict, UN OCHA Research Meeting, 26 June 2008 http://gender.care2share.wikispaces.net/file/view/Discussion+paper+and+Lit+Rev+SV+against+Men+and+Boys+Final.pdf (consulted on 15.10.2017).

46 Passy Mubalama et Simmon Jennings, " Roving Courts in Eastern Congo ", Institute for War & Peace Reporting, 13 February 2013 http://iwpr.net/report-news/roving-courts-easterncongo (consulted on 15.10.2017).

47 REDRESS, Submission to the Committee on the Elimination of Discrimination Against Women for Consideration of the Combined 6th and 7th Report of the Democratic Republic of the Congo, 24 June 2013 http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/REDRESSsubmission_ForTheSession_DRC_CEDAW55_E.pdf (consulted on 15.10.2017).

48 Prince Zeid Ra'ad Zeid Al-Hussein, « Stratégie globale visant à éliminer l'exploitation et les abus sexuels dans les opérations de maintien de la paix », Doc. ONU A/59/710, 24 mars 2005.

British forces, as well as the concerns reflecting the behavior of other forces, such as USA forces, demonstrate that the cases are not isolated, as is being attempted to present.[49] The practice of placing suspects amongst armed forces or local authorities, such as the case of British and American forces in Iraq and Afghanistan, even if these local actors are known for their lack of respect for the prohibition of torture, is equally an preoccupying issue.[50]

These evolutions have triggered legal actions both at national and international level. The efforts aiming the obtaining of justice for the violations committed by the armed forces abroad have to deal with the considerable difficulties, but also with some complex legal issues, such as competence, responsibility establishment and the pertinence of implementation. Finally, legal actions has been globally effective, discussing to establish that human rights obligations are applied extraterritorially, under the jurisdiction of a state, in particular in the case where a person is subject to effective control from the side of the armed forces and/or during the occupation time.[51] As a consequence, some states, such as United Kingdom have created investigation committees or paid allowances to the applicants. These late answers have revealed a number of shortcomings in the rules about the enrollment, training, conduct and responsibility mechanisms in force and have led to a number of institutional changes. At the same time, some responses, such as the creation of the IHAT (Iraq Historical Allegations Team), have been stunned in court proceedings, because persist doubts on the independence and effectiveness of this type of initiative.[52]

Conclusion

The approach of the international security concept in terms of co-ordination with other institutions of international law is argued by the increasing of interdependence between them, but also the appearance of that „novelty" element that is imposed under the conditions of new challenges with which are confronting the states in the context of ensuring the regional and global security.

First of all, these tendencies have negative effects upon some internationally recognized institutions as norms of imperative nature. It is about some institutions of international humanitarian law, such as the status of war prisoners, but also some

49 Ian Cobain, „MoD pays out millions to Iraqi torture victims", Guardian, 20 December 2012 http://www.guardian.co.uk/law/2012/dec/20/mod-iraqi-torture-victims?INTCMP=SRCH (consulted on 15.10.2017).

50 United Nations Assistance Mission in Afghanistan, Treatment of Conflict-Related Detainees in Afghan Custody One Year On, 2012 http://unama.unmissions.org/LinkClick.aspx?fileticket=VsBL0S5b37o%3d&tabid=12254&language=en-US (consulted on 15.10.2017).

51 ECHR. Case of Al-Skeini and Others v. the United Kingdom. Judgment. 7 July 2011 http://www.refworld.org/pdfid/4e2545502.pdf (consulted on 15.10.2017).

52 REDRESS, „Ali Zaki Mousa and others v Secretary of State for the Defence" http://www.redress.org/case-docket/single-iraq-inquiry (consulted on 15.10.2017).

certain institutions in relation to which there can be no reservations, such as the prohibition of torture. Or, the link between torture cases and measures taken by state authorities in the context of assurance of the process of international security is one express and is dictated by the level of transparency and fairness of the decision-maker factor.

Secondly, we have tried to analyze the concept of international security and through the process of reconciling a society that confronted an armed conflict or a crisis situation by implementing the mechanisms of transitional justice, a process that has demonstrated viability in several states that have gone through such situations.

The analysis of the international security concept in complex with other international law institutions, will allow the creation of a clearer picture, which will not allow the ignorance of some internationally legal norms recognized at the universal level. Such an approach aims to ensure the fundamental human rights and freedoms in any situation, including during armed conflict.