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## The march of the Mehteran Rethinking the human rights critiques of counter-terrorism

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### Introduction: two steps forward, one step back

Mehteran was the Military Band of the Janissary, the army of the Ottoman Empire. Mehteran was the first military band that involved a variety of musical instruments, whose music influenced world-renowned composers such as Mozart (e.g. Rondo a la Turca) and continued to be a phenomenon in wars until the late 18<sup>th</sup> century. However, it is not the music, but the march of Mehteran that is of interest to this paper. The march of Mehteran, while playing its music, was quite particular. The band, after taking two steps forward, would take one step back. Thus the forward move or the progress of the band by two steps would be an illusion since it would always take a step back after the second step.

Similarly, human rights are equipped with a variety of national and international laws and different protection mechanisms to influence a wide range of regimes and countries worldwide. Human rights claim to help to balance injustices and empower the weak. In this respect, human rights claim to address the disproportionate measures of counter-terrorism. However, as I will explain in my paper, this is an illusion, because although human rights seem to make progress in limiting the excessiveness of counter-terrorism measures, they take a step back and remain inadequate by failing to consider the issue of contemporary racism.

I need to make clear at the outset that my intention is not to undermine human rights law nor to devalue its criticism of counter-terrorism laws. Rather, I attempt to bring forward a new complementary way of looking at these laws, with the hope of presenting a wider picture.

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Throughout my paper I will be drawing on critical race theory<sup>1</sup> and reflexive racism<sup>2</sup> to elaborate on counter-terrorism measures and human rights.

My paper is composed of three sections. In the first section I examine the changed nature of counter-terrorism measures after 9/11 and the human rights critique of counter-terrorism measures, identifying the issue of contemporary racism within the context of the ‘war on terror’. In the second section I rethink the human rights critique<sup>3</sup> of counter-terrorism through the lens of contemporary racism. I evaluate the human rights critique of counter-terrorism and show how law is implicated. In the final section, although I seem to propose a way forward, I also take a silent step back due to my pessimism in light of the current rise of xenophobia and racism especially in Europe.

## **1. Human rights: two steps forward**

What happened in New York on a particular September day at the beginning of the previous decade was not the first terrorist attack; nevertheless, due to its magnitude and the reactions it created, 9/11 was a turning point in a number of perspectives. Immediately after the attack, the Western world was told that the system of liberal capitalism, with its democratic and human rights ideals, was now challenged and threatened by terrorists carrying labels such as religious fanatics, suicide bombers, and Islamic militants.<sup>4</sup>

Western governments responded to this threat by introducing an extensive range of counter-terrorism measures, ranging from restricting personal freedoms to limiting immigration policies and expanding surveillance. The international regime and legal measures against terrorism have been further expanded through the adoption of a number of United Nations (UN) General Assembly (UNGA) and Security Council (UNSC) resolutions,<sup>5</sup> and decisions of regional organisations.<sup>6</sup>

However, the practices did not remain at the international level. In line with these *most comprehensive and far-reaching*<sup>7</sup> UN resolutions, governments also adopted individual practices

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1 Critical Race Theory (CRT) is developed mainly in the United States of America. It argues that the notion of race is ideology, which is an account of lived reality and politics of representation. The ideology of ‘race consciousness’ is bound up with ‘black subordination’ and the perpetuation of ‘the white hierarchy’. Race, in other words, unites whites across boundaries of class or gender. Ideology, in this sense, operates to create ‘hegemony’ of interests. CRT argues that if one lives within a society infused by racism, then racism prescribes experience, stereotyping and classifying people. It becomes a part of the experience that one takes part in it without realising because it is not only an ingrained feature of our landscape, it looks ordinary and natural to persons in the culture, but it also constructs social reality in ways that promote its own self-interest (or that of elite groups). Therefore, according to CRT the concept of ‘racism’ should not be limited to specific or isolated acts or policies, but should be taken as a phenomenon that is deeply embedded in language and perception, which results in the subordination of certain people based on their supposed membership in a ‘non-white’ group. This approach on the one hand emphasises the effect on the persons who are the objects of racial thinking and, on the other, it acknowledges that law and policy can construct and communicate racial thinking even when they are not explicitly based on race. Therefore it could be said that CRT provokes a critical thinking that is not limited to a historical time and place, but confronts law’s complicity in the violent perpetuation of a racially-defined economic and social order.

2 Reflexive racism is a concept put forward by Slavoj Žižek. He argues by this concept that whereby racism is attributed to or fixed on others, and from a standpoint which claims for itself the high ground of multiculturalism, pluralism and anti-racism, when we portray others as unworthy of respect because they are, always have been, and always will be, a hopeless bunch of racist bigots, we create the basis for a new form of racism that again assaults anti-racism by co-opting it. For further reading see S. Žižek, *Welcome to the Desert of Real*, 2002.

3 I mainly use reports of the international institutions, non-governmental organisations and some of the academic work to summarise the critiques.

4 C. Douzinas, *Human Rights and Empire*, 2007, p. 4.

5 E.g. UNSC Resolutions 1368(2001), 1373(2001), 1540(2004), 1624(2005) and UNGA Resolution 56/1(2001).

6 E.g. Inter-American Convention against Terrorism (2002), Protocol Amending European Convention on the Suppression of Terrorism (2003), etc.

7 C. Ward, ‘Building Capacity to Combat International Terrorism: The Role of the United Nations Security Council’, 2003 *Journal of Conflict and Security Law* 8, pp. 289-299.

and policies<sup>8</sup> as a response to undefined<sup>9</sup> international terrorism. They involve a variety of policies and legal measures, which contain racist tones.

These legal measures and actions have attracted various criticisms. Academics and human rights advocates prepared extensive articles and reports raising attention to the general insufficiency of counter-terrorism measures to deal with the phenomenon of terrorism and their failure to respect human rights.<sup>10</sup> For example, the Eminent Jurists Panel on Terrorism concluded, ‘(...) in each country or region visited, the Panel provided a template for submissions and asked key questions in the course of their hearings, the Panel was struck by the similarity of the testimony provided at them. From New York to Nairobi, from Brussels to Bogotá, and from Moscow to the Maghreb, the voices heard by the Panel spoke with disturbing consistency and regularity that well-established principles of international human rights law are being ignored’.<sup>11</sup> These critiques<sup>12</sup> presented the promotion and the defence of human rights as the only way to balance counter-terrorism. However, I believe the critiques remain inadequate because the discriminatory aspect of counter-terrorism and the subtle racism involved are barely recognised by human rights advocates and academic researchers. The core issue is not only to balance security and liberty as they argue, but also the need to be alert and aware of the wider political implications of counter-terrorism measures.

### ***1.1. Terrorism, counter-terrorism and the notion of war***

Terrorism is perceived as a threat or danger to state authority having the potential to undermine a state’s political, economic, and social structures. The governments seek to attach a particular stigma to terrorism – treating it as a separate legal category that might override all existing laws. The words of Ignatieff summarize the necessity and the exceptionality of counter-terrorism policies aiming to save the system: ‘In the name of people’s safety, the Roman republic was prepared to sacrifice all other laws. For what laws would survive if Rome itself perished?’<sup>13</sup>

When evaluating measures aimed at keeping the state structure intact, one should keep in mind that it would be the state, as the rule setter, that would define who to protect and whom not to protect. The group to be protected would be defined as the accepted community, who would be bound by rules and customs that are accepted by all (universal). The group which is not to be protected is excluded and defined as the ‘other’. Throughout history when the Europeans began to encounter and rule other people, racism and discrimination characterised government conduct and laws. These same structures and laws are deeply ingrained in European culture and history, disguised in rhetoric and policies. The system was cemented by *jus gentium* (international law)

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8 E.g. in the US, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act - 2001), in the UK, the Anti-terrorism, Crime and Security Act (ATCSA - 2001).

9 Since terrorism or terrorist acts are not defined in these resolutions, it gives a freehand to states how to define and criminalise these acts.

10 Throughout my paper I will refer to them as ‘the critiques’.

11 Report of the Eminent Jurists Panel on Terrorism, *Assessing Damage, Urging Action: Counter-terrorism and Human Rights*, Geneva, 2009. p. 10.

12 The reports that have been examined for this study are: *Human Rights, Terrorism and Counter-terrorism, Fact Sheet No. 32*, Geneva, 2008; *United Nations, Assessing Damage, Urging Action, Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights*, Geneva, 2009; *In the Name of Counter-Terrorism: Human Rights Abuses Worldwide*, Human Rights Watch Briefing Paper, March 2003; *Terrorism And International Law: Challenges And Responses*, The International Institute Of Humanitarian Law, 2003; *United Kingdom, Human rights: a broken promise*, London, 2006, Amnesty International, EUR 45/004/2006. The academic works that have been examined for this study are: D. Moeckli, *Human Rights and Non-Discrimination in the ‘War on Terror’*, 2008; M.M. Mohamedou & R. Archer (eds.), *Human Rights after September 11*, 2002; W. Benedek & A. Yotopoulos-Marangopoulos, *Anti-Terrorist Measures and Human Rights*, 2004; C. Gearty, *Essays on human rights and terrorism: Comperative approaches to civil liberties in Asia, the EU and north America*, 2008; S. Sottiaux, *Terrorism and limitations of rights: the ECHR and the US Constitution*, 2008; S. Lagoutte et al. (eds.), *Human Rights in Turmoil: Facing Threats, Consolidating Achievements*, 2007; C. Gearty, *Can Human Rights Survive*, 2006.

13 M. Ignatieff, *The Lesser Evil: Political ethics in an Age of Terror*, 2005, p. 1.

that was based on natural law principles. It consisted of customs and contracts based on consensus, recognising not only the unity and universality of European law, but also the equality of all its members vis-à-vis the others. The concepts of ‘law’, ‘civilisation’ and ‘humanity’ were based on exclusively Eurocentric values. Non-Europe, ‘the rest of the world’, was considered to be uncivilised<sup>14</sup> or half-civilised, even empty, or in Hegel’s terms not to have contributed to world civilisation.<sup>15</sup> The belief in ‘European civilisation’ was essential to the structure of law and the state, pivotal to European consciousness. Within this framework, racism supported and justified the idea of a European ‘civilising mission’ as well as systems such as slavery.<sup>16</sup>

I believe that any criticism directed at government action that especially involves the ‘other’ should take into account racism in its contemporary forms, which are not necessarily only based on biological premises. What is needed is recognition that racism is itself an ideology, a political system, and a particular power structure of formal or informal rule, for the differential treatment of different groups.

The fact that the actions of the West in general took 9/11 as the reference to an unprecedented Islamist terrorist threat, a barbaric enemy that challenges the entire Western value system, has blurred the spectrum of counter-terrorism action. Terrorism and counter-terrorism was presented as an ever-present civilisational challenge, *a war for righteousness*.<sup>17</sup> A theoretical background for such a challenge was already in place<sup>18</sup> and was used accordingly by Western governments. Therefore the rhetoric of saving Western civilisation and the excessive measures did not generally shock the public; on the contrary, they were seen as necessary to save the ‘better’ system. The flexibility of international law and the vagueness of the UNSC resolutions were also of use in this respect.

The construction of an enemy is of crucial importance here. Žižek explains that ‘(...) since the end of the Cold War and the disappearance of the enemy, the Western imagination entered a decade of confusion and inefficiency, looking for suitable schematisations for the figure of enemy (...) only with 9/11 did this imagination regain its power by constructing the image of Osama bin Laden, the Islamic fundamentalist par excellence, and al-Qaeda, his “invisible” network’.<sup>19</sup> Once the enemy was created, a war had to be waged; and it is dubbed as the ‘war against terror’, a disguised name for counter-terrorism.

Once the language of war was accepted, it is misleading to pursue the debate about counter-terrorism and human rights in terms of balancing liberty and security<sup>20</sup> due to the creation of ‘us’ and ‘them’ through the language of war; it is also insufficient to discuss what actions would be within the limits of *jus in bello* or if the acts of certain countries fits *jus ad bellum* in the war against terror.<sup>21</sup> In other words, the notion of war not only creates an exceptionality that allows

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14 For example, Kant recognised the ‘European/white’ as the true form of ‘Man’ and argued ‘The Negro can be disciplined and cultivated, but is never genuinely civilized. He falls of his own accord into savagery’, for further reading see <<http://virt052.zim.uni-duisburg-essen.de/Kant/aa15/878.html>> or R. Bernasconi, ‘Kant as an Unfamiliar Source of Racism’, in J.K. Ward & T.L. Lott (eds.), *Philosophers on Race Critical Essays*, 2002.

15 For Further reading on Hegel’s race-thinking see R. Bernasconi, ‘With What must the Philosophy of World History Begin? On the Racial Basis of Hegel’s Eurocentrism’, 2000 *Nineteenth-Century Contexts* 22, pp.171-201.

16 S. Marks & A. Clapham (eds.), *International Human Rights Lexicon*, 2005, p. 28.

17 D. Moeckli, *Human Rights and Non-Discrimination in the ‘War on Terror’*, 2008, p. 49.

18 S. Huntington, ‘The Clash of Civilisations’, 1993 *Foreign Affairs* 72, no. 3, pp. 22-49

19 Žižek, supra note 2, p. 110.

20 Moeckli, supra note 12, p. 224.

21 For further discussion on this matter: S. Harzenski, ‘Terrorism, a History: Stage One’, 2003 *Transnational Law and Policy* 12, no. 2, pp. 137-196; C. Greenwood, ‘International Law and the “War Against Terrorism”’, 2002 *International Affairs* 78, pp. 301-317; A. Cassese, ‘Terrorism is also disrupting some crucial legal categories of international law’, 2001 *EJIL* 12, no. 5, pp. 683-699; R. Mullerson, ‘Jus Ad Bellum: Plus ça Change (le Monde) Plus C’est la Même Chose (le Droit)’’, 2002 *Journal of Conflict and Security Law* 7, no.2, pp. 149-189; R. Sloane,

the violation of the *jus cogens* norms of human rights (e.g. the right to life, the right to be free from torture) but it also justifies an institutionally blessed racism.

The language of war in counter-terrorism is used to justify the exceptional legal measures adopted due to exceptional circumstances and also used to segregate and discriminate the ‘suspected communities’ within the societies and the non-citizens. Delgado describes the notion of war as follows: ‘(...) when the language of wartime emergency is used, it looks as if the peacetime rules are simply bended a little. However if examined closely, one would see that it would really be a new way of looking at due process. What happens is that we first decide we are at war and then change our approach, so that we can apply international wartime rules even to civilians and civilian problems. Wartime exception is any sort of situation that prompts society to draw simple we/they distinction’.<sup>22</sup>

This distinction is the basis for racism. War, with its language and law, is inherently discriminatory and racist. It is based on the division of ‘us’ and ‘them’. The differences between ‘us’ and ‘them’ have to be underlined in order to motivate and continue the ‘war’. Moreover, in times of conflict or perceived conflict, presumed foreignness gives rise to a further presumption that these ‘permanent foreigners’ are loyal to their country of origin and disloyal to their host country. The government and law often officially approve the presumption of disloyalty and inscribe disloyalty as a racial characteristic.<sup>23</sup>

## 2. Racism in counter-terrorism: one step back

Accepting counter-terrorism as ‘war’ means that the human rights critique of counter-terrorism measures on the issue of the right to life<sup>24</sup> becomes redundant, because not only the state of emergency regulations based on ‘the rule of law’ give the state the *margin of appreciation*<sup>25</sup> but also the law of war gives the security forces within and outside the borders of the country an extended right to kill. These measures include ‘deliberate’ or ‘targeted killings’ to eliminate certain individuals who are believed to be guilty of terrorist crimes. In other cases, states adopt ‘shoot-to-kill’ law enforcement policies in response to perceived terrorist threats. The right to kill, which is justified through the excuse of protecting the life of innocents, when infused with racism produces negative outcomes in the so-called ‘battlefields’ in distant lands, and also leads to catastrophic situations within borders as well. The physical appearance of the person becomes not only an instrument for identifying or giving value to persons in society, but it also negates one’s individuality. Zizek exemplifies this with the anti-Semitic pogroms: ‘What the perpetrators

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‘The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War’, 2009 *Yale Journal of International Law* 34, no. 1, pp. 48-108.

22 R. Delgado, *Justice at War*, 2003, p. 72.

23 T. Joo, ‘Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11’, 2002 *Columbia Human Rights Law Review* 34, no. 1, p. 2.

24 The International Covenant on Civil and Political Rights (Art. 6 ICCPR) and the American Convention on Human Rights (Art. 4) prohibit the arbitrary deprivation of life, and Article 2 of the European Convention on Human Rights states that no one shall be deprived of life intentionally and that the use of force which is no more than absolutely necessary may be used in defence of any person from unlawful violence.

25 ‘Margin of appreciation’ refers to the power of a contracting state to an international treaty in assessing the factual circumstances and in applying the provisions envisaged in international human rights instruments. The margin of appreciation is based on the notion that each society is entitled to a certain latitude in balancing individual rights and national interests. In this regard, the doctrine is analogous to the concept of judicial discretion, where a judge, in line with certain constraints prescribed by legislation, precedent or custom, could decide a case within a range of possible solutions. The margin of appreciation is designed to provide flexibility in resolving conflicts emerging from diverse social, political, cultural and legal traditions of states with international law. For further reading see E. Benvenisti, ‘Margin of Appreciation, Consensus, and Universal Standards’, 1999 *Journal of International Law and Politics* 31, pp. 843-855; M.R. Hutchinson, ‘The Margin of Appreciation Doctrine in the European Court of Human Rights’, 1999 *International & Comparative Law Quarterly* 48, pp. 638-650.

of pogroms find intolerable and rage-provoking, what they react to, is not the immediate reality of Jews, but to the image/figure of the “Jew” which circulates and has been constructed in their tradition. The catch of course, is that one single individual cannot distinguish in any simple way between real Jews and their anti-Semitic image: this image over-determines the way I experience real Jews themselves and, furthermore, it affects the way Jews experience themselves. What makes a real Jew that an anti-Semite encounters on the street “intolerable”, what the anti-Semite tries to destroy when he attacks the Jew, the true target of his fury, is this fantasmatic dimension’.<sup>26</sup> The murder of Jean Charles de Menezes by the British Police in 2005 is an example of how an ordinary citizen could be presumed to be a suicide bomber based on his *appearance and colour*.<sup>27</sup>

The language of war is also used to justify torture.<sup>28</sup> Although strictly prohibited, torture was applied before 9/11. Following 9/11 the number of states practising torture have increased and the administration of torture is more openly discussed.<sup>29</sup> Torture is practised on terrorist suspects, or ‘unlawful combatants’ who are believed to have valuable information that would save human lives. Their human rights are violated in the name of our human rights. Although torture, which is claimed to have been eradicated in the West and remains one of the most widely criticised aspects of counter-terrorism measures in the West, is still exercised on terrorist suspects in non-Western countries. However, these suspects are handed over by rendition flights from the West. The ‘torturing countries’ carrying out the work for the West are seen as less civilised because they use torture and do not respect human dignity. Thus, on the one hand, it is the West that criticises these countries because they do not respect human rights, and, on the other, it is on behalf of the West that torture is used.

The critiques state that the state response to terrorism threatens the very freedom that the state is meant to protect. The principle of habeas corpus of human rights law establishes a number of safeguarding principles to prevent arbitrary detention<sup>30</sup> and the right to a fair trial. The critiques show that, since 9/11, a number of states set aside basic principles of liberty and the right to a fair trial, placed suspects outside the protection of their legal system, both through legislation and action, detained them indefinitely without trial and used special tribunals and restrictions.<sup>31</sup> Although the critiques touch upon a very important aspect of counter-terrorism measures, I believe that the core point of the issue is missing in these critiques. In the Western legal system, the subject/self is defined in his/her relation to the law. By removing the suspect from the legal system, the subject is placed outside of the system altogether, thus not only is his/her equality before the law denied, but also his/her self as a reasonable agent of choice. If suspects cannot be subjects within the existing legal system, they will naturally be subject to other laws within different systems, which are not necessarily based on human rights. Thus by

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26 S. Zizek, *Violence*, 2008, p. 57.

27 According to the Guardian newspaper he was shot 9 times, <<http://www.guardian.co.uk/uk/menezes>>.

28 The prohibition of torture and other cruel, inhuman or degrading treatment or punishment is absolute under international law. There are no exceptions to this rule on any grounds. There is also a specific Convention Against Torture (CAT). The Rome Statute also prohibits torture as a war crime whether it is committed in the context of a civil war or other non-international armed conflict.

29 C. Gearty, *Can Human Rights Survive*, 2006, p. 130

30 Art. 14 ICCPR.

31 The critiques list these measures as follows: pre-trial detention (detention before laying a criminal charge against a person for the purpose of further investigating whether that person was involved in the commission, or assisted in the commission, of a terrorist offence); administrative detention (detention to prevent a person from committing, or assisting in the commission of, a terrorist offence); control orders (imposing conditions on a person, short of detention, to prevent that person from committing, or assisting in the commission of, a terrorist offence, including the detention of a person awaiting determination of immigration or refugee status); and compulsory hearings (detention and compulsory questioning of a terrorist suspect, or non-suspect, to gather intelligence about terrorist activities) see UN Fact Sheet No. 32, supra note 12, p. 36.

denying them access to the legal system, which is valid for the majority, the humanity of terrorist suspects is denied. One can conclude that through counter-terrorism laws, a larger legally blessed discrimination, which is more powerful than the citizen/non-citizen separation, is achieved. Just like Apartheid or Nurnberg laws, we could now make a distinction even among our citizens by their different ethnic or religious background. With the continuing trend, such as the recent immigration bill<sup>32</sup> discussed in France, we would soon not even need counter-terrorism laws to differentiate between our citizens and deny them their nationality.<sup>33</sup>

Freedom of expression,<sup>34</sup> a broadly protected norm of international human rights law, has a complicated role in counter-terrorism measures and it becomes even more complex when the issue of contemporary racism is involved. Many human rights critics expressed their concerns when some states passed legislation permitting state interference in the media concerning counter-terrorism actions or put pressure on media outlets to refrain from critical reporting. States have also blocked or restricted journalists' access to prisoners, court proceedings and war zones. However, when security and police forces become the main source of information for the media, the media can also be used as a tool for institutional and popular contemporary racism,<sup>35</sup> providing a forum where the bureaucratic language of the former is translated into the populist language of the latter.<sup>36</sup>

This role of the media and a discriminatory application of laws for certain parts of the population helps to create a culture of suspicion against the 'other': the one presumed to be disloyal to the host country. The presumption of disloyalty plays an important role in the institutional aspect of racism especially in the context of war. It assists in categorising different 'races' based on their loyalty to countries. For example, during the Second World War, California Attorney General Earl Warren was a vocal proponent of Japanese internment (without any individual inquiry about their loyalty), but he opposed the mass internment of Germans and Italians because they were no different from anybody else.<sup>37</sup> A similar example is the Oklahoma City bomber Timothy McVeigh, whose disloyalty was never attributed to his whiteness. Whereas after 9/11, the FBI and other law enforcement agencies sent hundreds of letters to Muslim individuals requesting 'voluntary' interviews and during the two months following 9/11, about 1200 immigrants from the Middle East and South Asia were rounded up and held in US jails or detention centres for approximately two years. None were ultimately charged with involvement in the 9/11 attacks.<sup>38</sup>

The common conflation of 'Muslim' with 'terrorist' is an example of racial profiling. However, the racial profiling of potential suspects and highly discriminatory government actions carried out in the name of national security have not received sufficient attention from the critiques. In its General Policy paper ENAR underlined that, 'the challenge is to secure the effectiveness of counter-terrorism strategy by ensuring that it is carried out within the context of the international human rights framework and in a non-discriminatory manner. To date, insufficient attention has been given to the interaction between counter-terrorism strategies and the fight against racism.'<sup>39</sup> There have also been international calls for governments to ensure that *any*

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32 For the text of the law in French see <<http://www.assemblee-nationale.fr/13/ta/ta0542.asp>>.

33 <<http://jurist.org/paperchase/2010/10/france-lawmakers-vote-to-adopt-controversial-immigration-bill.php>>.

34 E.g. Art. 19 ICCPR and Art. 10 ECHR.

35 '(...) There is not good use of the media; the media are part of the event, they are part of the terror, and they work in both directions', J. Baudrillard, *The Spirit of Terrorism*, 2003, p. 31.

36 A. Kundnani, *The End of Tolerance: Racism in 21st Century Britain*, 2007, p. 167.

37 Joo, *supra* note 23, p.19.

38 *Ibid.*

39 *Counter-terrorism and combating racism*, ENAR General Policy Paper No. 4, November 2007, p. 4.

measures taken in the fight against terrorism would not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin and that non-citizens are not subjected to racial or ethnic profiling or stereotyping.<sup>40</sup> However, Western governments continued to use 9/11 and concerns of national security to justify tougher immigration and asylum laws<sup>41</sup> that have little to do with terrorism threats. These trends co-exist with increased support for anti-immigrant parties in national elections. The critiques in some instances (but without much cohesion) expressed concern that such developments have disproportionately affected Muslims. They pointed out that the huge legal edifice created to protect civilians from terrorism has targeted migrant communities, and extended already discriminatory applications of indefinite detention without trial and summary deportation of asylum seekers. For example, in the UK, new legislation was passed to allow the deportation of those who have already obtained the right to remain.<sup>42</sup> However, what the critiques miss is that equality is a political construct expressed through law.<sup>43</sup> Equality acquires its concrete meaning only before the law. To criticise counter-terrorism laws because they do not respect equality would be a step forward but it would not be progress because it would subsequently take a step back due to a lack of consideration for the nature of law. One must be aware of the nature of law, its role in the construction of social institutions, and be mindful of the subtle racism behind claims of neutrality that reveal the political and ideological substratum of the law.<sup>44</sup> When law is taken as a symbol of a nation<sup>45</sup> (the dominant race) it is discriminatory. Deportation carried out through counter-terrorism laws, not only of newcomers but also persons who have been residents for longer periods of time, becomes the desired solution *aiming to clean the society of groups*<sup>46</sup> believed to be unfitting. Thus once again, counter-terrorism laws are not only used to exclude and reject the supposed social evil of terrorism, but also the ones who do not socially fit in. Therefore deportation, expulsion and refoulement are not only against the universal principles of human rights but are inherently racist, which is formed and blessed by the political structure and the legal system.

Counter-terrorism measures proceed ethnic or cultural cleansing in Western countries by removing the unwanted migrants, refugees or sometimes simply Roma, but they also lead to ethnic cleansing in the countries that are the targets for counter-terrorism. In many of the countries (including their neighbours) against which the war on terror is waged, the ethnic or religious minorities are disappearing. The Christian communities of the Middle East are suffering their worst nightmare since the crusades, the ethnic balance of Afghanistan, Pakistan and the neighbouring Central Asian republics are constantly shaking and there is non-stop turmoil.

According to Critical Race Theory the concept of 'racism' is deeply embedded in language and perception, which result in the subordination of certain people based on their supposed

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40 Committee on the Elimination of Racial Discrimination (CERD), *General Recommendation No. 30*, 2004, <<http://www.unhcr.ch/tbs/doc.nsf/0/e3980a673769e229c1256f8d0057cd3d?Opendocument>>.

41 Under international human rights and refugee law, states have a fundamental duty to offer protection to those fleeing persecution and to treat all asylum seekers, refugees and migrants in a fair, non-discriminatory and humane way. According to the 1951 Refugee Convention the right to asylum is valid irrespective of how an individual enters the country, and no asylum seeker may be discriminated against and deprived of the right to a satisfactory asylum process on the basis of race, religion or country of origin.

42 A. Sivanandan, 'Racism, Liberty and the War on Terror', 2007 *Race & Class* 48, p. 48.

43 C. Douzinas & A. Geary, *Critical Jurisprudence: The Political Philosophy of Justice*, 2005, p. 191.

44 *Ibid.*, p. 260.

45 '(...) the central achievement of contemporary racism is to succeed in equalising the limits of "race" with national frontiers.' P. Gilroy, *There Ain't no Black in the Union Jack*, 2006, p. 46.

46 Douzinas and Geary give the following example while referring to expulsion and disinfection of societies: 'A white girl while combing her hair learns that the comb belongs to a black kid she immediately vomits. The image of vomiting presents an extreme bodily reaction as a metaphor for the social attitude of whites to blacks. They have to be removed, vomited out of the social body.' Douzinas & Geary, *supra* note 43, p. 265.



membership of a ‘non-white’ group. If we take into consideration the way Muslims are presented in popular discourse, as being members of a less developed culture, which upholds violence as an integral part of Islam (the concept of Jihad), Muslims are not believed to fit into the peaceful and law-abiding societies in which they live. Following this way of thinking, represented by politicians, the media and certain academics, counter-terrorism actions are justified because the West claims to be serving a higher culture, which is built on the notion of human dignity that is the core of human rights. Ignatieff, while talking about the excessive measures of counter-terrorism, claims ‘unlike terrorists, the defenders of democracy know what they are doing is wrong (or at least a bit wrong) even when they are doing it, and they have a set of democratic values to hand to stop things getting out of control, thus our evil is better (because it is less bad) than theirs’.<sup>47</sup> The fact that a suicide bomber goes to a marketplace, gets on a bus or an underground train and blows himself up for the sake of his higher good and he is named as a hero or saint, while we name him a terrorist, or when an American girl of seven whose father fights in Afghanistan writes ‘although she loved her father very much, she was ready to let him die, to sacrifice him for her country’<sup>48</sup> is the dilemma of the system. Thus if Muslims are framed as terrorists waging a civilisation war targeting innocent people, then the West would be just in defending its civilisation and innocent people by waging a defensive just war on the Muslims. However, from the other perspective, it is the West that is invading as the aggressor and the others are defending themselves. The power lies how the events are framed.

Racism holds that members of racial groups have characteristics that are determined by their race.<sup>49</sup> Although the law in the West rarely makes explicit reference to race, the ‘war on terror’ has furthered stereotypes of Muslims as suicide bombers and terrorists, and Islam as a religion that sanctifies such action.<sup>50</sup> The blanket nature of counter-terrorism laws (e.g. the stop-and-search policies of the police, which virtually suspect every Muslim of being a terrorist unless proved otherwise) has further enhanced this perception of the Muslim community in public opinion.<sup>51</sup> Counter-terrorism laws, combined with contemporary racism, result in the disappearance of individual responsibility, because the logic of racism works by group characterisations, and consequently the responsibility of terrorism would be put on the shoulders of the whole group. Thus through counter-terrorism laws the racially or culturally different ‘other’ does not only become a second-class citizen but also law becomes the *law of colour*,<sup>52</sup> as put forward by Douzinas and Geary, ‘the law turns colour and race into determinants of personhood, entitlement and status. It is not so much that the law discriminates but that it creates two laws and places under separate jurisdictions according to their colour and race. Colour overwhelms individual traits, qualities and attributes – all those elements that constitute concrete identities are set aside as insignificant. People are not just of colour; colour is the only quality that counts in their dealings with law’.

Therefore counter-terrorism laws and measures, by identifying Muslims as ‘the other’ and portraying Islam as representing a ‘threat’ to the Western identity, not only lead to the

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47 Ignatieff, *supra* note 13.

48 Zizek, *supra* note 2, p. 43.

49 Joo, *supra* note 23, p. 18.

50 According to the EPC report, 9/11 and the Madrid and London bombings have created an unfavourable climate for many Muslims in Europe and led to misconceptions and inaccurate stereotyping. The publication of the cartoons of the Prophet Muhammed heightened existing tensions. Whatever the arguments over freedom of speech, few people denied that these cartoons were offensive and provocative: especially the depiction of the Prophet wearing a bomb on his head, which reinforced perceived links between Islam and terrorism. M. Dittrich, *Muslims in Europe: Addressing the Challenges of Radicalisation*, EPC Working Paper No. 23, March 2006.

51 A. Sivanandan, ‘Freedom of Speech is not an Absolute’, 2006 *Race and Class* 48, p. 77.

52 Douzinas & Geary, *supra* note 43, p. 198.

marginalisation and surveillance of these communities, but also put racism once again at the centre of policy and law making. Law becomes not just a construction of social institutions and their ideological operation but their first and foremost expression.

### **3. The dual nature of human rights**

Until now I have tried to show how racism in the notion of war and counter-terrorism measures has polluted our political discourse and laws, and how law is entangled in the power struggle for the protection of those holding power. If such strategy had been used against the general population, it would have been strongly resisted. However, the counter-terrorism legislation was allowed to come into existence on the tacit understanding that it would only be deployed against ‘alien’ communities focusing mainly on immigrants and ‘Muslims’. As put forward by Gearty, ‘(...) Even where civil liberties ideals persist, the very mention of something being a counter-terrorism measure makes people more willing to contemplate the giving up of their freedoms. It may be that this reflects the assumption that suspected terrorists (rather than suspected criminals) are always going to be “other people” and so it is not their own freedom that they are sacrificing but rather that of people who are already in some ways of doubtful ethical provenance’.<sup>53</sup>

This points to a crucial point, which I believe could be identified as another reason why human rights critiques fail in their criticism of counter-terrorism measures. That is the involvement of race in human rights, giving it a dual role in the politics of power. According to Foucault, racism concerns the politics of domination and subordination and power relations. Foucault looks at racism as the ‘fundamental mechanism of power that exercises itself in modern states’.<sup>54</sup> In Foucault’s terms of biopolitics, race is a form of regulatory and disciplinary power. He writes: ‘the race struggle discourse becomes the discourse of a battle that has to be waged not necessarily between races, but by a race that is portrayed as the one true race, the race that holds power and is entitled to define norm, and against those who deviate from that norm, against those who pose a threat to the biological heritage. At this point we not only have all those biological-racist discourses of degeneracy, but also all those institutions within the social body which make the discourse of race struggle function as a principle of exclusion and segregation and, ultimately, as a way of normalising society’.<sup>55</sup>

The definition and explanation by Foucault fit perfectly well with the counter-terrorism and human rights politics of today. They point out the dual role that human rights have. Societies that hold power define the universal values and norms. And the West has had the tradition of imposing its values on the other since early modernity. If we only look at recent examples, it is clear that these values are imposed on the other by force. The West forcefully bring liberal capitalism (in Korea and Vietnam), forcefully bring aid (in Somalia), forcefully bring human rights (in Kosovo), forcefully bring gender equality (in Afghanistan) and forcefully bring democracy (in Iraq). Force is the method of extending the peaceful, civilised and rational value system of the West.

The West today defines its norms in political and economic terms as the human rights-based democratic government rule combined with the liberal capitalist economic system. When these values enforced on the ‘other’ are not embraced, resistance is labelled as terrorism. Baudrillard refers to the ‘other’ when speaking of terrorism and the system of the world. He

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53 Gearty 2008, *supra* note 12, p. 417.

54 M. Foucault, *Society Must be Defended Lectures at the College de France 1975-76*, 2003, p. 61.

55 *Ibid.*, p. 61.

writes, 'it was the system itself, which created the objective conditions for this brutal retaliation. By seizing all the cards for itself, it forced the Other to change the rules'.<sup>56</sup> It is interesting to note that Baudrillard in his explanation of the global system, its challengers and the resistance to globalisation, makes the distinction between 'one' and 'the other'; race-thinking finds its way in his explanation of 9/11 and the acts of terrorism against the hegemonic domination.

If terrorism and counter-terrorism were to be defined as a 'race struggle' in Foucauldian terms then we need to acknowledge that counter-terrorism policies are implemented not only to ensure the security of dominant societies, but also in order to bring the 'other' into the system, which is based on human rights. Human rights have a dual role in this struggle. First, human rights values are imposed on the 'other'. The 'other' resists this imposition of values and his resistance is called 'terrorism' and counter-terrorism measures are to defend the values of the West. Then, human rights defenders use the same values to save and protect the 'other' from counter-terrorism measures. In other words, human rights are used in defending the rights of the individuals who suffer the brutality of the counter-terrorism, and they are also used in promoting counter-terrorism measures by arguing the defence of the victims of terror and claiming to bring universal values to the 'other'.

However, it is important to note that the West not only tries to impose its rights and wrongs on the others, the others are also not treated with the same values. In this struggle, the 'other' is yet to be treated as equal, not only because it is considered to be of a different kind from the dominant society, but also by keeping the inequalities the dominant society ensures the endurance of political, economic or cultural domination. Therefore, once terrorism and counter-terrorism measures are taken as the new form of race struggle, the way of addressing it through the human rights critique is not sufficient, because human rights are also part of the same struggle, albeit at another level. Unless the involvement of racism and human rights in the power politics of today is recognised, the critiques of human rights activists will continue to be incomplete in dealing with these topics.

### **Conclusion: two steps forward?**

Since early modernity, starting with the most humanist lawyers such as Vitoria and Grotius or philosophers like Kant and Hegel, the West constantly searched and evaluated the 'others'' ethical and universal values and claimed that their lack of these values made them lesser beings. The West defined its relation to them through the imposition of Western laws. These laws established the hierarchy that justified the subordination of the 'other', who were seen as irrational or immature. However, the actions that were defined as irrational and immature were also used by the West. Previously, laws justified the acquisition of land, colonialism and slavery. Today, the laws of counter-terrorism justify torture, discrimination and execution without trial. Although being aware that these actions are gross violations of human rights, democratic societies allow themselves to remain agnostic to such acts hiding behind a rhetorical commitment to human rights. Thus the foundation of the system that is based on respect for human dignity is destroyed. By acting and applying counter-terrorism measures on the claim of them being less cultured, need to be educated, need to be taught how to rule themselves, thus them being lesser humans, the West becomes less human as well. The highly regarded values of human rights,

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<sup>56</sup> Baudrillard, *supra* note 35, pp. 9-12.

based on rationality, human dignity and equality lose their meaning and remain just words neither empowering the weak nor revolutionising the world.

The way the Ottomans solved the inadequate progress of the march of the Mehteran was to abolish the janissary system altogether. I am not suggesting that we should abolish the human rights system, but we need to strengthen it by being aware of the questions that it deals with. The concept of race and racial classification is built into the Western system due to its origins in the Enlightenment period. We need to retell our story of human dignity and rights by removing the white/European from the main role and put the 'other' into the main act.