

**CRIMINAL LAW BETWEEN WAR AND  
PEACE EL DERECHO PENAL ENTRE LA  
GUERRA Y LA PAZ LE DROIT PÉNAL  
ENTRE LA GUERRE ET LA PAIX**

# CRIMINAL LAW BETWEEN WAR AND PEACE

## JUSTICE AND CRIMINAL COOPERATION IN MILITARY INTERVENTIONS

Summary and conclusions of the 15th International Congress of  
the International Association of Social Defense<sup>1</sup>

### I

Despite the old adage «*inter arma, silent leges*», law and war do not actually exclude one another. Bringing both worlds closer together was a process hatched both conceptually and legally in the Enlightenment, when the distinction between *ius in bello* and *ius ad bellum* was made, and was developed in Europe on the bases of highly complicated practical cases that took place during the conflictive periods of the 19<sup>th</sup> and 20<sup>th</sup> centuries. The end of the two great European wars was a turning point materialised in the Nuremberg and Tokyo trials and in the signing of the four Geneva Conventions. These events gave rise to the first generation of norms of criminal law of war that respond to a clear dichotomy: to sanction the most unacceptable forms of conduct that occur during war as well as attacks against peace. These Conventions, together with the Universal Convention of Human Rights, flanked by different regional conventions, represent the

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The conclusions summarised in section VII were debated and written by a working group composed of Luis Arroyo, Luigi Foffani, Stefano Manacorda, Manuel Maroto, Adán Nieto, Daniel Scheunemann y Joachim Vogel.

essential foundations of the ethics of globalisation, a concept spoken of by *Mireille Delmas Marty* which was reinforced after the end of the Cold War when the Rome Statute was approved and the International Criminal Court came into being.

The strength and consistency of these foundations should enable us to confront and explain the several new questions put forward by *Stefano Manacorda* in his introductory account, dealing, to a great extent, with the breakdown of the binary logic which legal codes comprise. Between peace and war, between combatant enemies and innocent civilians far more complex realities have arisen. On the one hand, peace-keeping operations cover a number of different actions, ranging from maintaining peace to imposing it, which means having to act sometimes as peace-keeping forces and some other times as the armed forces, ready to take over the control of a territory or even become an occupying force. The international structure of these forces also means that their legal regulation is an example of interlegality. National legal systems, world conventions, such as the International Humanitarian Law (IHL), or regional conventions on human rights, which fall under the jurisdiction of international official bodies such as NATO, the UN or the EU, make up an intricate legal labyrinth. On the other hand, new actors have cropped up in armed conflicts: terrorists, mercenaries or corporations looking for business opportunities in a traditionally state-controlled area.

## II

The legal problems that such peace-keeping missions present are that they are focused on determining the norms that should govern their actions. This implies stating admissible limits to the use of force, a procedure carried out under the rules of engagement (ROE), and also establishing the legal norms to be respected when performing extremely important duties in many peace-keeping missions, such as policing and keeping public order. It is also essential to fix the boundaries of their criminal responsibility and the jurisdiction that their actions are subject to, all of which is carried out, to a great extent, through the SOFA (*Status of Forces Agreements*).

As *Kuniko Ozaki* put forward, the regime of responsibility of those

involved in a military mission abroad depends on whether they are part of the staff of an international organisation, as it happens in the unique case of the UN which has its own personnel and civil and military observers, or if, on the contrary, they are national military troops, whose legal statute is established under their corresponding SOFA, even if are part of an international mission under the command of an international organisation.

The case of sexual abuse committed by members of a UN peace-keeping mission in the Congo Republic has showed the actual difficulties that exist in placing criminal responsibility on members of the UN. Given that these cases are outside the general regime of immunity of the UN personnel, established under the Convention of 1946 regarding privileges and immunity, limiting the latter to those crimes committed in the performance of duties and actions wholly unconnected with any personal benefit, in principle, the Democratic Republic of the Congo would have been competent to prosecute the responsible ones for these incidents in keeping with its legislation. The difficulties arise when it is stated that the criminal system of the host state is not capable of either carrying out an investigation and the criminal process thereby entailed or there are doubts as to whether many of its norms or practices are compatible with human rights. Since this is a frequent situation, in order to establish an appropriate legal framework for criminal procedure to be applied to the UN personnel, the group of experts in charge of writing an *ad hoc* report on this incident developed a draft agreement aimed at establishing the criminal responsibility of the UN members (*International Convention on the Criminal Accountability of UN officials and experts on missions*). This project dealt exclusively with the worst forms of crime against life, physical integrity and sexual liberty, being the ultimate goal for at least each implied state to take part in and adopt the necessary measures to ensure the exercise of its jurisdiction, whether the crimes have been committed within its own territory, or whether they have been committed by one of its nationals. The Project also recommended the signing states to enlarge their own jurisdiction on the principle of passive personality and in cases in which the perpetrator regularly lives within their territory. Under art.7 of the Project, extradition and prosecution was also annulled. In April, 2007, the Committee of Experts decided to delay the processing of the Project in order for them to carry out

a deeper study on the type of crimes to which responsibility could be extended to, since it seemed unjustified, for example, to exclude offences against national heritage, and also to be able to improve the system of reparation for victims and the boundaries of the UN civil responsibility.

*Jean Paul Pierini's* paper was based on the different models of SOFA used to establish the applicable legal boundaries, along with the criminal responsibility of the members of contingent nations. The first SOFA model regulates the statute of the armed forces of a Member State in the territory of another one that belongs to the same international organisation, as it happens in the case of NATO. In this first model, in terms of criminal responsibility, the host state is competent to prosecute those offences that are solely criminal according to its legislation; if there is a double incrimination, the conflict of jurisdictions is resolved in favour of the state that sends the troops, should the conduct be connected with the performance of their duties; in all other cases, competence is attributed to the state with a greater interest in the sanction.

The suppositions dealing with regulating the statute of the armed forces in a third-party country is far more complex. The legal basis is in these cases much more confusing and the general legal problem is, sometimes, mixed up with the incapacity of the legal system of the host state to prosecute certain crimes. Cases in which a soldier or a national of the host state died or was injured in a «friendly fire» are equally delicate, as this gives rise to the suspicion that the procedure in the country sending the troops aims at guaranteeing immunity, by making a decision that blocks further proceedings. *Kuniko Ozaki*, following some of the recommendations of the UN group of experts regarding the sexual offences committed in Chad, proposed the creation of *ad hoc* mixed martial courts as a possible solution, responsible for judging the case in the host state where the most of the evidence, the witnesses and, of course, the victims are to be found.

From general criminal problems to those of a more particular nature which require military intervention abroad, some reflections closely connected with the ROE are going to be put forward at this point. Apart from *Jean Paul Pierini*, who outlined the framework of the general theory, Generals *José Antonio Fernández Tresguerres*, *José Elito Carvalho Siquiera* and lieutenant colonel *Silvain Fournier* have all pointed out both

the importance and the legal problems associated with the ROE, giving the examples of concrete operational experiences.

As it is already known, the main aim of the ROE lies in ensuring political control over the use of force; for this functional reason and because of the way in which they are adopted, which does not correspond with the requirements derived from the principle of criminal legality, their integration and invocation is complex so as to fulfil the system of justified causes under national criminal law, especially when taking into consideration the extent of actions, such as legitimate defence. The problem is singularly intricate in the case of missions that are led by international organisations (the UN, NATO, the EU) where it is not possible to use a single national framework as the only reference and where it is also common for the troops of a country to act under the orders of another country with ROE made in accordance with distinct legal parameters.

In his presentation, *Silvain Fournier* pointed out the way in which NATO develops its ROE within this framework of interlegality. Each state takes part in its developments on an equal footing, without the ROE limiting under any circumstances the law of legitimate defense as established under national legislation, also allowing the states to choose between either using them or restricting their use. This self-restraint is also notable in the ROE approved by the EU, which expressly state that the ROE are not of any relevance in the interpretation of the legal norms that regulate the use of force.

In order to answer these questions, Pierini puts forward two possible models of conceiving the ROE. In keeping with the first one, its purpose would be to regulate the use of force, along with the laws of the IHL, as something inherent to military operations; the purpose of the second model is to justify the use of force, on the understanding that this could potentially constitute a crime and would need to be justified case by case. According to this model, the ROE would be meant for completing the system of justified causes or *defenses* of a particular legislation, taking the IHL as its normative reference.

If considered according to the latter model, the ROE would be bound to fail, as they cannot revoke, specify or exclude internal norms, representing causes of putative justification that could be considered as cases of error.

However, if the ROE were conceived as a part of international law, and not as something the materialisation of the legal rules of a fixed legislation, their value would change considerably. The ROE would become legitimate if they were materialisations of norms of international law, as they legal codes considered them to be of a superior jurisdiction. These materialisations would legitimise the restriction of fundamental rights when in cases of conflict, hence not having to seek protection using the argument that these restrictions represent cases of legitimate defence.

Conceiving the ROE as specifications of legitimate defense also implies that the different frameworks where they are applied are unknown. Legitimate defense presupposes an exception to the state monopoly regarding violence. The ROE are meant to regulate situations characterised, to be precise, by the non-existence of this monopoly, along with the rest of the elements of legitimate defense, such as the moment of attack, the unfair nature of the aggression or its restriction in relation to fixed assets, all of which cause too many areas of friction when an attempt is made to legitimise the ROE on a basis such as this one, articulating each one as a cause for justification.

In his analysis, *Genevieve Giudicelli-Delage* outlined the legal problems when the armed forces abroad act as judicial police, characterised by their institutional diversity (states, international organisations), normative (the IHL, Human Rights Conventions, norms originating from the international organisation responsible for the mission, local law, the law of the state of the country sending the troops, the law of the state in command of the operation, etc.), and functionally by their diverse nature, since the functions of the judicial police consist of dealing with different types of crime, ranging from international crimes –whose competence lies with the International Criminal Court– to strict crime, military offences, terrorism or organised crime. In this sense, General *Rodriguez Tresguerres* put forward the complex problems that, from the internal point of view of the Spanish legislation, involved the active service of Spanish soldiers as a public order force in what used to be Yugoslavia. The Spanish troops had to perform a function constitutionally forbidden under their own legislation of reference, consisting of breaking up, for example, the civil population who, without weapons, opposed the military operation, or to close down radio

stations in Bosnia which incited «ethnic cleansing». *Kuniko Ozaki*, in reference to the importance of the problem, highlighted that the exercise of the policing functions were not in any way marginal in countries immersed in conflict. When there is no social control, situations that favour the proliferation of very diverse forms of crime are generated, including extremely serious forms of behaviour, such as organised crime, corruption, human trafficking and so on.

In order to tackle the normative and institutional complexity, *Giudicelli-Delage* points out at a solution, aimed at increasing efficiency, legal security, judicial control and guarantees, which, as far as possible, consists of strengthening and advising the policing authorities of the host state about their actions, guided by the international conventions on human rights. This guidance bears obvious advantages: it simplifies the normative complexity, re-establishes the internal police forces, training them in the exercise of policing practices in accordance with the law of the state, and, in addition, represents a stabilising force, essential to peace building in an area destroyed by conflict. The actions of the UN forces in Haiti, as related by the Commanding Officer of the Stabilisation Mission, *Carvalho Siquiera*, were guided by the bottom-up principle of integration, collaborating with the local police authorities.

Nevertheless, many times, in the short or medium term, it is not possible to take second place, owing to the fragile nature of the national police. In such cases, the soldiers who carry out these functions should adhere to sectorial norms that regulate the most important activities of policing duties (arrests, interrogations, searches, etc.). The unification through a standard criminal and procedural code is nowadays, if not impossible, then an extremely difficult task to undertake.

### III

If peace-keeping missions represent the first of the areas of complexity in relation to the current legal codes, the second of these great challenges is the new actors who have appeared on the scene, in particular terrorists and private companies.

The implications between the law of the war and terrorism was a key aspect in the paper of *Ulrich Sieber*, who diagnosed that the transformation which the greater part of the legal codes are currently experiencing not only implies the appearance of a new law on security incorporated under criminal law, but also within other sectors such as the law on immigration, on police, which is relative to secret services, on financial law, telecommunications and so on. Regarding legal matters and criminal processes, this has meant the establishment of a single preventive model of crime in the previous area, an example of which could be the new crimes of organised crime, which makes provision in matters of terrorism for the criminalisation of terrorist «sleeper cells». In criminal procedural law, the new model shows a similar logic to that of the principle of precaution. The objective of the new procedural measures is the vigilance of individuals who fit a generic profile in terms of being suspicious, over and above those in relation to whom no concrete suspicion in the participation of a crime exists. All of this has led to the deconstruction of the traditional guarantees, such as those connected with the length of the period of police custody. Looking beyond the criminal field, the creation of *task forces* are also a part of this new criminal law on security and consists of police, secret services, immigration authorities or customs, which, when transcending the state and turning into forms of international cooperation, they come across as being opaque and not tied down to judicial power.

The most radical demonstration of this new law on security stems from the extension of the law of war to the «war against terrorism». Its most spectacular developments have taken place in the United States, where the application of the law of war has allowed the justification of the legislative capacities of the executive through the *Presidential Order*, the practice of the indefinite detention of combatant-terrorists; torture as a method of investigation, the abduction of individuals as an alternative mechanism to extradition, and, moreover, removing these individuals from the legal and penitentiary systems.

Even though this strategy has not reached similar limits in Europe or in other countries that share a similar cultural identity, it should not be forgotten the example of the German Draft Law justifying the shooting down of those

planes captured by terrorists, as the logic of the war period is to use the law of the war. In countries such as Israel, the possibility of carrying out selective assassinations on a legal basis has been put forward. Even the UN itself, as it was pointed out by *Delmas Marty*, has contributed to blurring the limits between criminal law and war through the resolutions of the UN Security Council of 12<sup>th</sup> and 28<sup>th</sup> September 2001, allowing a state that has been a victim of a terrorist attack to invoke legitimate defence in order to formally decide upon a response.

*William Laufer, Ryan Burg and Mark Pieth* have analysed some of the most relevant problems that arise in relation to the intervention of private companies in a field which was previously a state monopoly, as it was the case of the war. War presents many attractive business opportunities. The opacity that surrounds many of the armament contracts, the absence of legal controls and efficient administration, and the legal complexity of the business being conducted outside of the national territory means that businesses on the war front are profitable and, hence, this encourages fraud and corruption, as a way of maximising profit. In line with this, *Mark Pieth's* paper revealed the importance of corruption in situations of conflict as a consequence of the weak nature of the controls of the country in crisis, of the countries sending troops and of the actual international organisations, which lack capacity and competence to carry out investigations. *Burg and Laufer* put forward numerous examples of fraud in contracts, committed by companies that have obtained the franchise for important public contracts, whether it is in reconstruction or in the supply of military materials.

In order to control the business activities carried out by companies in war time as well as their financial management, the fulfilment of contracts and the quality of the work they do, solutions such as the increase of state auditing and state intervention were proposed. The promotion of a self-regulating business is also advisable in this field. Finally, the types of corporate fraud in war should be categorised, establishing the criminal responsibility that the individuals bear, whether it is an individual or company. These regulations must be applied abroad during and after the war. A proposal of this nature is currently being debated in the US Senate.

## IV

In the face of such a complex and new reality, as above mentioned, it is essential to question, in the first place, what transformations all of this will imply in terms of military law and international criminal law, as they are the sectors of the legal codes most affected by the situations discussed, and secondly, what the role played by the human rights as well as that of the legal control.

With regards to military criminal law, the key question is whether it seems legitimate or necessary nowadays or whether it constitutes an atavistic leftover of the past, which would be worth abolishing. *José Jiménez Villarejo* and *Giovanni Fiandaca* replied to this question. The first one considered, from the point of view of the Spanish legislation, the reason military jurisdiction exists lies in three considerations: the unarguable speciality of military criminal law, when this is reduced to avoiding conduct which is incompatible with the good role played by the missions constitutionally attributed to the armed forces; the necessity that authorities and military commanders have to control the army's disciplinary power; and thirdly, the maintenance of military jurisdiction as a part of the Ministry of Defence, preventing the management of civil and military judges from being entrusted to the same official body.

Nevertheless, as it has been demonstrated by *Jiménez Villarejo*, military justice is becoming increasingly similar not only to the great principles, but also to the concrete norms of civil justice, in terms of criminal and administrative aspects, in relation to disciplinary sanctions. Even the organic connection of military judges with the Ministry of Defence has been attenuated, giving the military judges an independent status highly similar to that of civil judges. In this sense, what is particular to civil justice and military criminal law, above all, would be the protection of the constitutional functions of the armed forces, which makes legitimate the major part of military criminal law when it reveals itself in full, that is to say, in times of war and in military operations abroad. Whatever the case may be, military criminal law cannot divorce itself, not even in times of war, from the fundamental principles of common criminal law, and break with the principle of legality for example, in order to turn itself into a criminal law of the

executive, as it has happened with the model of criminal law on war shaped by the *Bush* administration.

This last consideration is probably one of the main lessons to be taken from the superb report by *Giovanni Fiandaca*. Military criminal law cannot be meant to protect the values deriving from sociological or political characteristics, which embodied the military in past times: courage, honour, spirit of sacrifice, fearless of danger, discipline, bureaucratic efficiency, etc. This old-fashioned military criminal law, endowed with a strong subjective tendency, far from the protection of legal provision, where criminal and disciplinary law are interlinked to the point of confusion, does not respond to the model of the current armed forces, which is much more technocratic and professionalised than heroic. In this new model of the army, if it is necessary to find a reason for military criminal law to exist, above all in times of conflict, what would unite the law of war with the criminal framework of peace-keeping missions, it should not lie in the search for «efficiency» in order to win the war, but rather in ensuring respect for the rules and practices of war meant to make it as human and less violent and less injury ridden as possible. From this point of view, any behaviour that infringes technical rules that pursue the suitability and efficiency of a military organisation may be susceptible of criminal sanctioning, and even, except for the problems stemming from the principle of legality, the violation of the ROE, the same as any other set of norms connected with personal safety in operations that would bring military criminal law closer to the criminal law on employment, in certain aspects.

*Antonio Intelisano* put forward a matter of equal importance surrounding the complexity of applying two distinct military criminal codes in times of peace and war in situations like the present one, in which peace-keeping missions are a *tertium genus* difficult to classify, and in which governments and parliaments avoid the use of the word war to address an armed conflict for political reasons at all cost. In Italy, a political decision has stopped the Military Criminal Code from being applied in times of war in relation to crimes committed during peace-keeping missions, as it used to be traditionally the case, entailing important practical consequences.

Finally, in the development of criminal military law, as raised by the addresses of *Carlos Lascano* and *Adán Nieto Martín*, the jurisprudence of

the regional courts of human rights have played a decisive role. The ECHR has, since the well-known *Engel* sentence (1976), made equal, in reasonable terms, the exercise of fundamental rights both inside and outside the barracks, placing guarantees on disciplinary law and military criminal law. Both laws are considered to be manifestations of the *ius puniendi* state criminal matter, which is why the guarantees applied come from art.6 and 7 of the Convention. No less abundant is the jurisprudence of the ECHR aimed at guaranteeing the impartiality and independence of military judges. The InterAmerican Court had underlined the restrictive character of military jurisdiction, in order to ultimately prevent this jurisdiction from getting involved with political repression, as has often been the case under military dictatorships.

This jurisdiction serves to conjure up the old dangers of military jurisdiction, as pointed out by *Raul Zaffaroni*: absurd and dangerous restrictions of liberties and guarantees of the soldiers subject to the process, to confuse disciplinary law and criminal law, or the actions of administrative judges who are subject to a strong line of command and, as such, lacking impartiality. Equally, as put forward by *Michael Noone* in his paper, this jurisprudence serves to harmonise two different models of military justice, the disciplinary model of Common Law and the Continental model, which is more similar to criminal law.

## V

The reflections connected to international law and the situations of war-like conflict inevitably lead to the question of what typifies the crime of aggression; looking beyond the legal problems that it can throw up, its existence constitutes the presumption of legitimacy of international criminal law. It is difficult to be able to justify the punishment for specific conducts, if the trigger factor of an armed conflict escapes any type of criminal legal consideration. *Gehard Werle* addressed the axles on which the current debate in matters relating to the crime of aggression turn, which, as it is known, is in a stand-by mode at present. The Statute of Rome made Provision for it, but it has not been defined yet. Based on the experiences of

*Nuremberg* and *Tokyo*, *Werle* points out that not any old illegitimate use of force by country constitutes a crime of aggression, rather only those which contain three elements: a certain intensity, that is to say the intensive use of the military force on a grand scale; the presence of a clear intention to annex or control another state; and, finally, leadership in relation to the active subject. If these characteristics are considered, the invasion of Iraq, for example, does not constitute a crime of aggression. This strict vision also predominates under the national laws that have decided to typify the crime of aggression, either when this is required owing to an attack on the independence or sovereignty of a state or a similar definition along the lines of *Nuremberg* is expressed.

The UN could certainly establish a wider definition of this crime, as it was proposed in 1973, and could finally dispose of art.5 of the Statute of Rome in the process. In the face of this new task, *Gerhard Werle* coincides in his opinion with that of *José Luis Rodríguez Villasante*, in the sense that the future typification of the existence of the crime of aggression, the opinion of the UN Security Council must not be either part of the crime or a condition for prosecution. This would politicise the UN Security Council considerably.

*Ile Delmas Marty* has pointed out to another perspective which should be taken into account in the event of a possible reform or, at least, conceptual makeover of war crimes. If the prohibition of conducts which therewith are pointed out to constitute the basis of universal ethics, these crimes should stand alone in situations of armed conflict, with the objective of being also applicable to the violation of the Geneva and Hague Conventions which occur on peace-keeping missions or in the fight against terrorism. A modification of this type can serve to counterbalance the new paradigm of the war against terrorism

The principle of universal justice generally results from its application to crimes considered to be crimes against humanity. However, this question is lately being reconsidered, both on a legislative and on a doctrinal basis. As such, *Werle*, in relation to the crime of aggression, put forward his doubts in relation to extending the principle of universal justice to this crime. *Florian Jesseberger* also commented on the restrictions that the § 153 f of the German Criminal Procedural Code has introduced to the principle of universal jurisdiction, aiming at reducing the application of this

principle in a reasonable way, avoiding the risk of «forum shopping» and overloading German jurisdiction. In accordance with this legal norm, which regulates the discretionary power of the public prosecutor when it comes to carrying out a prosecution in keeping with the principle of opportunity, the public prosecutor is only obliged to prosecute when there is a link with Germany, which the law stipulates in no uncertain terms. In all other cases, the public prosecutor can use the principle of opportunity in order not to pursue the facts.

These types of restrictions in the principle of universal justice are not incompatible with keeping a close eye on the principle of complementarity as an axle of the relationship between the International Criminal Court and national jurisdictions. Just as *Delmas Marty* has pointed out, the complementarity not only has the political advantage of a country keeping its national sovereignty, but also makes its application easier; as well as having the ethical advantage, if accompanied by measures of harmonisation, of favouring the emergency of a transcultural legal community.

After these general questions, *Gonzalo Jar* outlined a more specific matter, which also remains unresolved within international humanitarian or criminal law, as it is the case of protecting journalists working to cover armed conflicts. The figures show the importance of this question: during 2006, over 100 journalists died in armed conflicts, the majority of which died in Iraq, and many of them were native reporters whose deaths are not mentioned in the Western press. The problem is basically that the IHL considers the reporter as a member of the armed contingent, whose mission is to do with propaganda, and as such, the Geneva Conventions of 1949 puts them on the same footing as any other prisoner of war. With the appearance of the independent journalism for war, after the war of Vietnam, there emerged the new figure of the «journalist on a dangerous mission», which, under the additional first Protocol of the Geneva Conventions of 1977, meant that they were considered as any other civilians, which meant that it became a war crime to attack a journalist as this infringed on the requirements of the IHL.

## VI

A recurrent theme, which arose throughout the various presentations of the congress, was the value of human rights when it comes to establishing the limits of old and new forms of armed conflict.

The first aspect to be analysed in this sense is that of the relationships between humanitarian law, or the law in war and human rights. The International Court of Justice in its decision regarding the construction of the wall in order to separate Palestinian territory has confirmed the thesis that the human rights stipulated under international and regional conventions are also applicable during an armed conflict. Even though doctrine, as shown by *Rodríguez Villasante*, considers that both normative bodies are complementary, it is clear that the jurisprudence of the ECHR in relation to armed conflict bases its decisions entirely on the human rights recognised under the European Convention, perhaps because they believe that the IHL can reduce the level of protection of some human rights. The Inter-American Court has expressly indicated that it lacks competence in order to interpret the IHL.

The effectiveness of human rights in situations of armed conflict is, in addition, seriously diminished for two reasons. The first one, which is clearly shown in the *Bankovic* case (2001) of the TEDH, in relation to the bombing of the Serbian TV Radio Station by NATO military troops, belonging to countries which form part of the Convention, is that the basic principle for determining the area of application of the Convention and, therefore, the competence of the TEDH is the territorial one, a circumstance which precludes the Convention in all military missions that take place in third-party countries. No less limiting, in terms of the efficiency of the Convention, are the *Saramati* and *Behrami* cases (2007). In the operations led by international organisations, such as the UN or NATO, it is not possible to apply the Convention as it does not belong to these organisations. This doctrine, as put forward by *Adán Nieto Martín*, must be revised in keeping with the line of more innovative decisions, such as those of *Loizidou* (1995), *Issa* (2004) or the decision made by the House of Lords in the *Ali-Saeki* case. It seems strange that a soldier «carries all of the legal legislation in his backpack», except for the Conventions that protect human rights the

most. As *Stefano Manacorda* pointed out, these restrictions are also an obstacle for the harmonising function of military criminal law and the law of war that fulfils the fundamental rights gathered together under international conventions.

The participation of *Giovanni Grasso* revealed the importance of human rights in criminal cooperation to be found within the framework of armed conflicts. The relatively new Chamber of Human Rights of Bosnia Herzegovia, which is competent to point out any violations in this territory to the ECHR, has stood its ground over the more questionable aspects of the North American terrorist legislation. The aforementioned Court pointed out that the irregular handing over of Bosnian citizens suspected of terrorism to North American troops incurs a violation of the Convention. One of the most progressive and innovative lines of jurisprudence of the ECHR, provided in the *Soering* case (1989), indicated that cooperation with a legal system in cases presenting a risk of death penalty being imposed constitutes a violation of art.3 of the ECHR, where inhumane and degrading treatment is prohibited and it also break its additional protocols as they prohibit the death penalty. In order to consolidate and extend this jurisprudence, just as art.19.2 of the Draft of the European Constitution intends to do, any act of judicial cooperation with the procedural law of another state in which there is a risk of a violation of the human rights of the individual occurring would be contrary to the international conventions on human rights.

On the basis of human rights, the national case-law of various countries has managed to stop some of the more unacceptable aspects of anti-terrorist legislation of the United States or Israel. In the first case, as *Douglas Cassel* pointed out, the argument of the necessity for the military has led to an avoidance since 11<sup>th</sup> September, of the application of the IHL as much as it has of the fundamental rights of those referred to as combatant enemies. To address the fight against terrorism as «war» has restricted the application of human rights. Moreover, with the argument that the application of the IHL to the war against terrorism is not appropriate, as it does not deal with internal conflict or an international war between states, has also meant the avoidance of the application of this group of norms. These two arguments have placed those suspects of belonging to Al Qaeda in a legal state of limbo in which neither human rights nor the IHL are applicable, and not

even the law of the United States to remain outside of their territory. The Supreme Court, as it is known, has rejected these arguments.

*Rodríguez Villasante* also demonstrated that judicial activism in favour of human rights has been equally decisive in a context as complex as the Israel one. The Supreme Court of this country, under its decision of 13<sup>th</sup> December in 2006, in relation to targeted killings, ruled that, basing its decision on the IHL, the use of force and the potential deprivation of the right to life should be proportional to the risk that justifies the use of force, which leads to the illegitimacy of this type of practice.

In Italy, as *Armando Spataro*, the Public Prosecutor of Milan, divulged, the position of the Constitutional Tribunal appears to be of special importance in relation to the extraordinary renditions of the Abu Omar case. In the face of the allegations of the Italian government, which pointed out that the investigation of the prosecutor had violated state secrets, the Court objected to the use of this legal argument when fundamental rights are at play. Equal proof of the legal «mobilisation in relation to this case, is the effective cooperation that has existed between German, Swiss and Spanish judges, all fully aware of the fact that an omission on this point could potentially constitute a violation of the European Convention on Human Rights, which stipulates positive obligations of investigation when serious violations against human rights are at play.

## VII

Following the various debates and presentations hereby presented, the International Society of Social Defense invites you all to continue working on and developing the ten areas hereunder classified:

### FIRSTLY

Human Rights should be respected in any situation of armed conflict, that is to say that its effective application must be ensured. This also implies ensuring its extraterritorial application in operations carried out in third-party countries, through the effective control of the protection of human rights by regional courts.

The validity of human rights also requires its application in missions that are led by international organisations. This can be achieved through the express support of international organisations to international conventions, making national components responsible for respecting human rights during armed conflicts where they are involved.

## SECOND

Judicial or police collaboration with a criminal system that does not guarantee respect for human rights should be considered as a violation of the predictably affected human rights. Under no circumstances should it collaborate with proceedings under which the death penalty may be imposed.

## THIRD

The crime of aggression should have a wider definition than that provided for under customary law resulting from Nuremberg and Tokyo, without turning this crime into a criminal norm dependent on the decisions of the UN Security Council.

## FOURTH

The crimes against individuals and assets that are protected in the event of armed conflict should be extended to similar conduct carried out on peace-keeping missions and the war against terrorism.

## FIFTH

The development of an international convention to establish the criminal responsibility of UN members for crimes committed on peace-keeping missions would appear to be an urgent project and should also be extended to include the members of contingent nations.

## SIXTH

The efficiency of criminal law should be guaranteed in order to punish fraud and corruption carried out by companies obtaining

contracts to supply arms or that are connected with the execution of public works in areas of conflicts. The intervention of criminal law should be accompanied by as much transparency as possible for these types of contracts and by the establishment of rigorous auditing duties.

## SEVENTH

The specificity of military criminal law lies in the protection of the functions that democratic constitutions guarantee for the armed forces and, in particular, in procuring respect for the principles and norms related to humanising and making armed conflicts less violent. The military jurisdiction should enjoy a level of independence from civil jurisdiction and the criminal military procedure should accommodate the principles of a just process.

The legislation which restrict criminal military law in times of war and which provides a criminal code specific for times of war should also apply to crimes committed during peace-keeping missions.

## EIGHTH

The collaboration between institutions represents the ideal model for resolving the problems of interlegality stemming from the presence of troops in a foreign country. In this sense, the crimes committed by military or civil members of a peace-keeping mission in the host state should be judged by mixed tribunals made up of judges from the host state and the state sending the troops.

## NINTH

The national criminal courts normally give immediate normative effectiveness to the ROE, whether as defences (legitimate defense, exercise of a right etc.), or as material elements of crimes with normative characteristics different from criminal law. This efficiency of the ROE, which normally has criminal responsibility of the armed forces as an effective limit, is in contrast to the scant legitimacy and transparency of its process of development, dominated by larger states. The integration of the ROE, whether the national or

international ones, into the criminal justice system, should make itself subordinate *ex ante* to the existence of a parliamentary control, through the example of a special commission, and *ex post* to an effective judicial control related to the compatibility of these laws, not only with the internal of each country, but also with the IHL.

## TENTH

In order to increase the efficiency of the law and human rights in situations of conflict, the self-regulation of the subjects implied, both public and private, should be promoted. In this sense, a common code of conduct should be created, establishing the norms of conduct that soldiers would be subject to when carrying out policing functions. By the same token, NPOs and companies that participate in peace-keeping missions should put specific self-regulating systems in place (compliance programs) in order to respect human rights, employment rights and the prevention of fraud and corruption.

