

# INTER-AMERICAN COURT OF HUMAN RIGHTS AND PENAL MILITARY JUSTICE\*

CARLOS LASCANO

Penal Law Professor of the National University of Córdoba and the National University of La Rioja,  
Argentina\*\*\*

## I. INTRODUCTION

I would like to thank the authorities of the «*Société Internationale de Défense Sociale pour une politique criminelle humaniste*» and especially to express my gratitude to its President, Professor Luis Arroyo Zapatero, who has invited me to participate as a lecturer in this traditional congress, that gathers us in this venerable capital of the Kingdom of Spain.

In this first session, entitled «The Penal Justice between present and past», we are going to consider the modernization of penal military justice, focussing on the jurisprudencial contributions of European and Inter-American Courts of Human Rights, including the death penalty.

Taking into account the contributions of both courts related to Penal Law, we agree with LAURENCE BUGORGUE LARSEN<sup>1</sup>, who considers that «a jurisdiction which

---

\* Speech made in the «XV International Congress of Social Defense», organized by the «*Société Internationale de Défense Sociale pour une politique criminelle humaniste*» in cooperation with United Nations Office against Drugs and Crime, Toledo, Spain, September 20th, 2007.

\*\*\* Translated from spanish by Josefina González-Nuñez and Juan I. Martínez-Casas. Translation revised by Josefina Nuñez.

1 *El Tribunal Europeo de Derechos Humanos y el Derecho Penal*, translation revised by Marta Muñoz de Morales, International and European Penal Law Institution (UCLM), p. 36, which paper has been kindly sent by Prof. Luis Arroyo Zapatero.

ensures human rights cannot be equalized to any other international jurisdiction. Its goal, its essential function, is to protect human beings and in this context, the principle that governs those institutions is the *pro homine* principle, that, according to President SERGIO GARCÍA RAMÍREZ and Professor MAURICIO IVÁN DEL TORO HUERTA «encourages as a main standard the most extensive protection of human beings.»<sup>2</sup>

We are going to examine whether the jurisdiction assigned to military courts by the military justice code—at least in a period of peace—adjusts to the standards established by the American International Law of Human Rights.

This issue will be approached according to the jurisprudence of the Inter-American Court of Human Rights, that judges—in a definitive way and without appeal the cases which State members or the Inter-American Commission on Human Rights submit to the Court, regarding interpretation and application of the American Convention on Human Rights.

In case the Court of San José de Costa Rica decides that there was a human right violation protected by the Convention, the State member involved has to guarantee the use of the right that has been violated and if it were admissible, the State member should redress the consequences of such violation or situation that has vulnerated human rights, and should also pay a fair compensation to the injured part.

The court's decision does not restrict to the *thema decidendum* proposed by the Commission, it also includes the option to revise the issue *ex novo*, in all its magnitude, without being limited by the topics analized. That means that the Court can judge all facts and juridical matters submitted to its decision, as well as issues that are not presented to the Court. What we said before, shows that in the same way as European Court of Human Rights, the concordance principle has been weakened.

## II. PENAL MILITARY LAW

In 1993, professor EUGENIO RAÚL ZAFFARONI<sup>3</sup>, described the latin american penal system's view, evaluating it according to the guidelines of international treatise on human rights. In this point, he claimed that the degree and number of violations of

---

2 GARCÍA RAMÍREZ, Sergio – DEL TORO HUERTA, Mauricio Iván, «México y la Corte Interamericana de Derechos Humanos», in *La Corte Interamericana de Derechos Humanos*, Mexico, UNAM, 2001, p. 25. I would like to thank Professor García Ramírez the kindness of giving me, as present, his book *La jurisdicción penal militar en la jurisprudencia de la Corte Interamericana de Derechos Humanos (1997-2007)*, Interamerican Court of Human Rights, San José de Costa Rica, August 2007, which has let me know the most recents judgements of the quoted court related to the subject that we are talking about.

3 *Derechos humanos y sistemas penales en América Latina*, in «Criminología crítica y control social. 1. El poder punitivo del Estado, Juris editorial, Rosario, 1993, p. 62.

legal guarantees, not only important guarantees, but also essential ones, showed an actual functioning of Latin American penal systems, which delegitimizes the whole penal-juridical discourse.

ZAFFARONI, said precisely: «Our history shows us that Latin American penal systems did not emerge based on native or foreign codes or legislations, on the contrary, since the first colonization, they have evolved as a controlling disciplinary military power practice deployed over majorities and over dissidents. The incorporation of social dissidents by armies were the instrument of social control punishment most frequently used in our countries up until the last century. This military control was transferred to other agencies, but some remain in the armies of countries with compulsory military service, which nowadays are not in place to guarantee national defense (owing to the technological advances of modern war), but rather to maintain a disciplinary control over a great number of the young male population).»

In the twentieth century, Latin American countries had developed separate legislation for penal codes and military justice codes, distinguishing between ordinary crimes and military offences. There are several questions related to this issue.

**A.** Is there any essential characteristic that defines military offences and allow us to distinguish them from ordinary crimes?

**B.** Does the need to guarantee military discipline necessitate a Penal Military Law which severely punishes actions that could only be considered as military offences in as much as they involve such interests, or is it just an attempt to include criminal behaviour under military justice codes for the simple reason that they have been committed by members of the Armed Forces?

**C.** Has Penal Military Law got a criminal nature, or is it only a disciplinary kind of law?

**D.** Who should be in charge of judging military offences: a special jurisdiction practised by military courts, that implies a real justice administration by different courts separated from Judicial Power, or, should an ordinary jurisdiction practised by judges of the Judicial Power be the only admissible form?

**A.** With regard to the first question, as long as we analyze the thoughts of those who claim the autonomy of Penal military Law, LUIS JÍMENEZ DE ASÚA<sup>4</sup> expresses the opinion that despite the number of clever and important arguments, he was not persuaded, choosing to reflect instead on Napoleon's words: «Military Law is an ordinary law with a barracks cap.»

The line of thought that has prevailed claims the existence of Penal Military law, because –at the same time it shows its unique origins in penal ordinary law– it

---

4 *Tratado de Derecho Penal*, t. II, Losada editorial, Buenos Aires, n° 96, p. 1108.

reveals many differences that –without making it absolutely independent from penal ordinary law<sup>5</sup>– gives it a specific identity.<sup>6</sup>

Scientific opinion on the source of differentiation between Penal military Law –that it is a kind of special Penal Law– and ordinary penal Law, is divided. While some authors think that the main criteria would be the quality of the juridical interest concerned, others maintain it lies in the military state of the person who commits the crime.

The first point of view –which could be named *restrictive*– considers<sup>7</sup> that Penal military Law has only got its autonomy because of the specific nature of *interests concerned\**, which involve a several number of interests related to the existence and particularities of the military organization in order to achieve its goals efficiently.

On the other hand, the broader point of view<sup>8</sup> states «that the military offence depends on the military character of the offender and on the soldierly type of interests concerned.»

The supporters of this stance accept that, the academic position which puts forward legal interests, as a unique criterion, has failed to take into account the quality of the author in order to define the military offence, and that the sole argument of juridical objectivity is not sufficient to convert several numbers of ordinary crimes into military offenses that affect military juridical interests.

According to this point of view, the groundwork for the existence of Penal military Law and the military justice that enforces it, lies in the special characteristics of the military institution and juridical situation of its members. Discipline and order are essential values that entail a number of duties for its members not inherent in roles outside of the Armed Forces, the violation of which is considered to be especially serious in regards to the risks implied for society and, owing to the juridical conditions of its offenders, it makes their behavior more reprovable. In this sense, clause 521 is particularly illustrative of the Argentinian Military Justice Code, that prescribes an increase of the penalty depending on the greater hierarchy of the offender.<sup>9</sup>

---

5 As MAINARD HORACIO L. states in *Ensayo de derecho de guerra*, Buenos Aires, 1954. In contrary to this, ZAFFARONI, Eugenio Raúl, *Tratado de Derecho Penal. Parte General*, I, Ediar, Buenos Aires, 1987, p. 210 who claims that «*penal military law is not ordinary criminal law, but because of that it does not mean that it is not penal law*».

6 FONTÁN BALESTRA, Carlos, *Tratado de Derecho Penal, Parte General*, Volume I, Second edition, Abeledo-Perrot, Buenos Aires, 1970, p. 70. In the same vein, BERNARDI, Humberto P.J., *La sustantividad del Derecho penal militar*, L.L., t. 39, p. 1033.

7 COLOMBO, Carlos J., *El Derecho penal militar y la disciplina*, Valerio Abeledo, Buenos Aires, 1953, Introduction.

\* The expression «bienes jurídicos protegidos» used by the author is difficult to translate into English. The meaning of «interests concerned», refers to a several civil rights such as life, property, liberty, honor, etc., which are protected by law.

8 ZAFFARONI, Eugenio Raúl – CAVALLERO, Ricardo Juan, *Derecho penal militar, lineamientos de la Parte General*, Ediciones Jurídicas Ariel, Buenos Aires, 1980, p. 200.

9 ZAFFARONI – CAVALLERO, op. cit., p. 46.

In order to explain the peculiarity of military offences, that legitimizes the reason of existence and speciality of Penal military Law, ZAFFARONI<sup>10</sup> claims that that singularity of its nature «not only relates to it being a penal law which governs the relationships that take place in a special situation, but —what is more important still— they arise as a consequence of being a penal law based on a dire need (an actual or potential war) or based on the direst\* need. It is natural that penal law prescriptions that govern in circumstances of extreme need and even the direst need, are not the same as those which govern situations involving a different set of circumstances.»

When the above mentioned author and RICARDO JUAN CAVALLERO<sup>11</sup>, explain the difference between Penal military *ordinary* Law –legislated in the Military Justice Code and special acts, that does not include death penalty and *exceptional* Penal military Law –which admits that penalty and also includes crimes legislated by military edicts– they consider that that distinction is not the same as that which distinguishes Penal military Law in times of peace from Penal military Law in times of war, because both of them can be enforced in times of war or in times of peace. The difference between them is that the ordinary one is Penal military Law for a situation of urgent need, whilst the other one, the exceptional, is a Penal military Law for a direst need.

These authors<sup>12</sup> also make the comment that «Of course this situation of the most dire need will always take place in times of war, but this is not always necessary, because a catastrophe such as an earthquake that destroys a city, is not a war, however, it is a situation of the direst need, where exceptional Penal military Law may be enforced. On the contrary, a war represents a situation of dire need, but not a situation of the direst need, because the latter one only arises in a few number of exceptional cases in war. There are penal clauses in the Military Justice Code that imply a state of war, which does not make provision for discretionary legislation in times of war through military decisions, because if that were the case, the penal clauses that prescribe criminal behaviors committed in times of war would be senseless.»

**B.** Adopting the same position, authors have tried to answer the second question, which refers to whether the need to assure military discipline demands the description of crimes that objectively damage military interest, or whether it is sufficient that the Military Justice Code includes those criminal behaviors for the sole reason of the military rank pertaining to the offenders.<sup>13</sup>

---

10 *Tratado de Derecho Penal – Parte General*, I, pp. 210 and 211.

\* The cited author uses the neologism «terribilísima», which means a situation of more than an extreme need. Therefore, we are going to translate this word as the superlative of «dire».

11 *Derecho Penal Militar*, pp. 42 and 43.

12 *Op.*, cit., p. 43.

13 According to VELÁZQUEZ VELÁZQUEZ, Fernando (*Derecho Penal. Parte General*, 3rd edition, Temis, Bogotá, 1997, p. 67), the specific nature of Penal military Law resides in the fact that their addressees are the military citizens.

The correct position considers that military courts are not a personal privilege forbidden by the equal clause, but a special privilege that is «necessary because of the special characteristics of all army institutions, compounded by a great number of members who have to be disciplined and integrated, even in situations of the direst need, and, in the majority of cases when they are operating in inaccessible places, and also in foreign countries. That is why, [...] penal military clauses are extremely severe (more so than ordinary ones).»<sup>14</sup>

ZAFFARONI and CAVALLERO<sup>15</sup> find the *ratio essendi* of ordinary Penal military Law in the need to support a technical tool, which in times of peace has a preventive character in case of a situation of extreme need or menace —war—, and in times of war it assumes a defensive character in case of a current situation of extreme need. Due to the specific characteristics of this technical tool, their members must assume special duties in addition to the violation of some kind of obligations imposed on all citizens, which in their case becomes more serious, because of the increased danger and more reprovable behaviour. According to these characteristics, this technical tool must have a disciplined, well arranged, hierarchical organization from which duties emerge, the violation of which is a criminal offence because of the damage that it could cause to the effectiveness of the technical tool.

C. Related to the previous issues –and taking into account the relevance assumed by the military discipline under Penal military Law–, we can put forward the third question relating to whether this part of juridical system has penal nature or whether it is simply a disciplinary law. Despite the fact that for many years this kind of law has been recognized as an independent juridical subject, its relationship with Penal Law is still difficult.

If this question is answered following the first point of view, the position that would prevail is that of Latin American<sup>16</sup> and Argentinian<sup>17</sup> authors, who think that

---

14 IGOUNET, Oscar (h) – IGOUNET, Oscar, *Código de Justicia Militar*, Librería del Jurista, Buenos Aires, 1985, p. 18.

15 *Derecho Penal Militar*, pp. 46 and 47.

16 MENDOZA, José Rafael, *Curso de Derecho Penal Militar Venezolano*, I, Caracas, 1976, p. 7.

17 ZAFFARONI, Eugenio Raúl, *Tratado de Derecho Penal. Parte General*, I, p. 213; ZAFFARONI, Eugenio Raúl, ALGAGIA, Alejandro and SLOKAR, Alejandro, *Derecho Penal. Parte General*, second edition, Ediar, Buenos Aires, 2002, pp. 181 and 182. In similar way: SOLER, Sebastián, op. cit., p. 4, FONTÁN BALESTRA, Carlos, op. cit., pp. 70 and 71; COLOMBO, Carlos J., *El derecho penal y la disciplina*, p. 107; CREUS, Carlos, *Derecho Penal. Parte General*, 4th edition, 1st reprint, Astrea, Buenos Aires, 1999, p. 18.

—inside of what can be considered as military Law— we must distinguish between disciplinary military law and penal military law.

According to clause 99, 12<sup>th</sup> comma of the Argentinian Constitution, the President, as the Commander-in-Chief of the Armed Forces, officiates the high instance of disciplinary military jurisdiction, and also intervenes in appeals against sanctions applied by his subordinates. Finally, there are some military disciplinary sanctions that can only be applied by the President.

The interpretative constitutional international principles rule in Penal military Law and they also guide ordinary Penal Law.

ZAFFARONI, ALAGIA and SLOKAR<sup>18</sup>, consider that though in many countries, authors have argued about the nature of military disciplinary law, some of them also consider law as a kind of Penal Law, «*at least no European author doubts the penal nature of penal military law.*»

These authors explain that the warning mentioned is important because there are some Argentinian doctrinaires<sup>19</sup> that claim that penal military law is also a disciplinary law, though with a different purview, while some of them consider that disciplinary law is also Penal Law, they conclude that the Justice Military Code is unconstitutional inasmuch as it oversteps disciplinary matters, as it cannot include ordinary crimes; whereas some of them infer that the constitutionality of military justice can only be perceived as *administrative* law.

Among the first ones, RICARDO NUÑEZ<sup>20</sup>, in his «*Treaty*» limited to Penal military Law as «*a part of penal disciplinary law*», restricted to offences whose main concern of protection is the injury to the military order of subjection, and he considered that the fact that ordinary crimes are submitted to military courts «*mainly undermine the natural judge's principle, determined by jurisdiction, that comes from the Constitution, that this principle cannot be abolished by the ordinary legislator, from justice courts which are part of the Judicial Power of the country.*»<sup>21</sup>

---

18 *Derecho Penal Parte General*, p. 182, in quote 166 they cite JESCHECK, Hans-Heinrich – WEIGEND, Thomas, *Lehrbuch des Strafrechts, Allg. Teil*, Berlín, 1996, and RODRÍGUEZ DEVESA, José María – SERRANO GÓMEZ, Alfonso, *Derecho Penal Español. Parte General*, Madrid, 1994, p. 158.

19 RISSO DOMÍNGUEZ, Carlos, *La justicia militar. Conceptos fundamentales*, volume I, Buenos Aires, 1939, pp. 37 and 75; NUÑEZ, Ricardo C., *Derecho Penal Argentino. Parte General*, I, Editorial Bibliográfica Argentina, Buenos Aires, 1959, pp. 32 and 33; CLARIÁ OLMEDO, Jorge, *Competencia represiva militar*, Boletín de la Facultad de Derecho y Ciencias Sociales, Universidad Nacional de Córdoba, Córdoba, May-August, 1946; numbers 1, 2, 3, p. 217; MARTÍNEZ MUÑOZ, Ildelfonso, *Derecho militar y Derecho disciplinario militar*, Buenos Aires, 1977, p. 230.

20 opus and place quoted.

21 When ZAFFARONI, ALAGIA and SLOKAR, op. cit., p. 186, mention the personal extension of the penal military law, they argue that «those that lay claim to the disciplinary nature of penal military law have considered that in no case it can be applied to the *extraneus*, though some authors have claimed in an unreasonable way, recognising the contradiction of a disciplinary law that can be applied to those who are not subject to this disciplinary order.

In a later book<sup>22</sup>, NUÑEZ refers to Penal military Law, and says: *«Its source resides on the authority of the Legislative national Power in order to establish regulations and decrees to rule army forces (Argentinian Constitution, clause 75, comma 27<sup>th</sup>) and the reason of its sanctions is the supreme necessity of order and military discipline. However, the penal military Code, exceeding its own ambit, includes ordinary matter. This inroad, represents a serious disorder and becomes worse if an improper military jurisdiction is also created, because it endangers the garantistic principle established in clause 108 of argentinian Constitution, which means that military law is not a simple disciplinary law.»*

In general, these ideas are the same as the main arguments made by the Argentinian Supreme Court of Justice, which upheld in a recent judgement pronounced on March the 6<sup>th</sup>, 2007, *in re* «Recurso de hecho en López, Ramón Ángel s/ recurso del art. 445 bis del Código de Justicia Militar — causa 2845», modifying the previous jurisprudence, that military jurisdiction is unconstitutional not only in order to judge military offences committed by civilians, but also by members of the army.

Surprisingly, authors like ZAFFARONI, ALAGIA and SLOKAR<sup>23</sup> arrive to the same conclusion and –despite the fact that they disagree with the *«disciplinarian thesis»* that argue the supraconstitutionality of Penal military Law– they are in favour of its penal nature, and they understand that military courts are unconstitutional because they are composed of officials that are hierarchically dependent on the Executive Power, violating the essential clause that forbides the executive power to practice judicial functions.

The above mentioned professors of Buenos Aires University<sup>24</sup>, assert that the *administrative thesis* wanted to refute this argument, *«claiming that military jurisdiction does not belong to the judicial power, but to the executive power, because the President is the Commander-in-Chief of the army forces. This point of view was accepted by the Supreme Court. The unusual consequence of this criterion would be that the death penalty enforced by the existing law would be an administrative sanction.»*

CARLOS FONTÁN BALESTRA<sup>25</sup> agrees with this opinion and he opposes *«labelling as a disciplinary Law a number of juridical rules which can enforce even the death penalty. The fact is that army forces are part of public administration; but it is also true that their members are subjected to different rules than those that are imposed on other people who belong to the hierarchic order; and those rules imply more serious consequences; even more serious than those under ordinary Penal Law.»*

---

22 *Manual de Derecho Penal. Parte General*, 4th edition, updated by Roberto E. Spinka and Félix González, Marcos Lerner, Córdoba, 1999, p. 44.

23 *Op. cit.*, p. 182.

24 *Op. and place quoted.*

25 *Tratado de Derecho Penal, Parte General*, volume I, p. 71.

**D.** While the different authors are dealing with the arguments previously issued, they wonder about the fourth question: Who has to be in charge of judging military offences; a special jurisdiction practised by military courts, or, is an ordinary jurisdiction practised by judges of the Judicial Power the only admissible form?

In order to answer the last question, we are going to analyse the different replies given by Inter-American Court of Human Rights jurisprudence.

### **III. THE INTER-AMERICAN COURT OF HUMAN RIGHTS JURISPRUDENCE ABOUT PENAL MILITARY JUSTICE**

In Latin American countries, the real operativity of military justice codes showed—especially during the frequent military coups under which the Army Forces assumed political power—the general tendency to use those codes in order to judge civilians by military courts.

In analysing the validity of penal military justice in the ambit of the American Convention of Human Rights it is possible to perceive that the Inter-American Court of Human rights has attributed a restrictive purview to thus jurisdiction, showing its limitation to judge only military members who have committed military offences.

As such, the Court has sentenced in re «*Castillo Petruzzi y otros vs. Perú*», which refers to the judgement of four Chilean citizens, who were prosecuted in the Peruvian State by a military Court of Justice, and were given a life sentences, because they were found guilty of betrayal according to decree-law number 25.659.

This leading case was settled on 30th May, 1999, in a judgement in which the Inter-American Court of Human Rights, remarked that «*military jurisdiction has been established by a great number of legislations so as to maintain order and discipline inside the army forces. Moreover, this jurisdiction can be applied, under certain circumstances, to military members who have committed a crime or a fault. The military jurisdiction cannot be applied to civilians without military functions, and that is why they cannot perform behaviors against military functions. When the military justice assumes jurisdiction of a case which should be judged by ordinary courts, the natural judge clause is affected and, a fortiori, the due process clause, which relates to the right to access to the courts*» (considering clause number 128).

Under clause 130, the Interamerican Court of Human Rights upheld the following: «*The judge who has to resolve a case must be competent, independent and impartial, according to clause 8.1 of the American Convention of Human Rights. In this matter, the army forces involved in combat against insurgent groups, are those in charge of judging the members of such groups. This circumstance seriously affects the impartiality that a judge must have. On the other hand, according to the Military Justice Act, the Military Supreme Council is the highest official body in military justice, and its members are designated by the Minister of the executive power.*

*The Military Supreme Council members, at the same time, establish promotions, professional incentives and give assignments to their ancillaries. This evidence affects the military judges independence».*

The quoted clause of the American Convention on Human Rights expresses: *«Every person has the right to be heard, with due guarantees and within a reasonable time, by a competent, independent and impartial court, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights or obligations of a civil, labor, fiscal or any other nature.»*

In the case *«Cesti Hurtado, Gusavo Adolfo vs. Perú (Serie C-nro. 56)*, the San José de Costa Rica's court expresses that *«relating to the process followed against Mr. Cesti Hurtado by a body of military justice, the Court remarks that, at the time that the process took place, he was not in active duty, and that is why he could not be judge by military courts. Therefore, the trial at which Mr. Cesti Hurtado was judged violates clause 8.1 of the Convention, which establishes the right of access to a court»* (paragraph 151).

The criterion upheld by the Inter-American Court of Human Rights in re *«Castillo Petruzzi y otros»*, was repeated in the sentenced pronounced on 16th August, 2000, in re *«Durand y Ugarte vs. Perú»*, where the Court added that *«in a democratic State of law, the penal military jurisdiction should have a restrictive and exceptional purview and its purpose should be the protection of juridical special interests, related to military army legal functions. Military courts must not judge civilians and can only judge crimes committed by members of the army, that affect juridical military interests.*

This sentence went on to state that *«the courts that knew those facts «are a high Organism of Army Institutes» and its members were also in active military service, which is a requirement in order to be part of a military court. As a result, they were unable to pronounce an independent and impartial judgment»* (see clause 126).

This doctrine was also applied, *a contrario sensu*, by the Court in re *«Cantoral Benavides vs. Perú»*, pronounced on 18th August, 2000, where they repeated the arguments upheld in re *«Castillo Petruzzi»* and *«Durand Ugarte»*, and claimed *«that State's military courts that had judged a supposed victim —a civilian— for betrayal, does not satisfy the independence and impartiality requirements established under clause 8.1 of the Convention... in a case such as this, the judge's impartiality is affected by the army forces double function: to fight against insurgent groups and punish the members of those groups.* (see paragraphs 112 to 114).

These leading cases have been subsequently followed in re *«Las Palmeras vs. Colombia»* (12/06/01); *«Comerciantes vs. Colombia»* (07/05/04); *«Lori Berenson Mejía»* (11/25/04); *«Masacre de Mapiripán vs. Colombia»* (09/15/05); *«Palamarca Iribarne vs. Chile»* (11/22/05); *«Masacre de Pueblo Bello vs. Colombia»* (01/31/06);

«Almonacid Arellano y otros vs. Chile» (9/26/06); «La Cantuta vs. Perú» (11/29/06); «Masacre de La Rochela vs. Colombia (5/11/07); «Escué Zapata vs. Colombia» (07/04/07); «Zambrano Vélez y otros vs. Ecuador» (07/04/07).

Similarly, following this restrictive interpretation of penal military justice purview, the Inter-American Commission on Human Rights of the Organization of American States, in its 6<sup>th</sup> and 7<sup>th</sup> recommendations of its Annual Report 1993-1993, urged «*the State members to adopt according to clause 2 of the Convention, internal necessary measures in order to restrict the military courts jurisdiction only to military crimes, and to forbid the judgment of human rights violations in military courts*», and «*in case of arrests or inquests of civilians, the State members must only assign this function to civil authorities, either the police or the judicial power*».

With respect to the UN point of view in relation to military courts, it is convenient to mention clause 2.06 of the Universal Declaration regarding the independence of justice approved at the World Conference held in Montreal, Canada, in June 1983, which established that «*the military courts jurisdiction will be restricted to military offences committed by members of army forces. And also, there will always be the right to appeal to a legally qualified appeals court*».

On the other hand, the report presented by Mr. LOUIS JONET on 9th July, 2002, to the Commission for Human Rights of the Economic and Social Council (United Nations), related to «*justice administration — In the matter of justice administration under military courts*», made at the request of the Human Rights Sub-Commission of Promotion and Protection (2001/103 decision), mentions that the Commission on Human Rights agree on the need to limit the military courts function, and even to abolish them. On this point, the report invokes constitutional rules of countries that have restricted its jurisdiction or have abolished them in times of peace. Nevertheless, they do not claim its *per se* incompatibility with judging military members, on the contrary, such criticism is related to the judgement of civilians by military courts, because it is considered against clause 14 of the International Covenant on Civil and Political Rights.<sup>26</sup> In the same way, the report mentions the «*Terrorism and Human Rights*» resolution declared on 12th December, 2001 by the Inter-American Commission on Human Rights. The sixth recommendation of Mr. JOINET's report, suggests that in all cases, military court jurisdiction should be restricted to first grade jurisdiction and that civil justice should form part of appeal proceedings».<sup>27</sup>

---

<sup>26</sup> See Commission on Human Rights General Observation n° 13.

<sup>27</sup> See the summary report published on «*Investigaciones 3-2001*», by the «*Secretaría de Investigación de Derecho Comparado de la Corte Suprema de Justicia de Argentina*», pp. 583/586; and E/CN.4/Sub.2/2002/4 document of the UN Economic and Social Council.

The above mentioned report refers to clause 51 of the «*Declaración de Singhvi*», regarding independence and impartiality of judges, juries, assistants of counsel and the independence of lawyers, establishing in its «f»comma, that military court jurisdiction has to be restricted to military offences and that the right to appeal to a legally qualified court of appeal or a recourse of annulment will always exist<sup>28</sup>. Eventhough the former declaration has not been adopted by the Commission on Human Rights, in its resolution number 1989/32, pronounced on 6th March, 1989, governments were invited to take into account these principles.

As we can see, the United Nations' criteria are not different from those of the American International Law of Human Rights, in terms of defining the restrictive purview that is assigned to military courts and its limitation to judge only military members; even if there is a tendency to abolish them, their validity is also accepted, as well as the protection of procedure rules through the review of military court' decisions under civil justice.

#### IV. CONCLUSION

Inspite of the fact that the arguments pronounced on the Inter-American Court of Human Rights judgements regarding the *requirements of independence and impartiality established under clause 8.1. of the Convention*, this Tribunal has not had the chance to make a careful study of that line of thought, as up until now it has not been able to judge the validity of military court jurisdiction –composed of officials that are hierarchically dependent of the executive power– in order to judge military members accused of military offences.

We have already remarked that the Argentinian Supreme Court of Justice *in re* «López, Ramón Ángel» has recently decided upon the unconstitutionality of military courts jurisdiction in respect of this these cases.

In that way, the Argentinian High Court has made a copernican rotation in its traditional jurisprudence which, twenty three years ago, had rightly been questioned by RICARDO C. NUÑEZ.

As AÍDA TARDITTI<sup>29</sup> recalls, in Argentina, «*when democracy was recovered, the 23.049 Act that modifies the Military Justice Code (O.B. 2/15/84) established that the judgement of crimes committed before that act and indicted army forces members*

---

28 Precisely, clause 56 bis of argentinian Justice Penal Code, introduced by 23.049 Act, obliges the prosecutor to promote an appeal against the decision pronounced by a military court, according to clause 445 bis of the Justice Penal Code.

29 *Dr. Ricardo Nuñez: Coherencia jurídica y republicana*, in «Homenaje y recordatorios a Ricardo C. Nuñez», Poder Judicial de la Provincia de Córdoba, Centro de Perfeccionamiento Ricardo C. Nuñez, Marcos Lerner Editorial, Córdoba, 2000, pp. 20 and 21.

or members of the security forces under its control, in order to restrain terrorism, should be judged by the Supreme Council of Army Forces with the right to put forward an appeal to a Federal's Appellate Courts, which can get involved in the advocacy of the case if it notices an unjustifiable delay or neglect in the procedure of the trial. Under this legislative situation, on 21st June, 1984, an extraordinary legal remedy was resorted to the Supreme Court of Justice by Reynaldo Bignone's defender. The Court decided that the Army Forces Supreme Council must judge the crime for which the defendant was indicted, which was deprivation of freedom of two soldiers who were on military compulsory service at the National Military School where Bignone was director.»

TARDITTI adds that RICARDO C. NUÑEZ, in a strongly critical paper<sup>30</sup> «rejects the Supreme Courts arguments because the Congress in use of its attribution of organising military jurisdiction, proceeds with more extensive freedom. However, this freedom is not absolute and it is limited by the Constitution (...) and because the Constitution does not assign judicial functions to the army forces, this is why the jurisdiction to judge crimes only concerns federal or ordinary courts.»

The majority of Argentinian Supreme Court of Justice members, *in re* «López»—especially where clauses 6<sup>th</sup> to 10<sup>th</sup> are concerned— have adopted the arguments of one of its members, EUGENIO RAÚL ZAFFARONI, which are set out in his book «*Derecho Penal —Parte General*»<sup>31</sup>, coauthored with Alejandro Alagia y Alejandro Slokar.

These authors also express: «*The penal military jurisdiction is unconstitutional with respect to the members of armed forces (because it is not practiced by independent judges and because it does not guarantee the right to defence) and, of course, it is doubly unconstitutional if its application is extended to civilians, not being possible to appeal to a Martial Law, unknown in Argentinian legislation, which does not admit juridical voids*»<sup>32</sup>, as those that existed—in our opinion—in the «*law of the american rule*»—which does not mean «*the rule of law*»— and the cases of human rights violations of those who are imprisoned in Guantanamo's «*limbo*».

---

30 *¿Competencia ordinaria o militar?*, in «Doctrina Penal», 7th year, 1984, Depalma, Buenos Aires, pp. 501 to 507.

31 p. 181 to 184, paragraphs 3 to 7.

32 *Op. cit.*, p. 186.

