

RULES OF ENGAGEMENT, STATUS OF FORCES AGREEMENTS AND CRIMINAL LAW: DIFFERENT APPROACHES AS TO THE LEGAL BASE OF THE USE OF FORCE IN MILITARY OPERATIONS AND CONFLICTS OF JURISDICTION IN RESPECT OF FOREIGN FRIENDLY FIRE

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Summary: I. Premise. II. Historical aspects of *ROE* and «self definitions» of *rules of engagement*. III. Legal qualification of *Rules of engagement* and *criminal defenses*. IV. Unresolved legal issues in the «criminal law centric» approach to the use of force in military operations. V. Status of forces agreements applicable to the area/territory of operations and jurisdictional conflicts. VI. Conclusions.

* This report has been prepared in his exclusive private capacity, within the *Research on International Criminal Law* hosted by the University of Genoa – Italy. The Author is grateful to Ms. CATERINA PINO, *NATO School Research Assistant* for the review of the text and her precious advice. This Report has been drafted relying on the readers widest comprehension for the «principle of non attribution» and reflects only the personal understandings and the personal opinion of the author and is in no way intended to reflect the understanding of the *Italian MOD*, the Navy or even *NATO*. This will be, by the way, sufficiently evident after the reading. Unfortunately this Report reflects also the author's «non understanding» of several specific aspects related to the *rules of engagement*. Therefore any clarification is the welcome and can be forwarded to my e-mail address (jpierin@lex.unict.it). Fundamentally this report was thought rather as a «*working paper*» outlining, in a kind of logical order, legal points/bullets for further development and hopefully as a contribution to an interdisciplinary debate.

I. PREMISE

The term *rules of engagement*, once confined within the technical language of the military, has become known to the public opinion – especially in Italy – after some parliamentary inquiries on the adequacy of the authorizations given to national troops, to resort to force and is now part of the common language¹.

Nevertheless the existence of such rules doesn't seem to have awakened the interest of scholars and even students.

There is an established military doctrine distinguishing military operations into two main categories: «war operations» (including ideally *collective self defense*, art. 5 operations under the NATO treaty) and, on the other side *crisis response operations* or *Military operations other than war*. The last mentioned category should ideally encompass *peace support operations*, proper *peace keeping*, *peace enforcement*, *conflict prevention*, *peace building*, but also support to humanitarian operations, humanitarian assistance, support to and proper disaster relief operations, non combat evacuation operations, extraction operations and so on. Whilst at a first view the above distinction may appear clear, the labeling of operations becomes critical already in the national military planning phase and further when different national views must be taken into account. Operations labeling by the political authorities is something totally different and takes into account not only the national position, but also internal divergences amongst political parties.

The consequences are that the right of the enemy to fight and harm legitimately under international law is mainly neglected – trend which can be defined as «criminalization of the enemy» – and judicial resources are wasted in improbable crime. This lead, for example, to the inconsistent pretence to proceed extraterritorially in Italy for acts of hostility committed in Iraq by Iraqi nationals before the hand over of the administration to the Iraqi authorities².

1 P. ZEN RUFFINEN, *Les Regles d'engagement (ROE)*, *Revue militaire Suisse*, 2006, n. 5, p. 16.

2 We are of the opinion that the provisions contained by the Italian Government the 10th of July 2003 with the decree n. 165, as validated by the law n. 219 the 1st of August 2003, which establish (art. 16) by foreigners against Italian citizens participating to the Italian mission in Iraq are punished in accordance with the Italian criminal law and fall within the territorial jurisdiction of the ordinary (not military) tribunal of Rome are in breach of the provisions contained in the fourth Geneva Convention. The parliamentary process shows that there hasn't been any serious debate on the topic of the «law of occupation» and the accuses of «having occupied Iraq» were used in the political debate with provocative (and not informed) intent by the left parties and rejected in a vehement (but not informed) indignation by the Government. Unfortunately whilst there is a certain level of knowledge of the provision of the fourth Geneva Convention requiring States to establish universal jurisdiction over grave breaches (paragraphs 146 and 147), provisions requiring the application of the criminal law previously in force in the occupied territories (paragraphs 64.1) unless another law (say the Italian law) has been dully published and divulged (paragraph 65), exercise of the jurisdiction trough a military tribunal having necessarily their seat

Intent of this presentation is to highlight the different approaches to the use of force in military operations abroad defining two abstract models. The first model mirrored in the military doctrine, consider use of force as inherent to the employment of the military instrument. The second model is the criminal law centric one. According to the last one each and any engagement is a potential infringement to criminal law unless is it justified by the codified defenses. Within the first model there is no need to codify *rules of engagement* whilst in the second one there isn't mainly the will to do so. To a certain extent the two models mirror the main distinction of judicial systems in a model of common law and civil law model³.

in the occupied territories whilst also trial on appeal should by preference take place in the said territories (paragraph 66). Besides, pending the occupation an extradition of protected persons may be considered only for crimes committed outside the occupied territories (paragraph 70). Once a tribunal has sentenced a protected person, the sentence must be enforced in the occupied territories, and the said person must be handed over, once the occupation ceases, to the local authorities. It is our opinion that the rights of protected person in occupied territories may no the neglected due to unilateral labeling of a military mission. It must also be observed that the simple requirement of the request of the Minister of justice (eventually with the agreement of the Ministry of Defense) for the prosecution of the said crimes, due to its poor drafting raises multiple questions on the further application of other legal requirements established in article 10 of the Italian penal code. It must also be mentioned that Parliamentary proceedings shows that in the establishment of jurisdictional rules the existence of CPA Regulation n. 17 has been ignores and members of the Parliament deemed the mission in Iraq as being governed by the NATO Sofa (Sic!). M. ZWANENBURG, *Existentialism in Iraq: Security Council Resolution 1483 and the Law of Occupation*, in *Intern. Rv. Red Cross*, 2004, p. 754, argues the applications of the duties of the occupants from the wording of Regulation n. 17 of the CPA and the corresponding definition of members of the *Multi National Force*. Only Norway has expressively declared to fulfill only strictly humanitarian tasks in Iraq and therefore not to be bound by the obligations lasting on the occupant parties. Once the occupation phase is over, the territoriality of the conduct ceases to be an absolute reason to trial the protected individual «on site» and re-start representing a circumstance which normally leads to a bar to extradition; besides we can also imagine a denial *iudicati causa* or a delay whilst territorial authorities are proceeding. A reasonable possibility to trial the accused is linked with the eventuality that the individual chose to refuge in a third State, and also in this case the individual can raise a *prima facie* case on the very political nature of the targeting of a military objective in a situation which amounts clearly to an internal war.

3 In our report we will not further deal with the different issue of the threshold for the use of military force to counter criminal phenomena like the international terrorism, or the still open issues of the set of international rules applicable to the «Global War against Terrorism» (GWAT). Fundamentally the *rationale* of the use of military force against terrorism is illustrated in the *US National Strategy* and linked up with the desired *End State* represented by the possibility of the reduction of terrorism to a merely criminal dimension which can be countered with law enforcement means. Curiously a theorization of the situations in which the defense of the State is out of the reach of criminal law and the contingency of law enforcement means with the resort to war can be found in the early study on international criminal law of A.F. BERNER, *Wirkungskreis des Strafgesetzes, nach Zeit, Raum und Personen besonders von der Bestrafung der im Auslande begangenen Verbrechen, vom Asilrecht und von der Auslieferung der Verbrecher, von der Rückwirkung und vom Rechtsirrtum*, Berlin, 1853, p. 143. On the effects, characteristics and cost effectiveness of the different levels and means of cooperation (Military, Financial, Law Enforcement, Intelligence and Reconstruction), see N. BENSANEL, *A Coalition of Coalitions: International Cooperation Against Terrorism, Studies in Conflicts & Terrorism*, 2006, p. 35ff..

Curiously the «criminal law centric» approach is normally shared by Countries in which interdictory or other non statutory forms of relief aren't granted and scrutiny by a criminal jurisdiction is the only form of «indirect protection» granted by the law⁴.

This presentation deals also with the problem of *status of forces agreements* in operational environment. As will be shown the *status of forces agreements* reflects the need of each and any sending State to exercise exclusive jurisdiction over its troops and accompanying civilians; need which is consistent with pretence of each nation to define when and to what extent to use the military force. The different sources of such agreement will be examined and also the result unequal application by the different States due to constitutional provisions, different attitudes towards international law and extraterritorial jurisdiction.

4 Judicial relief can be ideally divided: a) relief granted against ongoing measures (and sometimes measures still to be adapted) mainly in interdictory form or directly by quashing the measure itself b) relief granted against measures which have already extinguished its effects mainly in declaratory form and sometimes as an interlocutory step in the view of further legal remedies c) relief granted in form of refund or restitution d) indirect relief through the application of criminal law. As an example of judicial relief to prevent certain feared actions, we can list the decision by which the *Supreme Court of Israel*, sitting as the *High Court of justice* has set, the 14th of December 2006, at the request of the Public Committee against Torture in Israel and the Palestinian Society for the Protection of Human Rights and the Environment, the limits within which «targeted killings». The aim of such a judicial proceeding is to «reviews the legality of the use of the discretion of the commanders of the army forces». In our opinion, the best explanation of the very essence of such a judicial review is given by reproducing the *Order Nisi* issued at the request of the applicants: «to obligate respondents ... to appear and explain why the 'targeted killing' policy (hereinafter – 'execution policy') should not be annulled, and why they should not refrain from ordering respondents ... to implement that policy, and to obligate respondents ... to appear and explain why they should not refrain from carrying out executions of wanted persons according to said policy». As a matter of fact States relying on «criminal law» as a source of law for the use of force in military operations usually doesn't recognize in respect of the use of military force in military operations, judicial remedies falling under the above categories a), b) and even claims for refund are usually denied based on the absence of *locus standi* of the individual under article 91 of the first additional Protocol to the 1949 Geneva Conventions. Reference is to the decision of the German *Bundegerichtshof* of the 2 November 2006, *IIZR* 190/05, in respect of the NATO bombing of *Varvarin*. In similar circumstances the Italian Supreme Court of Cassation, joint civilian sections, 16th March 2002, affirmed that acts of belligerence aren't open to judicial review as they are expression of the supreme powers of a State. The last affirmation reproduced, in a slightly different form, the wording of a long lasting jurisprudence excluding refund for wrongfully acts of public authorities. The decision was originated by the direct and immediate appeal for jurisdictional reasons brought by the Italian Government and the Ministry of Defense, through the State's advocacy, in order to disrupt the first instance civilian claim. The embarrassing reasoning underlying the appeal was that judicial authorities would lack of the necessary independence and impartiality as acts of belligerence aren't imputable to State's organizations but rather to the population as a whole». To be honest, after several centuries of efforts to establish the principle of separation in armed conflicts, we cannot imagine something more improper.

In order not to cover matters dealt in other presentations, examination will be limited to criminal law aspects of *rules of engagement* and *jurisdictional conflicts* in respect of conducts «below the level of *core crimes*» and considerations expressed are be, unless otherwise specified, exclusively referred to such conducts.

II. HISTORICAL ASPECTS OF ROE AND «SELF DEFINITIONS» OF RULES OF ENGAGEMENT

Curiously the first invocation of what looks like a *rule of engagement* dates back to the 18th century and specifically to a phrase pronounced in order to delay the engagement with the enemy to a certain moment. The said phrase stated «*don't one of you fire until you see the whites of their eyes*» has been attributed in an almost identical version and according to the different sources, to several military commanders⁵.

In that contest the *rules of engagement* were intended at assuring the full control of the military commander on the very beginning of the engagement. Obviously the problem of the reach of codified criminal defenses was far away from the perturbing the thought of the mentioned military commanders.

Whilst the first use of the term *rules of engagement* is quoted as being used the first time during the sixties in respects to instructions issued to naval commanders in a «cold war» scenario, some early examples of instructions issued in 1918 to British commanders deployed in the Baltic Sea have been quoted. The wording of these instructions must sound familiar to anyone aware of the modern language of *rules of engagement*: «*A Bolshevik man-of-war operating off the coast of the Baltic Provinces must be assumed to be doing so with hostile intent and treated accordingly*»⁶.

The cold war scenario procedures lead to the fact that also in the country in which one could suppose *rules of engagement* poses less legal problems – reference is to the United States – in the late seventies and early eighties there were the awareness that *rules of engagement* established until then by the Navy – chief of naval operations, represented «*clear statements of national views on self-defense in peacetime that could also smooth the transition to hostilities and, for that matter, might be*

5 The Commanders claimed to be the «fathers» of the modern concept of *rules of engagement* are respectively William Prescott at *Bunker Hill* (1775), Israel Putnam, apparently in the same war and probably in the contest of the same battle of *Bunker Hill*. On the European side, the concept is claimed to have been expressed some decades before by Prince Charles of Prussia at *Jagerndorf* (1745) and by Frederick the Great at Prague (1757). Quotations by G.R. PHILLIPS, *Rules of Engagement: A Primer; The Army Lawyer*, 1993, n. 7, p. 5.

6 Quoted by G.R. PHILLIPS, *Rules of Engagement: A Primer; The Army Lawyer*, 1993, n. 7, p. 5.

used in many stages of a belligerency»⁷. The critical aspect of these procedures was represented by the need to inbound under the political authority the power to issue instructions which could clearly determine the escalation of the use of force.

The later U.S. definition of *rules of engagement* («*Directives that a government may establish to delineate the circumstances and limitations under which its own naval, ground, and air force will initiate and/or continue combat engagement with enemy forces*») ⁸ shows that the said rules are part of the political process by which armed forces are subordinate to the political will⁹.

The most important circumstance in which force can be used are represented by circumstances in which the inherent right of self defense arises. «*Unit self defense*»¹⁰ and «*National self defense*»¹¹ have both been defined in a Memorandum by the U.S. *Joint Chiefs of Staff*, now quoted in an operational law handbook. According to both definitions a «hostile act» performed and/or a «hostile intent» manifested, justify Unit/National self defense.

At the same time, *rules of engagement* don't «*address the right to protect the individual, the commanding officer, the unit commander and his [or her] command from attack or threat of imminent attack in situations involving localized conflict, or in low level situations that are not preliminary to a prolonged engagement*»¹². Obviously in situations preliminary to a prolonged conflict or representing itself a prolonged conflict, the above individual self defense should cease to be regarded as such and should become simply an engagement.

It is not our aim do discuss the relationship between hostile act/intent and an «actual attack/treat» which justify in most legal systems self defense. For the only purpose of qualifying hostile act/intent under criminal law, we can consider then as symptomatic situations in which a treat can be deemed as existing.

7 W. HAYS PARKS, *Righting the Rules of Engagement, Proceedings*, 1989, n. 5, p. 85.

8 *Joint Chiefs of Staff, Publication 1-02, Department of Defense Dictionary of Military and Associated Terms 298*. A later version of the same publication, updated the 24 January 2000, reproduces a similar definition which states that *rules of engagement* are: *directives issued by competent military authorities which delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered*.

9 G. BUNN, *International Law and the Use of Force in Peacetime: Do U.S. Ships Have to take the first hit?*, *Naval War College Review*, n. 3, 1986, p. 69.

10 «*The act of defending a particular unit of U.S. Forces, or an element thereof, against a hostile act or manifestation of hostile intent. The need to exercise unit self-defense may arise in situations ranging from apparently unrelated, localized violence, to terrorist acts, low – level conflicts and prolonged engagements*».

11 «*The act of defending the U.S., U.S. Forces, and, in certain circumstances, U.S. citizens, their property, or U.S. commercial assets from a hostile act or hostile intent. The need to exercise national self-defense may arise in isolated or prolonged regional or global situations that are often related to international instability*».

12 J.A. ROACH, *Rules of Engagement*, *Naval War College Review*, 1983, n. 1, p. 49.

According to two successful graphical representations (*Venn diagrams*)¹³ – which still continue to be used also in other not U.S. contests – *rules of engagement* are represented as smaller and totally contained subset of a larger set of actions permitted under the law of armed conflicts, whilst the four factors (unequally) influencing *rules of engagement* are identified in the law, operations, diplomacy and policy.

These diagrams, and specially the second, are – in our opinion – useful when it comes to show organic interactions in the definition of the *rules of engagement* but are «affected» *prima facie* by the specific U.S. Constitutional role of the executive in military and foreign affairs (article II, section 2) and therefore should be carefully waged when used in other contests. The definitions quoted above are strictly linked with U.S. perspectives on international law and specifically with U.S. view on *self defense* and specifically *anticipated self defense* in international law.

The model of use of force defined above, in which engagement also in the initial phase of the triggering of what could become a conflict is governed by diplomacy and policy and limited by law and specifically international law, is applicable exclusively to operations abroad. The use of force in domestic operations is governed by domestic law and in particular statutes on the employment of armed forces as «constables»¹⁴ and by defenses established in criminal law.

In 1997, the so called *Banuelos case* – a *U.S.M.C.* corporal in the context of a boarder control operation and acting pursuant to its rules of engagement killed an individual which previously fired at him, drove the attention of the military on the until then neglected point of law represented by the applicability of the criminal law and procedure of the State of Texas¹⁵.

Accordingly as standing *rules of engagement* used to apply to all military operations, irrespective of their location in or outside the United States, as of 15th January 2000, they apply only during «*operations, contingencies, and terrorist attacks outside the United States, and during attacks against the United States*». On the other

13 J.A. ROACH, *Rules of Engagement*, Naval War College Review, 1983, n. 1, p. 46. A slightly different version a the quoted version of J.A. ROACH, can be found in C. CABIGIOSU, *Rules of Engagement in Military Operations*, in S. MANACORDA (coordinated by) *European Common Defence and Criminal Judicial Area, Rome 26th – 28th November 2004*, p. 139. According to the said diagram whilst policy reflect on law, *Rules of engagement* are the expression of the mission an law.

14 So under the Canadian *National Defense Act* whilst in the U.S there is the prohibition to use the military as a *posse comitatus* or otherwise to execute the laws and respective exceptions e.g. for *military support in drug interdiction* must be considered.

15 See W.A. STAFFORD, *How to Keep Military Personnel from going to Jail for Doing the Right Thing: Jurisdiction, ROE & the Rules of Deadly Force*, *The Army Lawyer*, 2000, n. 11, p. 1ff..

side of the Atlantic, *rules of engagement* for domestic police operations were tested against article 2 paragraph 2 of the *European Human Rights Convention*¹⁶.

The *Venn diagram* mentioned previously on the factors influencing the definitions of the rules of engagement survived unchanged to the *de localization* of the sphere of application of the *rules of engagement* to operations abroad and to responses to current attack and to the overwhelming preeminence of domestic in situations previously covered by standing rules of engagement.

Besides the model according to which *rules of engagement* defines how and to which extent a combat engagement will be initiated and/or continued in a legal space governed by policy, diplomacy and operational factors within the framework of international law is not only consequential to the U.S. Constitutional model, but influenced by the lack of extraterritorial reach of domestic statutes and the Constitution itself.

A. NATO Rules of Engagement

NATO notion of *rules of engagement*¹⁷ is obviously not «nation oriented» as the U.S. one, nor focused on «*combat engagement*» with an enemy. They are defined as instructions to commanders and commanding officers within the framework of

16 The first case in which a *rules of engagement* issue was raised under the *European Human Rights Convention* is represented by application brought by *Steward* against the U.K.. The application was dealt by the European Human Rights Commission and decided the 10th of July 1984. The applicant's 13 years old son was hit by a «plastic baton round» fired by a British soldier in Northern Ireland and died some days later. *Rules of engagement* on the use of plastic baton rounds were issued to soldiers. The use of PVC round was allowed to disperse crowds as «minimum and reasonable force» and rounds were to be fired «at selected persons» and not indiscriminately. The commission proceeded assessing the absolute necessity to use of force and didn't further consider the very nature of rules of engagement. The perhaps most known episode in which *rules of engagement* were evaluated in the contexts of a domestic operation is represented by the *McCann v. the U.K.* case, decided the 5th of November 1995. In this case the *ECHR* had to evaluate if in the light of article 2 paragraph 2 of the Convention the shooting of suspect terrorist deemed to carry explosive devices was the expression of an absolutely necessary level of force. In that context *rules of engagement* weren't evaluated under their legal effects but rather within the actions taken by the State. Intelligence failures lead to the ascertainment of a violation of article 2. In *Ergi v. Turkey*, decided by the *ECHR* the 28th July 1998, the respondent Government claimed the adequacy of the issued *rules of engagement* in respect of article 2. Real issue of the case was the absence of an independent investigation. In the *Kakouly v. Turkey case*, decided by the *ECHR* the 22 November 2005, use of force was found not being in accordance with rules of engagement which reserved lethal force for self defense circumstances. As in the precedent case, the real issue of the claim was the absence of an adequate investigation on the deadly use of force. On the jurisprudence of the *ECHR*, see, F. DE SANCTIS, *What Duties do States have with Regard to the Rules of Engagement and the Training of Security Forces under Article 2 of the European Convention on Human Rights?*, *The Intern. Jr. of Human rights*, 2006, n. 1, p. 33ff.

17 North Atlantic Military Committee, MC 362, *NATO Rules of Engagement* (2003).

overall political directives that define the degree and manner in which force may be applied. These rules are not used to assign tasks or give tactical instructions. *Rules of engagement* may consist of authorizations to use force, as well as limitation in the use of force where such use is otherwise authorized. Furthermore, through the retention of specific rules at an appropriate level of command a better balancing of the evaluation to resort to specific means or levels of force may be realized. Military commanders may also enact further detailed instructions for the same purpose. The framework within which force may lawfully be used in military operations is defined by international law, to include applicable provisions of the law of armed conflict and human rights law, whilst national law may establish further limitations. Where States have different international obligations, every effort to adopt a «common approach» must be made (...)¹⁸.

Rules of engagement don't limit what is called the «inherent right of self defense» and this right covers «unit» and «individual» self defense and covers also the need to defend other Nation's forces. National self defense is in principle not covered by *rules of engagement* as a consequence of different national view and perhaps also as a consequence of the wording of the Atlantic Treaty in respect of articles 4 and 5 and the need to avoid an overlapping.

Possible inconsistencies, due to national law and views, as to the moment in which the right to self defense (and extended self defense) ends and the use of force in accordance with the rules of engagement begins are acknowledged. The solution to such inconsistencies is represented by the interpretation of the *rules of engagement* in a way as not limiting the right of self defense.

The concepts of *hostile intent* and *hostile act* – we have previously seen enclosed, the first one in the 1918 British instructions in respect of the «Bolshevik men-of war» and both in the US unit and national self defense (where they represent a situation in which it is appropriate to act in self defense) – encompasses situations in which the threat doesn't rise the level necessary to act on self defense and are therefore dealt by *rules of engagement*. Inconsistencies with domestic laws are resolved taking into account that *rules of engagement* doesn't prejudice national right of self defense and that compliance with domestic law is a national issue. Engagement of a designated element demonstrating *hostile intent* is justified by its capability to harm and its intention to act accordingly. A *hostile act* is an act which cause serious prejudicial to/or endanger own forces without amounting to an imminent or actual attack.

18 The last principle may pose harsh legal questions as some State have ratified the first additional Protocol to the 1949 Geneva Conventions and other State's hasn't. An acceptable «common approach» may never result in the violation of obligations to which a State is formally bound. Most critical aspects are represented by the necessarily different rules applicable to the targeting and the treatment of belligerents/civilians taking actively part to the hostilities under article 61 of the mentioned Protocol.

Accordingly one could affirm that NATO *rules of engagement*, as defined by a document called *MC362*, are strictly neutral in respect of the different national approaches to the threshold of an armed conflict and would abstractly be still workable if one Nation considers to take part to an armed conflict without acknowledging it and relying on the authority of defenses codified in its criminal law. This is obviously a paradox and the «criminal centric approach» to the use of force at a certain point will collapse because of its internal inconsistency.

B. European Union Rules of engagement

The EU definition¹⁹ differs from the NATO one because it focuses more on the concerns related with the «triggering» effects of the use of force. Accordingly *Rules of engagement are directives to military commanders and forces (including individuals) that define the circumstances, conditions and degree and manner in which force, or other actions which might be construed as provocative may, or may not be applied: rules of engagement are not used to assign tasks or give tactical instructions. Rules of engagement do not affect the right of self defense under national law. Formulations and terms used in the description of rules of engagement are factual descriptions and do not in any way affect the interpretation of the legal basis of the use of force*». The EU has his own compendium containing a number of prohibitions and authorizations to be used in the operational planning process for the definition of mission tailored *rules of engagement*. The *EU Council* grants political approval²⁰.

A recent analysis on NATO and EU *rules of engagement* bodies has suggested that in all cases the said rules are a tool which allows political control over the military's use of force²¹. This consideration is without any doubt consistent with the way rules of engagement are construed but it doesn't overcome the dual – model underlying the use of force in military operations because, the source of law, authorizing the use of force is strictly based on national views. And broad definitions support the search of different legal bases by different nations.

19 *Use of Force Concept for EU-led Military Crisis Management Operations, ESDP/PESD COSDP 342.*

20 On the planning process within the European Union, See S. MAYER, *Sicherheitspolitische Interventionen der Europäischen Union: Rahmenbedingungen, Kompetenzen und Interaktionsmuster – TransState Working Paper*, Bremen, 2005, p. 28.

21 C. CABIGIOSU, *Rules of Engagement in Military Operations*, in S. MANACORDA (coordinated by) *European Common Defence and Criminal Judicial Area, Rome 26th – 28th November 2004*, p. 142.

C. United Nations Rules of Engagement

United Nations *rules of engagement* reflect the evolution of the use of force concept in peacekeeping missions. As such missions were traditionally based on the «non use of force except for self defense» *rules* and self defense are in a different relationship as the one mentioned for the NATO in which instructions doesn't address self defense. Use of force for the sole self defense was based on practical and doctrinal considerations and fundamentally on the need to preserve impartiality. This approach was questioned in the so called *Brahini Report*²². Within the concept of self defense and the respective authorization to use force there has been an evolution with the moving from an initial concept implying «*response with force to an armed attack, including attempt to make UN troops withdraw from positions occupied under the mandate*» to a more active concept developed for the mission *UNEF II* which included «*resistance to attempt by forceful means to prevent peace keeping forces from discharging their duties under the mandate*». Next factual development was the blurring of the distinction between peace keeping and peace enforcement and the further extension of self defense to permit enforcement of the mandate²³. In other words, self defense remains the keyword but its extension tends to include «mission accomplishment». The more the need for the force is reflected by the mission, and this use departs from the initial strict notion of *self defense*, the more the need for *rules of engagement* increases²⁴.

As we mentioned in the premise, «labeling» of a military mission by the political level often is inaccurate and governed by the necessity to reach internal political consensus on the international mission. There is a clear preference in some countries for the labeling of any mission as a *peace ... something* mission.

This comes close to a persistent United Nations Charter «*Chapter accounting error*» or to a «*forever and in any case Chapter VI approach*». Unfortunately this approach is sometimes shared by non military ordinary judicial authorities. Consequences are the often inconsistent and ill founded invocation of the protection of national troops under the 1984 New York Convention on the protection U.N. personnel (e.g. claimed applications to Chapter VII missions in the absence of the conventional requirements due to partial readings of the said convention) and even

22 *Report of the Panel on UN Peacekeeping Operations*, United Nations, 23 August 2000.

23 On the creation and control of places of protection, See B.M. OSWALD, *The creation and control of places of protection during United nations peace operations*, ICRC Rv., 2001, p. 1013.

24 UN DPKO, *Guidelines for the Development of Rules of Engagement for Peace Keeping Operations*, UN MD/FGS/0220.0001(2000). The «*Master List*» of numbered *rules of engagement* includes use of force against «hostile act».

the dereliction of duties under the fourth Geneva Convention when troop contributions take place in a regime of occupation²⁵.

D. On the field consequences of different approaches

Military commanders try to speak all the same language and normally try to reach agreement on the *rules of engagement* even at the price, for non U.S. Commanders, of filling legislative and constitutional gaps by substituting national or unit with individual self-defense as defined in domestic law. In other terms what shouldn't be dealt within the *rules of engagement* – the individual self defense – becomes the primary source of law for the use of force which is really contradictory. The instrument for the composition of radical different legal models and avoiding an operational stake is represented by the *caveats* to specific *rules of engagement*. *Caveats* permit military commanders to maintain the fundamental clash between different legal models of use of force, at a «non declared level of conflict» and allow furtherance of military cooperation. This implies that also if military commanders of several nations pronounce the term *rules of engagement*, they have in mind (or should have in order to avoid legal problems) the limits established by criminal defenses.

Besides this, constabulary functions and duties attributed to military commanders may interfere with the use of force in accordance with *rules of engagement* (e.g. arrest and detention of individuals during maritime interdiction operations) as such functions are necessarily exercised under the authority and control of judicial authorities and therefore could led to a return under national authority even if operational control is delegated to foreign/international authorities.

III. LEGAL QUALIFICATION OF RULES OF ENGAGEMENT AND CRIMINAL DEFENSES

In the «first model» of the use of force in military operations we have mentioned, *rules of engagement* aren't considered as criminal defenses nor they fulfill or complete the legal provision of any criminal defense. Nevertheless contravening to *rules of engagement* may result in disobedience and the material conduct may be qualified as a crime. In what can be defined a «purely international law governed

25 Improper mission labeling brings some Countries to the obstinate and persistent refusal to qualify own troops as «combatants» – because they are always and for media purposes employed in peaceful tasks (even under the occupant's chain of command and tasked with the disarmament of resistant factions) – and to the correlate refusal to rely on the law of armed conflicts as the proper source of law in which authorization for the use of force should be sought. Next step is obviously the full reliance on domestic criminal law and specifically criminal defenses.

use of force», *Rules of engagement* and criminal defenses operate on different levels without interferences.

In order to clarify the concept we can rely on «tree directions of force example», based on the illustration of forces in physics, and related to the ambit of application criminal law in a combat situation.

a) When a soldier targets frontally the opponent in accordance with the *rules of engagement* – which we can suppose are in whole encompassed by the limits of authorized use of force under the law of armed conflict – it is simply an engagement and there is no need to look for a criminal defense. In such a situation, criminal law may be relevant following the violation of the *rules of engagement* without trespassing the frames of the law of armed conflict (situation open to qualification under the national law varying from disobedience to a specific criminal qualification of the conduct, to a mere violation of instructions of non criminal relevance) and the violation of the said frames (war crime or crime against humanity as long as a specific qualification of the conduct is requested under domestic criminal law).

b) When a soldier targets friendly forces, whether foreign or not, on his side there may be the need to look for a criminal defense. Normally when foreign friendly fire episodes happens amongst forces from contributing Nations both relying on international law as the source for the use of force, such episodes are dealt within combined non judicial investigations²⁶ and multiple level investigations by the respective JAGs. In such a situation ambits for the application of criminal law are represented by the violation of the *rules of engagement* and/or the erroneous qualification of the circumstances within the rules of engagement (situation open to qualification under the national law varying from disobedience to a specific criminal qualification of the conduct). *Rules of engagement* remain relevant in respect of aspects like the identification of a designated target. Same for minute instructions expressed as «*pre-planned responses*» to a certain apparent treat.

c) Finally, when the same soldier target his superior (or if he writes an injurious e-mail to the Secretary of defense or to his girlfriend!) the consequences of his actions will be governed by criminal law (whether military or not).

But even the pure model isn't totally pure and claims of self – defense arise in situations in which there is the need to defend military compounds and the labeling as «defensive engagement» seems to be more appropriate.

And also this model may show some discrepancies in the very beginning of a situation of armed conflict and in the triggering of such a situation and in events of

²⁶ On the so called *Tarnak Farms* episode in 2002, a *Coalition Investigation Board* was established. On the episode and the *rules of engagement* and «special instructions» implication, see P.E. JETER, *What do special instructions bring to the rules of engagement? Chaos or Clarity?*, *The Air Force Law Review*, 2003, p. 377.

international tensions whilst self defense doesn't apply but the military instrument is used for the support of strong national interests and offensive measures can be considered.

In the opposite «criminal law centric» model of the use of force, the military instrument is simply present in an operational environment and reacts to the events in terms of defeating unjust threats, disrupting unjust violence exercised against own and associated forces, overcome unjust resistance opposed and so on. Later we will return on the issue and raise the question to what extent relativism (and also circumstances legitimating the opponent) under international law may impair the application of ethical oriented criminal defenses in situations of armed conflicts.

Whilst for example NATO *rules of engagement* derived their concept from national *rules of engagement* intended as an instrument to ensure political goals within the framework of international law and in situations governed by international law rather than by domestic law, they show a significant adaptation in order to fit the concerns of States largely relying on their domestic law. On the other side, NATO *rules of engagement* largely influenced national *rules of engagement* of the last mentioned States which developed their own catalogue, sometimes with the same numbering series, which is useful for reciprocal comprehension, and sometimes not! Apart from the *Rules of engagement* catalogue, it is usual to find references to the fine wording of NATO *rules of engagements* through the formula «... as per MC362». NATO *rules of engagement* clearly disseminated the concept of rules of engagement in Countries which hadn't previously developed their ones.

NATO *rules of engagement* derives their authority from the *North Atlantic Council (NAC)* which is the institution provided with effective political authority. National *rules of engagement* are symmetrically approved by an appropriate political authority in accordance (more or less) with the relevant constitutional provisions²⁷.

27 Italian national rules of engagement are approved by the Minister of defense and its implementation is often delegated at military commanders at operational level whilst there is the tendency to qualify the said rules as «political acts». Sometimes political coverage is sought presenting the rules of engagement to the concerned parliamentary committees for what represents an authorization without legislative character. At this purpose, See M. TONDINI, *Regole d'ingaggio e uso della forza in mare*, *Rivista Marittima*, 2005, p. 57ff.. Qualification of the rules of engagement as «political act» is in our view inappropriate as long as the authorization will stay with the Minister which isn't authorized to enact political acts but rather to implement political decisions adopted by the Government. This has been clearly shown by the jurisprudence with of the rejection of the «political act claim» (and correlate attempts to subtract the decision to a legitimacy scrutiny by courts dealing with administrative issues) for the commitment for extradition ordered in the so called «political phase» of the passive extradition proceeding by the Minister of justice. Shifting this competence from the Minister of defense (representing the so called military – political level) to the Government (representing the so called political strategic level) would allow to qualify the rules of engagement as «political act» and at the same time prevent a qualification of the said rules as «military orders» as they aren't enacted by a body (the Government) provided with strictly military hierarchical powers. Obviously such qualification of the rules of engagement under domestic law doesn't prevent their qualification as orders under international criminal law.

In the «criminal law centric model» the *rules of engagement* which accompany necessarily military commanders in the fulfillment of their task are metered having in mind not the law of armed conflict and relevant human rights law, but rather domestic criminal defenses. The issue if *rules of engagement* represent themselves a criminal defense is a merely rhetoric one, and the negative answer is more than obvious in most legal systems following such an approach.

In a study recently published, the legal effects, in the Italian criminal system, of *rules of engagement* have been analytically examined into detail. Accordingly *rules of engagement* have been qualified as atypical or «non statutory» criminal defenses, as such without relevance in order to prevent the individual violating provisions of the law in the fulfillment of his duties and in compliance with the rules of engagement, from incurring in criminal responsibility²⁸. The said analysis was conducted under the perspective of the «asymmetric integration of criminal law» by legal sources (the *rules of engagement*) hierarchically subordinated to a formal law. A derogatory effect of foreign (international) *rules of engagement* is denied based on the consideration that in one way or the other they are enacted through a national act without derogatory effect on laws²⁹.

28 G. CARLIZZI, *Outline of the Efficacy of the Rules of Engagement in the Italian Criminal Law*, in S. MANACORDA (coordinated by) *European Common defense and Criminal Judicial Area – Documents*, cit., p. 167

29 Whilst rules of engagement normally rely on international law and fills the choices as the State's legitimate use of force or degree of such use under international law, the invocation for an «internationalization» of the respective matter in respect of domestic law and specifically criminal law requires an assessment of the derogative attitude of international rules of engagement. *NATO rules of engagement* cannot be invoked under domestic law in order to assert a derogatory effect in respect of domestic criminal law provisions, because their aim is to address the use of force within the legal framework the nations considers relevant. This exempts us from an examination of the legal value of acts adopted by the North Atlantic Council and the Military Committee under the law applicable to international organizations and under the Nations constitutional law. *EU rules of engagement*, even if licensed with the political approval of the Council, are no more than «atypical act» adopted within the context of the second pillar of the European Union treaty where also typical (except for the «unopposed» adoption of international treaties with third parties) acts haven't direct legal innovative or derogatory effects on domestic laws. Whilst e.g. in NATO the legal tension between rules of engagement and domestic law is resolved by several legal «switch points» ensuring compliance with and prevalence of domestic law, doctrinal assumptions on the «command» of a peacekeeping force and exclusive and presumptive of *UN-issued rules of engagement* apparently induces prevalence over domestic law. Also if rules of engagement consistent with the traditional prohibition of the use of force except for self defense are in most cases adopted in full compliance with contributing State's domestic law unless it comes to hostile act or hostile intent situations. Critical cases are represented by freedom of movement linked provisions on the use of force. The legal assimilation of national contingents under pre-emptive and all encompassing UN authority is both banal and misconceived. D. STEPHENS, *The Lawful Use of Force by Peacekeeping Forces: The tactical Imperative*, *Intern. Peacekeeping*, 2005, . 12, p. 158. The theory of the incorporation of National contingents under a «supranational authority» and the delegation of

Nevertheless, as «asymmetric integration of criminal law» isn't prevented at all, the Author proceeded to an assessment as/and to what extent criminal defenses codified in criminal law accept an integration through *rules of engagement*. This led to the theorization of three groups of criminal defenses which respectively:

- a) prevent an integration of its regulation by the *rules of engagement*, so for the «legitimate use of arms», state of necessity or «distress» and finally «self defense»;
- b) may allow, based of their structure a real integration *cum grano salis* like the «consensus by the eligible person»³⁰;

sovereignty was based on the existence of «contribution agreements». So R.C.R. SIEKMANN, *National Contingents in United Nations Peace-keeping Forces*, Dordrecht, 1991, p.119. Delegation of sovereignty poses harsh legal questions under most Constitutional Systems some of them ignore the concept and acknowledged instead mere (passive) limitations to sovereignty. According to an opposite theorization, the organization is the sum total of all its members ... and sometimes takes on a life of its own ... but in no way it can interfere with the sovereignty of its members. If one ignore the inconsistencies of the position adopted by the ECHR in the so called *Saramati case*, and its blind efforts to place a United Nations Security Council hat on the Chapter VII authorized KFOR mission, neglecting sources of law previously identified (reference is to the ILC Draft Articles on the Responsibility of International Organizations, article 5), the unresolved problem of command of peacekeeping forces could be considered as a resolved issue! Theoretically the international organization's responsibility should imply on the other side, the existence of binding powers in order to ensure compliance of the participants with the law. At this purpose see D. SHRAGA, *The United Nations as an Actor Bound by International Humanitarian Law, Intern. Peacekeeping*, 1998, n. 2, p. 65 But this consequentiality – expressed by the adoption of the Secretary General's Bulletin Concerning the Observance by United Nations Forces of International Humanitarian Law (*ST/sgb/1999/13, 6 August 1999*) doesn't imply that the International Organization may compel participants to adopt broader standards by exceeding stricter domestic standards under criminal law. In the practice, missions are governed by the so called «phone home» syndrome in which participants seek legal guidance by their National authorities in respect of use of force issues and ensure compatibility of methods and means prescribed by the operation's command through rules of engagement or other directives, with own domestic laws. The preference for standard rules of engagement, notwithstanding the content of an applicable Security Council Resolution produces chasm between the goals set by the Security Council and the tactically focused rules of engagement, but at the same time reduces the risks of non compliance with domestic legislations. So D. STEPHENS, *The Lawful Use of Force by Peacekeeping Forces: The tactical Imperative, cit.*, p. 164. Where a specific conduct comply with UN issued rules of engagement, but not with national ones and/or with national statutes *UN-rules of engagement* doesn't mainly be considered as an exonerating circumstance based on a dualistic approach to international law (need to be incorporated, which would presume a defined legal status of such rules) and/or the absence of a direct link with the authority of the Security Council Resolution and finally its «administrative» flavor.

30 It remains frankly obscure to us to which extent the consent of the eligible person may be integrated by the discipline posed by rules of engagement. There are situations – as reported by B. OSWALD in an oral intervention in respect of the international mission in *East Timor*; in The Hague, 29th May 2006 – in which individuals may be deprived with their consent of their freedom and detained, mainly in order to avoid prejudice to them. In any case, such situations refer to rights which cannot be disposed of by the concerned person in most States.

c) may allow a real integration with a certain frequency as the codified defenses of the «exercise of a right» and the «fulfillment of a duty».

As orders, administrative acts or regulations, determinations contained in the *rules of engagement* in order to qualify a specific situation as authorizing *self defense*³¹ isn't binding for the judicial authorities based on their subjection to the sole law. This prevent some useful procedures established in order to define precisely steps (*pre planned responses*) to be taken in respect of unidentified targets approaching e.g. with a suspect flight profile. Furthermore some defensive measures developed in maritime warfare, like the so called «*defense bubbles*», would represent, after they have lead to an engagement, nothing more than a «not binding qualification of a factual situation» open to judicial review. Eventually they could be qualified as «putative defenses» which are defenses reputedly arising in a specific factual situation as a result of a non culpable false evaluation. *Hostile intent* and *hostile act rules of engagement* based responses are more problematic as they manifest the intent to anticipate the «actuality» requirement under self defense. This conscious anticipation should exclude a qualification as «putative defenses» and the effects under criminal law of a response under *hostile intent* and *hostile act* depends largely on the possibility to extend, as a matter of interpretation, the actuality requirement.

Whilst the legal qualification as «orders» may shift criminal liability from the executor which was unaware of the specific criminal character of the order to the one who gave that order, qualification as a regulation below the level of a formal law should imply an incidental legal scrutiny of the said regulation and eventually move the judge not to take into consideration the regulation.

Nevertheless effects of *rules of engagement* under criminal law have been theorized in respect of the violation of the said role under the different profiles of the qualification of the violation itself as disobedience and as a circumstance aggravating the criminal position of the accused who acted without intention because he violated specific instructions and/or regulations. *Rules of engagement* are accordingly taken into consideration as «diligence pattern or parameters». Apart from the above mentioned «*in malam partem* effect», *rules of engagement* are deemed as being without relevance under criminal law.

According to another recent Italian study, Constitutional principles – specifically the prohibition to resort to war as a mean to resolve international controversies – reflect necessarily in a reverse «macro to micro approach», in the content of single *rules of engagement* none of which should represent a fraction of the violation of

31 Which should not happen once we consider that *rules of engagement* shouldn't address *self defense*, but we can imagine a reliance on domestic *self defense* for several «attack» *rules of engagement*.

the said principle. This would prevent the legitimate issuing of aggressive *rules of engagement*³².

Notwithstanding the opposite approaches to the use of force in military operations which reflect respectively an international law and a domestic criminal law approach, the recent jurisprudence involving *rules of engagement* shows significant similarities.

Assessments of the legitimacy of the use of force in accordance with criteria normally established for self defense can be found in both systems when it comes to use of force³³ in military compounds. Such situations relate to alleged threats brought by civilians acting mainly with criminal purposes in a way which cannot be considered a «direct participation» to the hostilities. At the contrary, use of force to prevent intrusion into secure areas or in order to secure a military unit is in a twilight area³⁴.

At the opposite, the assessment of the legitimacy of the use of force in accordance with so called «go to war» *rules of engagement* isn't a probable event under

32 L. D'ANGELO, *Missioni Militari all'estero, regole d'ingaggio e cause di non punibilità codificate nella legislazione penale comune e militare, Diritto penale e processo*, 2005, n. 9, p. 1161.

33 The Canadian LtCol Mathieu was charged, in connection with the killing and torturing of a Somali juvenile which had introduced himself in the Canadian camp, with negligent performance of duty as a result of orders allegedly given on the use of deadly force contrary to the *rules of engagement*, confusing criminal intent of looters with «hostile intent» under the *rules of engagement*, and authorizing specifically the use of deadly force against fleeing thieves. The defense departed from the challenging of the very character of the mission which couldn't define a «peace keeping mission» and stressed the effort of the defendant to inform local elders that use of force would have exercised in accordance with the *rules of engagement*. LtCol Mathieu was acquitted and an appeal was brought based on wrong instructions passed to the Court Martial Panel in respect of the standards of negligence. LtCol Mathieu was acquitted also by the second general court martial panel. On the above mentioned facts see *Report of the Somalia Commission of Inquiry –The Somalia Mission: Post Deployment The Courts martial Investigations and Charges*. In the same Somali scenario use of deadly force was investigated by Belgian Judicial authorities in the *Koral Kalid v. Paracomando soldier case*. In the last mentioned case a Belgian soldier, after verbal warning as well as warning shots, aimed his weapon and fired at the legs of a 12 years old child injuring him. The *rules of engagement* issued to the soldier were addressed with the relevant provision of the penal code establishing obedience to legal orders as a defense. The Military Court of Appeal in its decision of the 21st August 1993, in M. SASSOLI, *How Does Law Protect in War, ICRC Rv.*, 1999, p. 1062, assessed the legality of the order (prevent access to area) with the absolute necessity to resort to the use of force. The Court discusses also the nature of United Nations *Rules of engagement*, which are «translated» in form of orders for troops made available to the mission by the Nation.

34 In *Soman Somow v. Paracomando*, a Belgian service member, assigned to an observation post on the Kismayo beach was ordered should enter the sector and have the opportunity to install himself in a Shipwreck. The soldier spotted a person close to a shipwreck, issued all the specified warnings, aimed at the Shipwreck and involuntarily killed the person. He was charged with involuntary manslaughter and acquitted. In that circumstance the Court that the compulsory nature of the *rules of engagement* is not enough purely and simply to assume beforehand the binding character of those rules.

systems relying on international law (unless the frameworks of international law is violated) and would bring over its stress point a criminal law centric system³⁵.

Episodically preeminence, granted under a constitutional system to international law in respect to domestic criminal rules has been affirmed by the jurisprudence³⁶. Circumstance which has been welcomed as an – in our opinion unripe³⁷ – «internationalization of criminal liability» in peace support operations.

IV. UNRESOLVED LEGAL ISSUES IN THE «CRIMINAL LAW CENTRIC» APPROACH TO THE USE OF FORCE IN MILITARY OPERATIONS

Criminal law absolves, at least in its territorial expression, in most Nations the very fundamental function of allowing the existence of an organized society, granting at the same time, protection to the established «social order». The consid-

35 The judicial proceeding which followed the shooting in Nassiria, during the so called «battle of the bridges», of an ambulance approaching Italian posts, is the argument of a separate report. We had no opportunity to read the reasoning of the acquittal and we can only observe that the soldiers were charged under a criminal provision contained in the war time military penal code and that *rules of engagement* were examined as to their compliance with international law as recalled by domestic law.

36 Dutch Military Chamber of the Court of Appeal in Arnhem, 4th May 2005, in the case of Eric O.. On the decision, see G.J.A. KNOOPS, *Criminal Liability for Contemporary International Military (Crisis Management) Operations: Towards a refined Adjudicatory Framework*, in R. ARNOLD – G.J.A. KNOOPS, *Practice and policies of modern peace support operations under international law*, New York, 2006, p. 187ff.. The case must not, in our opinion, be exaggerated in its implications. The Dutch Sergeant Eric O. was tasked with the securing of a trailer. In order to prevent a crowd from approaching further, he directed a warning shot at the side of the crowd hitting notwithstanding and individual who died. He was later charged under article 136 of the Dutch military criminal code and under articles 307 and 309 of the Dutch criminal code because he allegedly acted in violation of the «National *rules of engagement* card». The Court faced the question if foreign (British) *rules of engagement* could qualify as orders under Dutch military law and gave a positive answer based on the following chain of arguments: the engagement of the security forces in Iraq is legitimate under the UNSCR 1483 and 1511, the Netherlands entered into a *memorandum of understanding* with the UK as «lead Nation» and *rules of engagement* formed a part of this *memorandum*. This allowed the Court to overcome the alleged violation of the National *rules of engagement* card and later to rely on the UK (but NATO derived) *rule of engagement* n. 151 (authorization of warning shots) and to enforcement of this rule in the light of the «Commandant's intent» intent, to acquit the accused. The wording of the decision and specifically the phrase recalling the need that prosecutors have a sufficient «operational awareness», has been by some reader interpreted as a «revenge of the soldier over the prosecutor. In our view, the «internationalization» of the criminal liability goes beyond the decision of the Court and what was superseded wasn't represented by the domestic criminal law but rather by the national *rules of engagement*. Besides qualification of foreign/international as binding orders under military criminal law by way of interpretation may have *nulla poena sine lege* implications in the event such rules are violated.

37 See, V. FARA, *Regole d'ingaggio, Bandi Militari e costituzione*, Riv. Dir. Pubbl. Comp., 2003, p. 539.

eration for the role of criminal law could itself justify the question if and to which extent criminal law can provide a legitimate legal base for the use of force in military operations where the organized society is mostly the foreign and is at a stake. *A fortiori* criminal law isn't the appropriate instrument to rule clashed amongst organized societies (except for the criminal law enforcing rules established under international law).

One could also question if the criminal law centric approach as such isn't the expression of a *Realsystem in selbstsüchtiger Auffassung*.

Further we will focus on some specific legal issues related to the «criminal law centric» approach to the use of force in military operations.

A. The threshold of an armed conflict

In the previous paragraph we have summarily highlighted the relation which exists between use of force in military operations pursuant to *rules of engagement* and criminal defenses and we have seen that in what we called the first model for the use of force in military operations, where the authority for such use is sought in international law, *rules of engagement* aren't considered as criminal defenses nor they fulfill or complete the legal provision of any criminal defense. The analysis of the efficacy of the *rules of engagement* in criminal law from the perspective of the «asymmetric integration of criminal law» and its limits is consistent, as long as, the said *rules* aren't regarded as directions given to the military within the frames of the law of armed conflict (whether customary or conventional) and as an authorizations to use force which represent a less than what would be otherwise allowed. Once this step is taken integration cannot be any longer considered and as being asymmetric; integration then becomes symmetric as long as the authorized use of force is maintained within the above mentioned frame. Violating relevant international law may then newly pose a question of asymmetric integration of criminal law applicable to armed conflicts (and also of that branch which has developed as international criminal law). Obviously such a question requires newly a negative answer.

Nevertheless, challenging the «criminal law centric» approach to the use of force based on the threshold of an armed conflict represent nothing more than challenging one model based on the other. And this doesn't bring us any further. Nor the obligation arising for each Nation under the law of armed conflicts, to acknowledge and armed conflict as such brings us any further. Metering and enforcing permissive rules of engagement (which have been drafted having in mind the limits established in international law) with the parameters of domestic criminal law in most cases grants a higher standard: a mainly zero casualties and collateral damage (unless concurrent applications of different criminal defenses is claimed, e.g. self defense to defeat the individual threatening own forces and state of necessity for the casualties?).

Usually the «criminal law centric» approach to the use of force comes along with the pretence to criminalize the opponent which may represent a violation of the Nation's obligation to recognize and acknowledge a specific status to the opponent in situations of international and internal conflict.

B. The role of «criminal defenses» in respect of fundamental rights violated or endangered by the conduct

The resort to a criminal law as source of law to justify the use of force is normally the consequence – in a civil law system in which Constitutional rights and generically laws are deemed having extraterritorial reach – of various factor like. At this purpose we can list:

- a certain approach to the sources of law which might authorize intervention on and/or restriction of fundamental rights granted by the constitution,
- the basic consideration of the extraterritorial reach of the Contributing State's criminal law as *flag law*,
- the need for some kind of «democratic oversight» in the form of judicial review through the criminal jurisdiction.

Other «circumstances» which may lead towards a «criminal law centric» approach are represented by the reciprocal attitudes of the judicial and the executive power in certain historical context and also by the search for a certain preeminence within armed forces of the components vested with constabulary functions.

One objection that we consider should be moved to a «criminal law centric» approach to the use of force in military operations pertains to the function of criminal defenses in respect of the fundamental rights violated or endangered by the conduct (use of force) by a State's agent. It is unclear if and to what extent, *Eingriffsnormen* – rules granting the authority to intervene on a fundamental right within a Constitutional framework – can be surrogated by criminal defenses³⁸. Hidden intervention on fundamental rights, masked as criminal defenses, sometimes may represent a tricky way to overcome limits (*Schranken*) set by the constitution³⁹. In a strictly construed

38 Some constitutional systems are more strictly construed than others and within this strictly construed systems *Eingriffsnormen* are subject to specific requirements as to their strict and specific formulation. Constitutional requirements reflect accordingly in the topography of the mentioned rules and shows a clear preference e.g. for the construction of precise autonomous regulations on the legitimate use of coactions by civilian and/or military authorities rather than synthetically worded criminal defenses.

39 As an example we can mention the recent Italian law (3 august 2007 n. 124) on the reform of the *intelligence and security sector* which show the intent to elude constitutional fences (e.g. the reserve for a judicial order for a house search) by codifying a defense aimed at preventing the punishment of the individual which conduct violated criminal law. Obviously, once the defense applies, the court cannot award any refund/reparation to the victim. The legitimacy of a restriction of fundamental rights by criminal defenses, weakening an effective sanction for a violation of fundamental rights doesn't seem to have awaked the debate of the Italian Constitutional Law Scholars.

system of granted fundamental rights only «self defense» and the State of necessity (distress) seems to work as properly formulated *Eingriffsnormes* whilst other codified defenses, like for example the exercise of a right/fulfillment of a duty need a symmetric integration by the appropriate statutes. It is a question to be metered with the relevant Constitutional law provisions if the establishment by statute of a legal duty suffices as an authorization to intervene on fundamental rights⁴⁰.

The above considerations aren't intended to prejudice the question of the extra-territorial reach of the constitution of the nations, as this question is to be resolved on a case by case basis for each Constitutional system and within each of them in respect of single provision⁴¹.

The territorial reach of some defenses emerges once the role of the statutes integrating them is considered. Accordingly, to rely on a defense like the exercise of right/fulfillment of a duty, it is the underlying relationship which must be considered⁴². The normally territorial purpose of such defenses may be fully appreciated from the viewpoint of what has been defined as «international administrative law» (*Internationales Verwaltungsrecht*)⁴³. Whilst the principles of «international admin-

40 In some systems there is the requirement for an express mention of the right the legislative is going to restrict (*Zitiergebot*). Some fundamental rights as established under relevant conventional instruments doesn't allow a restriction other than in a way prescribed by law and in a lawful manner (e.g. art. 5 of the *ECHR*). The first requirement prevents restrictions relying on a codified criminal defense as such a provision doesn't establish a legitimate procedure on how the freedom of the individual can be restricted.

41 The extraterritorial reach of the constitutions of contributing States is often claimed as a part of the *Flag State Law*. It is a frequent topic that troops deploy with their own «*constitutions in the backpack*» and it is also frequent that the topic – expression of a «feeling of constitutional extraterritorial effect» remains such without any assessment as to which provision exceeding the ones applicable in «organic and jurisdictional relationships» really apply abroad. The criminal centric approach to the use of force abroad doesn't necessarily rely on the consideration of a full extraterritorial application of the constitutions and may be based on the more simplistic considerations of the application of national criminal law to the deployed troops. This approach doesn't support a broad consideration of the role of criminal defenses in their relationship with fundamental rights.

42 In order to clarify the affirmation we can refer to the example of some exceptional authorizations for military personnel to perform a «stop and search» under domestic law: what about a stop and search in operational environment out of the reach of the respective «*Eingriffsnorm*»? may a symmetrically integrated defense be claimed if the integrating rule isn't applicable extraterritorially?

43 In the definition given by K. NEUMEYER, *Internationales Verwaltungsrecht*, IV, 1936, p. 475, International administrative law is represented by the totality of norms of conflict ruling the relationship with a foreign legal system. In an earlier definition given by the same Author, *Vom Recht der auswärtigen Verwaltung und verwandten Rechtsbegriffen*, 1913, p. 101, the above mentioned legal branch dealt with the exercise of coercive powers in respect of foreign State territories. The implications of his «conflicts of law oriented» visions of criminal law is besides clearly mirrored in the search of a balance in the repression of crimes committed abroad. At this purpose, see *Das internationale Strafrecht in Vorentwurf zu einem Deutsche Strafgesetzbuch, Blätter für Rechtsanwendung*, 1911, p. 6ff..

istrative law» have been convincingly challenged in order to deny that police agents acting abroad may rely on foreign *Eingriffsnormen*⁴⁴, we still consider that the mentioned principles (and specifically the individuation of the set of rules more close to a specific situation) remain useful to circumscribe the reach of defenses which implies a background defined by the public law of the contributing State⁴⁵.

C. Specific problems related to self defense

Also the concept of self defense can raise questions in their application to the use of force in military operations. Situations of self defense are traditionally situations in which an individual threatened in his life of physical integrity may react and defend himself. The individual may also react to defend other individuals. This happens in a system in which the State has the legal monopole of the use of force and the individual lost the right to resort to the use of force, unless the State isn't, in the specific situation mentioned, in condition to take care of the individual's life and/physical integrity. In a military operation the State itself is normally at a stake. There isn't any legal monopole of the use of force in the battlefield (except the one of the combatants).

44 M. BALDUS, *Transnationales Polizeirecht*, Baden Baden, 2001, p. 236ff..

45 In a wider perspective, there is – in our opinion – the need to verify if and to which extent under the different Constitutional systems, the authorization granted by the United Nations Security Council under Chapter VII may determine an extension of the normally territorial reach of *Eingriffsnormen* adopted in strict adherence with the principle of the reserve of law (or remove an obstacle to the «enforceability» of such rules once the unlimited spatial applicability is theorized). The answer to the question would be in the major legal systems in the negative and lead to the assessment of the need for a detailed implementation legislation. Similar verification should be carried out in respect of Chapter VI consent based peace keeping operations. The consent of the concerned State seems to facilitate an extension of the domestic rules of a contributing Nation by removing a limit to the exercise of authoritative acts outside the contributing Nation's boundaries. In the opposite perspective of the applications of the consenting State's own *Eingriffsnormen*, in accordance with the principles of the so called International administrative law, there is the need to provide authorization to act under foreign laws to the troops. This is in our opinion the «missing piece» of the remarkable attempt to justify detention in military operations as carried out under the authority of the *lex loci actus*. The above considerations aren't in any way intended to affect the different question if UNSC Resolutions may themselves represent «*Eingriffsnormen*» and authorize specific restriction on human rights by authorizing e.g. detention. A positive answer is suggested by G.J.A. KNOOPS, *Criminal Liability for Contemporary International Military (Crisis Management) Operations: Towards a refined Adjudicatory Framework*, cit. , p. 197. Question which remains on the background of the lack of imputation based decision of the ECHR in the so called *Saramati case* in which it is affirmed that detention of individual was authorized under the UNSCR authorizing generically any necessary mean. The affirmation is questionable as authorization wasn't expressly stated and in no case should have been enforced in a way contrary to international human rights law in the absence of any form of judicial review, but this consideration pertains to the different topic of accountability for human rights violations.

One could argue that, in the absence such a legal monopole of the use of force, whilst State owned troops are threatened and there isn't the expectation that any other legal authority will hand over the issue, the threshold of self defense should be lowered to encompass symptomatic figures like *hostile act* and *hostile intent* we have mentioned previously.

Also the usual criteria related to the «proportionality» of the response may be seen – if strictly construed – as an excessive limitation in a military operation. There is a famous example⁴⁶, at this purpose, related to the elimination of a sniper by artillery instead of by through same level of force counters-sniping.

The actuality requirement related to the threat may have a different meaning in respect of what is called «*unit self defense*» and must necessarily take into consideration the necessary tactical assessment and countering of the threat.

Criteria developed in national system as to the negative requirement of the impossibility for the individual resorting to the use of force in self defense to avail him of a *commodus discessus* would have a deep impact on the battlefield if suddenly judicial authorities would change their mind on the issue.

The most relevant difference amongst domestic systems in respect of self defense is represented by the inclusion/exclusion of the coverage of defense of «property» and equipments. An attempt to match restrictive domestic approaches with *rules of engagement* goes through the labeling of specific goods a «mission vital».

Sometimes the wording of codified defense has, like in the Italian ordinary and military code, a «strong ethical orientation» which may lead to curious outcomes in respect of the use of force in military operations. Reference is to the requirements of the «unjust» character of the feared harm to the individual's right (article 52 of the Italian penal code) and the «actual violence» the military is countering (article 42 of the Italian military penal code). Violence includes, according to a legal definition the crimes of homicide, bodily harm, aggression and any attempt to offend with arms. Accordingly the treat the military acting in self defense is countering is legally qualified as a crime. The strong ethical characterization of the ordinary and military self-defense is a consequence of the fact that the said criminal defenses weren't aimed at succoring the military carrying out a legitimate act of warfare and weren't metered on the relativism of international law. Similar consideration applies to codified defenses referring to the need overcome a «resistance to the authority» (art. 53

⁴⁶ P. ROWE, *The united Nations Rules of Engagement and the British Soldier*, in *Intern. And Comp. Law Quart.*, 1994, p. 951

Italian criminal code)⁴⁷. This wording presumes an unlawful resistance and clearly reminds concept proper of the domestic administrative law.

Such ethical requirements doesn't, in general terms suit the operational needs where there is the necessity to counter an opponent which may well have their legitimating reasons to act. In some criminal systems the unlawfulness of the attack which moves the individual in self defense isn't expressed in the wording of the defense but emerges as a *Rechtfertigungslage*. Whilst the concept of unjust harm is senseless in the battlefield, the concept of unlawful attack may lead to curious configurations if metered with the law of armed conflict and undermine the whole consistency of the reliance on criminal law as a source of law for the use of force.

Under a strict approach to criminal law one could argue that relevant set of rules in order to establish if and to what extent the threatened harm is unjust and/or the attack fits the legal qualifications of an attempt to commit murder is the contributing Nation's criminal law. As we observed previously the law applicable to armed conflict doesn't per se prevent the reliance of domestic criminal law as source of law for the use of force in military operations, but as the «criminal law centric» approach to the use of force comes along with the pretence to criminalize the opponent, this may represent a violation of the obligation to recognize and acknowledge a specific status to the opponent in situations of international and internal conflict.

One reply could be that whilst the opponent may have his legitimating ground under international law this doesn't prevent the labeling of his attack as «unjust» under domestic criminal for the sole application of a criminal defense as legal qualification must reflect a homogeneous legal categories. A second reply could be that, despite legitimating grounds under international law that attack remains unjust in its roots (that legitimating grounds under the law of armed conflict doesn't elide the unlawfulness and prevent only punishment of the opponent).

The claim for a persistent unjust/unlawful characterization of the opponents attack despite legitimating status and situation under the law of armed conflict should be considered in the wider perspective of the effect of the threshold of an

47 The «military version» of the defense, codified in article 41 of the military criminal code, reproduces the above wording without to the «Authority» reference. The aim the defense was to extend to military authorities the authorization mentioned in the texts in an essentially «domestic environment». *De facto*, the mentioned defense is actually used to justify use of force in kinetic operations departing from the mainly passive authorization granted by the self-defense. The underlying concept of resistance presumes and actual, specific, physical opposition to a legitimate act and may not be identified with resistance to a certain party, country or government, labeled as *resistant*. Accordingly the said defense may not provide authority to act under a «go to war rule of engagement».

armed conflict and the performance of legitimate acts of war under wartime criminal law⁴⁸.

Generally speaking the «criminal law centric» approach to the use of force in military operations is «self legitimating» (*Realsystem in selbstsüchtiger Auffassung*). Nevertheless the requirements as to the unjust/unlawful character of the threat/attack in respect of self defense remains open for judicial appreciation and puts in the hands of the judiciary the last word as to the legitimacy of labeling military operations. This may represent the ultimate switch for the application of the law of armed conflict despite the determinations of the executive. Denial of self defense based on the lack of unjust character of the opponents threat/attack without application of the law of armed conflict to the defendant would be pathological.

D. Foreign rules of engagement and «conflicts of law issues»

In some very limited situations there is the need to assess what foreign *rules of engagement* are and in which relationship this rules are with own criminal defenses. Situations we can imagine are represented by:

- the assessment of criminal responsibility of an own military commander inserted in a foreign chain of command for passing of order (including the confirmation/implementation of *rules of engagement*) to such foreign forces under/in accordance with foreign *rules of engagement*;
- the assessment of criminal responsibility of own military personnel detached under a foreign chain of command and acting under foreign *rules of engagement*;

48 In a so called «tree elements theory of crime», one could question if the triggering of the application of the war time criminal law (which normally reflect a second degree specialty in respect of ordinary criminal law and first degree specialty in respect of peace time military criminal law) elides, in respect of a «legitimate act engagement», the unlawfulness requirement (*Rechtswidrigkeit*) or – as we prefer – determines the application of a new set of patterns for the legal description of the conduct (*Tatbestand*), mainly through the reference, in war time criminal provisions to the violation of conventional provisions? The question can be symmetrically raised in respect of a «two elements theory of crime». Does of the application of the law of armed conflict represent per se a (codified) cause of justification – a *Rechtfertigungsgrund* – or does such an application operate on the objective circumstances by outlining a new set of pattern for the so called *Positive Umstände*? The above considerations obviously refer to what we have defined as «frontal use of force» in our tree directions example. The solution given to the questions are relevant when it comes to establish what a legitimate (under the law of armed conflicts as recalled by the war time military criminal law) targeting of an opponent in the battlefield is in respect to the criminal provisions codified in the ordinary criminal law: nothing because the said provision is set off, a lawful conduct, a conduct justified (by situational circumstances of by ordinary and eventually a peace-time defense or by a special defenses)? The underlying mechanism of specialty of war time criminal law (referred to the legal descriptions of criminal conducts) and the complementarity of peace time defenses in war time situations may lead to different and opposite results.

– the assessment of criminal responsibility of a military member of an associated Nation's armed forces in respect of episodes which can be qualified as «foreign friendly fire»;

– the assessment of criminal responsibility of a foreign military member for engagements taking place in the context of an armed conflict and below the threshold of an armed conflict.

The first situation (own military commander passing of order to foreign forces under foreign *rules of engagement*) may pose harsh political questions when the foreign military forces are relying, as a legal source for the use of force, on international law and the ones from which the Commander is detached aren't⁴⁹. Passing of orders under foreign *rules of engagement* is still a critical issue under NATO doctrine, where such a situations is followed by an interrogation mark. A possible suggestion, in order to avoid incurring in criminal liability for having passed an order potentially criminal under the commandant's national law would be to avoid exercise of «tactical control» over foreign forces. If such a solution is effectively workable is an open question under the domestic criminal laws and the answer depend on how the forms of «participation in a crime» are regulated. In our view artificial «command and control structures» rarely are helpful in preventing criminal liability. Under a different perspective the legal extensive effect of *foreign rules of engagement* for foreign military forces (considered as material executors of the crime) should be assessed. Under most legal systems an «extensive effect» of the foreign rules of engagement as causes of justification to the military commander would be excluded for a certain number of reasons. Firstly foreign law is rarely relevant under the criminal law of the *lex loci processus*, secondly foreign excusing circumstances/reasons, if recognized by conflict of law rules, are of a «subjective» nature (to say related to the personal qualities or *status* of the executor) and therefore not extensible to the military commander we mentioned in our example, and thirdly foreign *rules of engagement* may, due to their qualification under the issuing Nations Law (e.g. if the legal source for the use of force is sought in international law), be irrelevant for criminal law (unless violated). Legal implications of the detachment of a military Commander to head an international mission may be different and pose different problems related to the nature of functions exercised⁵⁰.

49 The result may look like the detachment of a military commander under wartime rules whilst the detaching State doesn't recognize such a situation.

50 At this purpose we can observe that the situation in which a contributing nation's military commander acting as mission commander pose harsh legal questions. As the Commander of the Military Component of a U.N. Peace keeping mission, a military commander can be called up to pass order, he should refuse to execute directly or through military personnel of its own Nation as a National Contingent Commander. This orders fall under the regulation of the *Convention on the Privileges and Immu-*

The second situation, in which foreign military personnel detached under a foreign chain of command, is acting «criminally» under foreign *rules of engagement* may arise in respect of small units of «special forces». If compared with the previous situation, the current one, prevent any attempt to argue in respect of the different forms of participation in the crime. The considerations expressed above on the problems related with the extensions of effects recognized to foreign *rules of engagement* under foreign law applies *a fortiori* to the situation in which orders are passed under foreign law to own military personnel.

The third situation, relating to «*foreign friendly fire*», shouldn't arise if *status of forces agreements* and other similar regulations work properly. We will return on the last mentioned issue in the next paragraphs. *Foreign friendly fire* episodes have conflict of laws implications in respect of the value/efficacy which should be recognized to *foreign rules of engagement*. As we mentioned above, under the different

unities of the United Nations, adopted the 13th February 1946 as this provision complement articles 24, 46 and 47 of the *U.N. Model Sofa*. The last one is limited in its effects to the area/territory of operations and jurisdictional regulations refer mainly to courts of the State consenting to the mission. Criminal responsibility of the Commander of the Military Component of a U.N. Peace keeping mission under the contributing Nation's own criminal law is addressed by articles 18 and 20 of the Convention on the Privileges and Immunities of the United Nations as applicable (e.g. waiver of immunity is granted by the Special Representative). If he relies on his national authority to enforce the order he is fully responsible under national law. A distinction on the value of United nations Rules of Engagement as a «mandate under international law» in respect of Nations, Military Commander made directly available to the Mission one side and as a base for own translated «orders» is driven by the Belgian Military Court of Appeal in its decision of the 21st August 1993, in M. SASSOLI, *How Does Law Protect in War*, ICRC Review, 1999, p. 1062. Apart from the mentioned model, responsibility for orders passed as an organ of an international organization are highly critical and even more critical in respect of mere «aggregates» like most international military missions. Immunity claim as State official in respect of an order for disclosure and to testify issues by the ICTY in the *Todorovic case*, of the SFOR Commandant, *Gen. Shinseki*, has been submitted by the United States. At this purpose, see S.D. MURPHY, *ICTY Order for Disclosure of Information by NATO/SFOR*, in *Am. Jr. of International Law*, 2001, n. 2, p. 401ss. Unfortunately also the recent decision of the ECHR in the cases of *Behrami and Saramati* (2 May 2007) is of not aid, because its authority is definitively undermined by a gross error in the reconstruction of the command and control structure and in the nature of NATO rules of engagement. Instead of driving a distinction between the responsibility for issuing and passing orders on detention on one side and executing this orders on the other side, the ECHR build up a fog curtain by improperly expressing the relationship amongst the UN, the NATO chain of Command and the Troop contributing Nation. Besides, the national responsibilities in enforcing rules of engagement – as we have seen compliance with domestic regulation is and remain a National responsibility – is neglected by the simple affirmation that (§ 139) there was no suggestion of national orders interfering with detention matters. The effects of international detachment of organs/State agents (*Organleihe*) have been studied mainly under the perspective of the (subsidiary) responsibility under international law of the State/International Organization to which the organ/agent has been detached. Criminal law implications need to be assessed. In specific cases obligations and immunities of liaisons officers has been established in international agreements (e.g. *Europol treaty* and the respective *Immunities protocol*).

criminal systems foreign law is rarely relevant. Evaluation of the mandatory character of foreign orders is normally carried out having in mind the foreign military organic relations but this approach doesn't seem appropriate to address the issue of *foreign friendly fire* and the legal effects of foreign *rules of engagement*, as the legal standards of conduct (apart the mentioned aspects of the duty to obey/disobey) are necessarily found in the own legal system⁵¹.

An exception to the irrelevance of foreign criminal law, is represented by the «*dual criminal liability*» rule for crimes committed abroad under the criminal law of the *lex loci processus*. Unfortunately this principle – if not neglected in the legislations passed on hostile acts towards military forces abroad⁵² – refer to the *lex loci commissi delicti* and not to the *Contributing State's* law and in our opinion it is worth to make a point out of it. In specific circumstances, where the exclusive jurisdiction of each *Contributing State* is established under a formal law of the *Receiving State*, like in the case of the regulations passed by *UNMIK* and the *CPA* in Iraq, one could question if «exclusive jurisdiction clauses» doesn't determine itself

51 In the recent *Lozano case*, in order to commit a U.S. military service member to trial for the shooting at a road block of an Italian high ranking agent of the intelligence, the judge for the preliminary hearing, decision, still unpublished, shared the views of the prosecutor and affirmed that the soldier acted in violation of the *rules of engagement* and «outside» the mentioned rules. This prevented the judge from assessing the legal efficacy of foreign *rules of engagement*. As the victim wasn't technically accompanying the Italian mission in Iraq, there was the need to fulfill the strict jurisdictional requirements established in article 10 of the Italian penal code. These requirements have been passed through the questionable labeling of the conduct as a «political crime». The indictment hasn't been served to the accused as the U.S. Authorities refused to cooperate. This moved the judge for the preliminary investigations to share the opinion of the Prosecutor, affirming that the accused was consciously subtracting himself to the knowledge of the acts of the proceeding, and granting authorization to serve the indictment to the defense attorney.

52 The principle seems to have lost over the decades its relevance and the existence of *dual criminal liability* requirement has become a positive rather than a dogmatic question. And the traditional reasons for the departure from the requirements are no longer considered. Within the European Union the requirement doesn't need to be ascertained in respect of the enforcement of an European Arrest Warrant and for a closed list of conduct for which the fulfillment of the requirement is presumed. At the opposite the freedom to provide services within the European Community has newly raised double criminal liability issues in respect of «cross-border services». At this purpose, see B. HECKER, *Europäisches Strafrecht*, Berlin – Heidelberg, 2005, p. 312ff.. The European Human Rights Court in the two decisions on the «Wall shooting», *Strentletz, Kessler and Krentz v. Germany* and *H.W. v. Germany*, both decides the 22 March 2001, has conducted a double criminal liability test which was imposed by the relevant positive law (*DDR* criminal law was to be applied if *lex mitior*) but its interpretation in respect of the *nulla poena sine lege* principle, lead to the affirmation that the said principle contained the requirement for the possibility to «foresee the conviction» (foreseeable conviction requirement). And this requirement seems us to include the dial criminal liability requirement in respect of crimes committed abroad where such a requirement isn't derogated due to the traditional restrictions (e.g. foreign conduct in fraud to the law).

also the applicable substantial law? In the positive, the «dual criminal liability test» under the *lex loci commissi delicti* could be considered either as fulfilled (in respect of the false and inapplicable substantial law, eventually considering the procedural and not substantial character of the «immunity granted» by the regulation), failed (considering exclusive applicability of Contributing State law as non incriminability under the *lex loci commissi delicti*) or referred to Contributing State law (if the rule establishing the requirement accepts the *renvoi* or *Weiterverweisung* which bring us in a perspective close to the one of international private law)⁵³.

A further problem in respect of the dual criminal liability test is represented by the legal value of foreign assessments as to the legitimacy of the conduct under the *rules of engagement*. The question posed by such assessments is similar to the one posed by foreign decisions assessing the non criminal character of a conduct under foreign law once there is the need to assess the dual criminal liability requirement⁵⁴.

53 The problem of the *renvoi* in international criminal law is deeply analyzed by H. DONNEDIEU DE VABRES, *Les Principes modernes du Droit Pénal International*, Paris, 1928, p. 373 – 381, who rejects the conclusion according to which a *revoi* is absolutely excluded under international criminal law. The Author refers specifically to the example of the dual criminal liability principle (p. 374) and further 9p. 380) to facts committed abroad falling under the *competence personelle*, even if not comparable with the situation we have outlined above. According to the Author *l'exclusion du renvoi entraîne un conflit négative de compétence* and prevents impunity, reasoning which doesn't fit a situation in which the Contributing State's exclusive jurisdiction is positively established and the acceptance of the *renvoi* by the last mentioned State's legislation can be *ictu oculi* affirmed. Specifically on the relationship between the dual criminal liability principle and the *renvoi* in the *lex loci* to the national law of the accused, See F. MEILI, *Lehrbuch des Internationalen Strafrechts & Strafprozessrecht*, Zürich, 1910, p. 147. The last mentioned Author, once premised the «nationalization of the foreign law» affirms that ... *wenn ein Delikt in einem Gebiet begangen ist, in welchem keine Staatsgewalt und kein positives Gesetz besteht, kann eine Bestrafung nicht eintreten, es müsste denn sein, dass der beteiligte Staat in solchen Fällen das nationale Gesetz als anwendbar erklärt. Dann ist die Lücke ausgefüllt, und der Richter des erkennendes Staates kann also auf dieses recht abstellen*. The reference to territories not governed by any law as well as the reference to national law is proper to a colonial (or capitulation) regime. Reliance on 'colonial penal law» as a source of inspiration for the proper settlement of Contributing State's reciprocal relationship, may appear provocative and indecent, but in our opinion the analytical legal thought of a generations of early international criminal law scholars cannot be ignored.

54 On the problems posed by the ascertainment of foreign criminal law, See H. DONNEDIEU DE VABRES, *Les Principes modernes du Droit Pénal International*, cit.. According to the Author, p. 217, *il est donc nécessaire que le juge saisi d'inspire, dans la mesure où il la connaît, de la jurisprudence étrangère ... il va d'ailleurs de soi que son interprétation ne sera contrôlée que par la Cour régulatrice de son pays*. An interesting viewpoint as to the relevance of judgments acquitting the accused because the conduct isn't punishable under the *ne bis in idem* principle as linked up with the dual criminal liability principle has been expressed in the *Explanatory Report* to the *European Convention on the international validity of criminal judgements*, ETS 70, under article 53. The *Explanatory Report* reads as follows: ... *the question has arisen whether an acquittal, which is not due to the absence of evidence showing that the prosecuted act was committed by the accused, but to the fact that the particular act is not punishable under the penal legislation of the State of judgment, should also debar other States in which the act would be punishable, from prosecuting. In view of the fact that the rule of ne bis in idem will normally be*

V. STATUS OF FORCES AGREEMENTS APPLICABLE TO THE AREA/TERRITORY OF OPERATIONS AND JURISDICTIONAL CONFLICTS

Best known *status of forces agreement* are the *NATO Sofa*, the regulations applicable to international military headquarters and its *PfP* derivatives. These agreements are aimed at providing a legal framework for the consented presence of what, in the perspective of the *Receiving State*, is a «foreign military presence».

This agreements depart from the absolute immunity/extraterritoriality of foreign armed forces and move towards a discipline intended to mediate, on one side, the need of the Sending State to ensure their armed forces an unimpeded fulfillment of their function and, on the other side, the need of the receiving State non to be excessively impeded in their fundamental territorial jurisdiction.

In the *NATO Sofa*, the *Sending State* and the *Receiving State* are each afforded by an exclusive jurisdiction for crimes committed by members of the visiting force and their relatives in respect of crimes punished exclusively by that State. Accordingly the «lack of dual criminal liability» works as a «jurisdictional criteria», which is acceptable because on the *Receiving State's* side the conduct is regarded as «territorial» and on the side of the *Sending State*, exercise of organic jurisdiction has never been linked to the dual criminal liability requirement.

Apart from the mentioned eventuality, in which a jurisdiction is determined by the exclusive punishment of s specific conduct, *status of forces agreements* tend to introduce jurisdiction sharing regulations in order to establish, based on the official character of the conduct or the specific interest in the punishment of a conduct, priority criteria.

Status of forces agreements applicable to military operations abroad have a different aim. Practice of the 1st world war shows that several *status of forces agreements*, signed by Belgium and France, were intended to limit the otherwise unlimited jurisdiction of French military courts over Belgian nationals and later to the withdrew of the French jurisdiction in Belgium in respect to all persons not belonging to the French army⁵⁵. Similar agreements were adopted by Italy and its allies. These least

relevant only if the judgment is delivered in the State in which the offence was committed, it will accord best with the general principle of dual criminal liability ... that an acquittal based on the fact that the act is not punishable in that State should also be covered by the provision

55 G.P. BARTON, *Foreign Armed Forces: Immunity from Criminal Jurisdiction*, *Br. Yb. Intern. Law*, 1950 p. 187. From the same Author, see also, *Foreign Armed Forces: Immunity from Supervisory Jurisdiction*, *Br. Yb. Intern. Law*, 1949, p. 380; and *Foreign Armed Forces: qualified Jurisdictional Immunity*, *Br. Yb. Intern. Law*, 1954, p. 341. On historical aspects of *Status of Forces Agreements*, see also D.S. WIJEWARDANE, *Criminal Jurisdiction over visiting forces with special reference to international forces*, *Br. Yb. Intern. Law*, 1965, p. 122.

agreements show also the tendency to limit the jurisdiction of allied military forces within the «area of operations». Practice of the II World war shows the tendency to grant exclusive jurisdiction to U.S. forces stationing in Canada and Great Britain before projected into major operations.

The *NATO Sofa* provides a fundamentally territorial regulation and doesn't apply to «out of area operations»⁵⁶. It's «jurisdictional provisions «are set aside in the event of hostilities (so the regulations contained in article VIII paragraphs 2 and 5) or subject to review by the parties (so the regulations contained in article VII). Whilst normally *Status of forces agreement* provide regulations in order to define the *status* of the visiting forces «in the receiving State», *status of forces agreement* applicable to military operations should also provide regulations as to the *status* reciprocally granted by the different *Contributing States*. This second aspect can be dealt in the same *status of force agreement* or separately.

As a matter of fact almost all *status of forces agreements* applicable to military operations tend to establish the Contributing States «exclusive jurisdiction» over their military personnel, accompanying civilians, national contractors and so on.

Status of forces agreement applicable to military operations, are often adopted in a legally weak and questionable form. This may lead to asymmetric obligations or worse to the asymmetric application of the said *status of forces agreements*. The authorities of the *Receiving State* are unable, unwilling to or discouraged (sometimes also *de facto*, as happened recently in Iraq where a local prison was brought under British siege in order to free own service members) in the exercise of their jurisdiction in breach of the *status of forces agreements/regulations*.

At the opposite, provisions on reciprocal granting of exclusive jurisdiction amongst *Contributing States*, are less safe in their applications due to the fundamentally territorial (limited to the area of operations) reach of the respective regulations and the questionable legal form in which they are adopted. At this purpose, it should be mentioned that *States* whose legislation provide for the establishment of deployable judicial resources, are prevented by their own regulations, to exercise such a «cross jurisdiction»⁵⁷. Other States (e.g. Italy) normally exercising their jurisdiction for crimes committed abroad in their own territory, and doesn't feel bound – in

56 Inter partes applicability of the NATO Sofa and the Paris Protocol is suggested by A.P.V. ROGERS, *Visiting Forces in an Operational Context*, D. FLECK (edited by) *The Handbook of the Law of Visiting Forces*, New York, 2001, p. 537.

57 As an example of the traditional *restrains* of some State in the exercise of jurisdiction over foreign troops we can mention the lack of British jurisdiction over the Hannoverian troops which were under British pay and were sent into the Flanders in 1742. At this purpose see C.M. CLODE, *The Administration Of Justice Under Military And Martial Law: as Applicable To The Army, Navy, Marines And Auxiliary Forces*, London 1873.

respect of episodes of *foreign friendly fire* – by territorially limited *status of forces agreements* and perceive such regulations as not legally binding.

Acceptance of what has been called «fog of war» by *Carl von Clausewitz* – referring to the myriad of unexpected, uncontrollable factors which affect troops in combat – has proven to be decisively reduced. Criminal proceedings for *foreign friendly fire* episodes represent an evident form of «jurisdictional conflict»⁵⁸: two States pretend to adjudicate (or one of them, the Contributing State, expressed the view not to proceed judicially), requests for judicial cooperation are subject to determinations non to grant the request (we can imagine denials *iudicati causa* or on the base of an exclusive jurisdiction claim, absence of the requestors jurisdiction, lack of dual criminal liability and so on). Normally critical aspects in the relations amongst the Contributing State become harsh when the request for judicial cooperation is addressed to a third State as there may be a question of residual Receiving State extraterritorial jurisdiction under *status of forces agreements*, «exclusion agreements» issue and «third State *double jeopardy*». Besides, the eventuality of foreign friendly fire jurisdictional conflict may discourage close military cooperation within a coalition and endanger reciprocal trust.

The following are a non exhaustive list of agreements/regulations that we can find in the practice of military operations:

a) *SOFA negotiated by NATO*: *SOFA* applicable the (*olim*) *SFOR* and *IFOR* personnel was contained in an international treaty to which NATO was signatory (*Dayton Agreement*, appendix B, annex 1-A, art. 2 – 8)⁵⁹.

b) *SOFA negotiated by the single mission (as an aggregation of States)*. Sometimes agreements have been negotiated in the form of a *Military Technical Agreement* by the Command of the Mission.

58 Jurisdictional conflict arising out of international military operations are not a consequence of the wider span of international military cooperation in respect of established juridical spaces of security and justice – like the one embodied by the European Union – as the prevention of jurisdictional conflicts is far from being resolved even within such a legal space. This is mainly a consequence of the approach to the repression of certain grave forms of crimes which is clearly highlighted by the example of the «strict net»; the cost of such an approach is obviously the overlapping of mandatory jurisdictional competencies and the increase of conflicts. Nor the prevention of conflict is effectively prevented by the rubbish forms of coordination of the investigations (reference is to *Eurojust* and single coordination clauses in specific conventions derivative act adopted within the so called third pillar of the European Union) which are inaccessible to the defendant.

59 The mentioned *sofa* has been, later adopted for the mission *Altea* led by the European Union. At this purpose see S. MANACORDA, *European Model of Criminal Integration in missions abroad: analysis and possible developments*, S. MANACORDA (coord. by) *European Common defence and Criminal Judicial Area – Documents*, Roma, 2004, 276. On the international subjectivity of NATO, see U. ERBERICH, *Auslandsätze der Bundeswehr und Europäische Menschenrechtskonvention*, Carl Heymann Verlag, 2004, p. 116ss..

c) *SOFA adopted by the United Nations* with States on whose territory a peace keeping mission s going to be deployed. The mission itself is qualified as a subsidiary organ of the United Nations⁶⁰. This *status of forces agreements* are integrated by *Contribution Agreement* signed by the United Nations and the Contributing Nation. In the absence of a formal adoption of such an agreements the *UN Model Sofa* is deemed to apply as customary international law.

d) *SOFA negotiated by the European Union*⁶¹. This agreements are adopted by the Council under art. 24 paragraph 1 of the *Treaty on the European Union* and are binding for the member States. The said agreement normally reproduces the dispositions of the 1961 Vienna Convention on Diplomatic Relations. Waiver of immunity can be granted by the head of the mission in agreement with the *Sending State*.

e) *SOFA negotiated by the Leading Nation*. Sometimes *status of forces agreements* has been negotiated on behalf of the mission by the State in charge for the military command of the mission. An example is represented by the exchange of notes between the Australian and the Indonesian Government in respect of the *status* of the mission *INTERFET (International Force in East Timor)*. This *arrangement* was integrated by an exchange of notes between the Australian Government and *UNTAET (United Nations Temporary Administration East Timor)*, and by agreements with the States participating to the mission (to which the *status of forces agreement*) should extend) as well as by a *Military technical agreement* containing detailed regulation of certain aspects (e.g the treatment of detainees).

f) *Extension «inter partes» of the NATO Sofa*. This extensions is aimed at regulating the reciprocal relationship between the different *Contributing States*. In respect of the mission *KFOR* the *NAC (North Atlantic Council)* disposed the extension of the *NATO Sofa*.

g) *Disciplines on the status of forces container directly in United Nations Security Council Resolutions*. The United Nations Security Council recently has inserted in its resolutions regulations related to the *status* of forces provided by *Contributing States* granting exclusive jurisdiction to the said States over their troops. This regu-

60 See, the *Model Contribution Agreement between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peace Keeping Operations*, UN-Document: A/46/185, 23rd May 1991.

61 See for example, the Decision 2003/222/PESC adopted by the Council of the 21st March 2003 on the *Conclusion of an agreement between the European Union and Macedonia on the status of forces lead by the European Union (EUF)*. Following the common action 2003/681/PESC and agreement a similar agreement has been adopted in order to define the legal status of *EUPOL «Proxima»*.

lations aren't strictly territorial and prevent exercise of jurisdiction by international jurisdictions and also by other States⁶².

h) *Territorial legislations containing regulations as to the legal status of forces*. In this category we can list the regulation adopted by UNMIK (*United Nations Mission in Kosovo*) in order to provide a legal discipline for the *status* of UNMIK itself and KFOR, and the «notorious» *Regulation n. 17* adopted by the *Coalition Provisional Authority* in order to establish a legal framework for the *status* of the MNF (*Multinational Force*) in Iraq⁶³. These regulations are properly domestic regulations.

How and to what extent are these agreements/regulations binding for Contributing States? As we mentioned above *status of forces agreements* have a normally territorial ambit of application, which reduces mainly the regulations establishing exclusive jurisdiction of Contributing States over their troops to regulations applicable to the sole «area of operations».

As to the legal form in which these agreements are adopted, we can observe that the binding character for *NATO member States* of agreements adopted by NATO is to be assessed under the Law of treaties between International Organizations and International Organizations and one or more States (*Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*, done the 21 March 1986) and specifically under the presumption of the State's assent. On the other side one could contend that «out of area» operations aren't dealt in the North – Atlantic Treaty which brings the negotiation of the treaty itself out of the funding convention of the International Organization. Things look slightly different for agreements negotiated by the single Mission, as they cannot qualify as an International Organization and are rather an aggregation of States. The clear reciprocal knowledge of constitutional concerns should exclude that such agreements are binding under the law of treaties.

Status of forces agreements negotiated by the United Nations for peace keeping missions (which qualifies as subsidiary bodies are) binding for the Receiving State and the Contributing States. Such *status of forces agreements* have a strictly territorial character. Contribution agreements (later replaced by specific «*Contingent owned Equipment MOU*»), which are less strictly territorial in their reach. They

62 At this pur pose, *see* regulations applicable to the international missions in Liberia (*UNSC Res. 1497*) and Sudan (*UNSC Res. 1593*). These resolutions have a relevant impact on international criminal law and on the repression of *core crimes*. At this regard, *see* J. NEHA, *A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court*, in *EJIL*, 2005, p. 239; M. HAPPOLD, *DARFUR , The Security Council, and the International Criminal Court*, in *Intern. And Comp. Law Quart.*, 2006, p. 226; R. CRYER, *Sudan, Resolution 1593, and International Criminal Justice*, in *Leiden Jr. of International Law*, 2006, p. 195.

63 At this purpose *see*. J.S. SHI, *The Legal Status of Foreign Military and Civilian Personnel Following the transfer of Powers to the Iraq Interim Government*, in *GA Jr. Intern. Comp. Law*, 2004.

were in the practice not regarded as international treaties but rather as a work level agreement.

Status of forces agreements negotiated by the European Union are subject to the provision contained in article 24 of the treaty on the European Union according to which, in the absence of an express reservation of a member State in respect of their Constitutional requirements, agreements adopted by the Council are binding for the member States.

Status of forces, negotiated by the leading Nation and adopted in a simplified way, represent a critical issue under the law of treaties. Furthermore a formal ratification by joining Nations seems to be prevented. Also a reference to such agreements seems to be prevented as under several constitutional systems, reference to international treaties as a source of law is possible only in respect of formally ratified treaties. Not less critical are the extensions *inter partes* of the NATO Sofa, as there isn't any «derivate law» of the North Atlantic treaty⁶⁴.

Jurisdictional clauses inserted directly in United Nations Security Council Resolutions aren't territorial and are binding.

The most fascinating category of regulations on the *status of forces* is, in our opinion represented by the domestic territorial legislations. Their binding character is questionable⁶⁵ and the regulation itself is strictly territorial in its

64 In his decision adopted the 22d November 2001, the German Constitutional Court had to qualify the legal character of the «New Strategic Concept» of the NATO and to resolve the issue if/and to what extent the mentioned concept could be considered an international treaty. The answer was obviously in the negative. At this purpose, see M. RAU, *NATO's New Strategic Concept and the German Federal Government's Authority in the Sphere of Foreign Affairs. The decision of the German federal Constitutional Court of 12th November 2001*, in *German YB of Intern. Law*, 2001, p. 44ss.

65 An exclusive jurisdiction claim by an occupying State can be found in the conclusions submitted by the French agent in the so called *Affaire des Deserteurs de Casablanca*, to the *Cour Permanente d'Arbitrage*, the 1st of May 1909 (... *les droits exclusives de jurisdiction qui appartiennent à l'État occupant, en territoire étranger, meme en pays de Capitulations, au regard des soldats de l'armée d'occupation, et des actes, qu'ils et d'où qu'ils viennent ...*). Unfortunately, after having raised several highly interesting and critical points of law, the *Cour Permanente d'Arbitrage* concludes bypassing all those questions – exceeding the ones of the persistence consular functions pending occupation of the State which have received the consular representative, and reaching the notorious political decision of the 22 May 1909 which displaces the today's reader. In the *Lotus case* the *Permanent Court of International Justice* dealt with the question of the *de facto* legitimacy (the decision was decisively influenced by the form jurisdictional agreement and the Turkish conviction wasn't alleged to the acts of the proceeding) of the Turkish conviction of a French seaman. The decision, adopted the which is actually quoted as a landmark of the State's freedom as restrictions under international law cannot be presumed once not read with the «spectacles of the Nuclear threat case», its significance in respect of the absence of limits to a State's jurisdiction under international law must be reduced: it was a majority decision adopted with the casting vote of the President and the majority quotes the «localizations of the effects of the crime» in a place (the Turkish vessel) assimilated to Turkish territory.

reach⁶⁶. These regulations may lead to suggestive configurations in conjunction with the dual criminal liability requirement.

VI. CONCLUSIONS

Rules of engagement are instructions issued to militaries in order to ensure compliance with political decisions as to the legitimate (under international law) use of force in military operations. Violation of rules of engagement may amount *per se* to a crime (e.g. disobedience).

Legal effects attributed to rules of engagement in national systems are different – as the legal base for the military operations is differently defined by the respective State. Accordingly, where the legal base for the use of force is sought in domestic criminal law, rules of engagement are generally considered mere orders unsusceptible to prevent soldiers from incurring in criminal responsibility under domestic law where such use of force doesn't fulfill the requirements of codified defenses.

On the other side, reliance of criminal law as a legal source for the use of force in military operations may stress the very function of criminal law. Besides, in a legal system adopting a criminal law centric approach to the use of force in military operations, there is the need to assess if/and to what extent criminal defenses may

⁶⁶ Curiously in the recent decision given by the German *l'OLG Stuttgart*, 13th September 2005, *NStZ*, 2006, p. 117 in which the claim brought in order to compel the Prosecution office to proceed against the U.S. Secretary of defense *Rumsfeld* and other U.S. Officers, for what is defined the *Abu Graib case*, was rejected based on the prosecutorial discretion under § 153-f of the criminal procedure code, in respect of one of the accused the Court mentioned the Sending State's jurisdiction. As no further reference it is still open if the Court considered the *NATO Sofa* applicable to crimes committed outside the Receiving State's territory (which isn't), if the reference was to the *CPA Regulation n. 17* (based on the attribution of extraterritorial reach) or, finally, if it was simply a factual consideration expressed in the view of the application of domestic law. *CPA Regulation n. 17* hasn't been quoted in the Italian proceeding against the *US Service member Lozano*. Harsh legal questions are posed by the episodes preceding the establishment of the *MNF (Multi-National Force)* in Iraq under *UNSC Resolutions* 1511 and 1546, and therefore falling outside the purpose of the above mentioned *CPA Resolution*. Reference is to the Spanish proceeding for the shooting of the journalist *Couso*. Besides this episode has been qualified as a «crime against humanity» and should therefore overcome jurisdiction sharing agreements. In the recent case of the US pilots firing on a British convoy during the military operations in Iraq in March of 2003, in which Lance Corporal *Matty Hull* was killed and four other British soldiers were wounded, the Oxfordshire coroner, *Andrew Walker*, conducts an inquest. Territorial competence was based on the location where the bodies are brought back to the UK (*RAF Brize Norton*). US personnel failed to attend the inquests of British service personnel killed. The same coroner affirmed that US soldiers who shot dead the *ITN* journalist *Terry Lloyd* the 22 March 2003, could face trial in a British court for murder. At the current stage decision by the Attorney General *Lord Goldsmith* on the issue is still pending.

operate as an authorization to intervene on fundamental rights and also if and to what extent law integrating criminal defenses they may apply abroad.

There is the need to tailor the usual requirements of self defense on the need of military operations. This may imply the need to codify «unit self defense» and/or a «tactical self defense». The strong ethical characterization of self defense may lead to curious configurations in respect to the opponent's legitimating reasons under international law.

Rules of engagement are mainly not codified in legal systems relying entirely on international law as a legal base for the use of force in military operations – because there isn't the need for such a codification, whilst in «criminal law centric systems» they represents a sort of primer awaiting a definitive legal qualification.

In the last mentioned systems, once the contradictions of the full reliance on criminal law have been fully exploited, there is the need to legally qualify *rules of engagement* and to codify them by a formal law establishing the frames and *caveats* within which the Government may authorize the use of force in military operations (in situations non which doesn't match the threshold of an armed conflict) and correspondingly intervene on fundamental rights of individuals.

Same legal framework should be established in order to allow the use of *rules of engagement* adopted by international organizations.

In our opinion *rules of engagement* shouldn't codified as a criminal defense, as defenses shouldn't be used to codify directly the use of force and the power of a State's organization/partition to intervene on fundamental rights.

The establishment of such framework legislation doesn't resolve the problem of the mainly classified character of *rules of engagement* and the concerns related with the disclosure, during an operation, of the relevant *rules of engagement*. A possible solution to the problem would be represented by the adoption of confirmation/clearing procedures by the authority issuing the *rules of engagement* (or authorizing the use of foreign/international *rules of engagement*) preliminary to and eventually representing a bar to criminal investigations or, if constitutional limits prevent such a solution, the reliance on a strict system of procedural safeguards in order to prevent, pending trial, disclosure to the public of the rules of engagement (e.g. in camera inspection, judicial orders to prevent disclosure by the parties to the proceedings, classification of judicial acts, security clearance for defense attorneys etc.).

Status of forces agreements and other regulations on the *status of forces/mission* mostly reaches their intent to grant unimpeded fulfillment of the mission's task in respect of the authorities of the area of operations. Nevertheless these regulations mostly fail, due to the legal weaknesses related to the form in which they are adopted and their contempt (territorial reach) to prevent jurisdictional conflicts in respect of *foreign friendly fire* episodes.

De iure condendo, the introduction of «subsidiary jurisdiction clauses»⁶⁷ in domestic legislations would help to create for the Contributing States binding regulation which would operate unaffected by the mostly questionable form in which the *status of forces agreements* are adopted.

Besides it would certainly not be a primer, if military and especially military criminal law precedes development of other legal branches. «Cross proceedings» and related conflict of jurisdictions could be correspondingly confined in residual situations in which primary jurisdiction is used to shield the individual – sharing a view expressed within homogeneous legal systems like the *EU* in respect of the possible perverse effect of the recognition of the *ne bis in idem* principle⁶⁸ – and situations in which States are under an international obligation to proceed.

67 It is our intention not to further contribute to the misleading use of the term «complementarity» as used in the Statute of the International Criminal Court and as unfortunately become usual in the doctrinal debate on international criminal law.

68 Reference is to the *Freiburg Proposal on Concurrent Jurisdictions and the prohibition of multiple Prosecutions in the European Union*. This proposal is based on a Study conducted by A. BIEHLER – R. KNIEBLER – J. LELIEUR FISCHER – S. STEIN, within the *Max Plank Institut e for Foreign and International Criminal Law* in Freiburg. On the project, see M. PISANI, *Giurisdizioni concorrenti e divieto di azioni multiple: una proposta da Friburgo*, *Riv. it. dir. proc. pen.*, 2004, p. 374. The above proposal implies a «re-modulation» of the competence of the *European Court of Justice*. In respect of the topic of «foreign friendly fire» we cannot obviously theorize a similar adjudicatory competence of the mentioned Court, and our preference would be for a national «admissibility proceeding» preliminary to the opening of an investigation.

