Année 2007/2008

Bulletin de la Société internationale de défense sociale pour une politique criminelle humaniste

CAHIERS DE DEFENSE SOCIALE

Bulletin of the International Society of Social Defence and Humane Criminal Policy

CAHIERS DE DEFENSE SOCIALE
Bulletin de la Société internationale de défense sociale pour une politique criminelle humaniste – SIDS
Bulletin of the International Society of Social Defence and Humane Criminal Policy – ISSD

SOCIETE INTERNATIONALE DE DEFENSE SOCIALE POUR UNE POLITIQUE CRIMINELLE HUMANISTE – SIDS
Organisation dotée de statut consultatif auprès du Conseil économique et social des Nations Unies
INTERNATIONAL SOCIETY OF SOCIAL DEFENCE AND HUMANE CRIMINAL POLICY – ISSD
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TABLE DES MATIERES / *TABLE OF CONTENTS*

À nos lecteurs / *To our Readers* / A nuestros lectores (M.P.) Page 13

LE XVème CONGRES INTERNATIONAL DE DEFENSE SOCIALE
(Toledo, 20-22 septembre 2007)

Entre la guerre et la paix: quelle place pour le pénal
STEFANO MANACORDA page 19

Le droit pénal comme éthique de la mondialisation
MIREILLE DELMAS-MARTY page 33

Conclusions du Xvème Congres Internationale de la SIDS/ *Conclusione of the fifteenth International Congress of the ISSD* / Conclusiones del XV Congreso Internacional de la Asociación Internacional de Defensa Social page 43

Buscando una justicia penal militar más modernizada page 50

ISSD Resolution on a Moratorium on the death penalty/ *ISSD Resolution on Mercenary activities: a new threat to the peace and security of mankind* page 51

LA MEDAILLE BECCARIA 2006
THE BECCARIA MEDAL 2006

Juan Guzmán: "En el borde del mundo"
HERNAN HORMAZABAL MALAREE page 57

Discours de Juan Guzmàn Tapia lors de la remise de la médaille Beccaria à Tolède, le 22 septembre 2008 page 61

Prix CESARE BECCARIA pour Jeunes Chercheurs

Call for papers / Appel d'offre de recherche pour le Xvème Congrès International de Défense Sociale page 65

Prix Cesare Beccaria pour Jeunes Chercheurs/*Cesare Beccaria prize for Young Researchers* page 67

Nueva modernidad de las corporaciones y protección internacionál de los derechos umanos
MIGUEL ÁNGUEL RODRÍGUEZ ARIAS page 69

ETUDES / STUDIES

Etica profesional: los trances del penalista y el dilema "Garantias individuales-defensa de la sociedad"
BERNARDO BEIDERMAN page 97

Beyond extradiction:Safeguards for "Extraterritorial" and "Sane Territory" surrender of individuals
JEAN PAUL PIERINI page 103

Les criminologues dans les prisons militaires
YIANNIS PANOUSSIS page 155

IN MEMORIAM

A Salute to Gerhard W.O. Mueller
EDUARDO VETERE page 169

Une fleur pour Nicola page 177

OBSERVATOIRE INTERNATIONALE /*INTERNATIONAL OBSERVATORY*

ISPAC International Conference: "The Evolving Challenge of Identity-Related Crime: Addressing Fraud and the Criminal Misuse and Falsification of Identity"
(Courmayeur Mont Blanc, Italy, 30 November - 2 December 2007) page 181

United Nations General Assembly Resolution 62/149 – Moratorium on the use of the death penalty page 189

Résolution adoptée à la Session de Santiago, 20-28 octobre 2007
Present problems of the use of armed Forces in international Law:
- *A. Self–Defence*
- *B. Humanitarian Action* page 191

INFORMATIONS / *INFORMATION*

Un grand merci à Luciana/*Heartfelt thanks to Luciana*/Un grande gracias a Luciana page 197

NOTES BIBLIOGRAPHIQUES / *BIBLIOGRAPHY*

Bibliography
Application form
Règlement des cotisation/Payment of the annual Fee/Sistema de abono de las cuotas

À nos lecteurs

Le présent numéro des *Cahiers* est dédié, en premier lieu, aux thèmes et aux conclusions de l'important XVème Congrès international de notre *Société* qui s'est tenu en septembre 2007 dans le cadre magnifique de la ville de Tolède.

Nous rappelons qu'à cette occasion une nouvelle "Médaille Beccaria" fut attribuée a Juan Guzmán Tapia, un personnage illustre dont le nom vient s'ajouter à ceux de Simone Rozès, H.H. Jescheck et Giuliano Vassalli.

En outre, le nom de Cesare Beccaria a été également donné à une autre initiative qui fait appel à l'intelligence et aux ressources des jeunes chercheurs, en d'autre mots, des éspoirs de demain.

Les rubriques traditionnelles d'études et d'informations complètent ce volume. M.P.

To our Readers

This issue of the Cahiers *focuses, to a large degree, on the subjects and conclusions of the important Fifteenth international Congress organized by our* Société *in September 2007 against the magnificent backdrop of the city of Toledo.*

On this occasion, a new "Beccaria Medal" was awarded to Juan Guzmán Tapia, whose illustrious name joins those of Simone Rozès, H.H. Jescheck et Giuliano Vassalli.

Moreover, the name of Cesare Beccaria was used for another initiative which calls upon the intelligence and resources of young researchers, in other words, of those who represent our hopes for the future.

The usual chapters containing studies and information complete the present issue. M.P.

A nuestros lectores

Este número de los *Cahiers* está centrado, en su mayor parte, en las materias y conclusiones del importante Decimoquinto Congreso internacional organizado por nuestra *Société* en Septiembre de 2007, en el magnífico escenario de la ciudad de Toledo.

En esta ocasión, una nueva "Medalla Beccaria" fue entregada a Juan Guzmán Tapia, cuyo ilustre nombre se une a los de Simone Rozès, H.H.

Jescheck y Giuliano Vassalli.

Además, el nombre de Cesare Beccaria fue usado para otra iniciativa que apela a la inteligencia y a los recursos de los jóvenes investigadores, en otras palabras, de aquellos que representan nuestras esperanzas para el futuro.

Los habituales capítulos compuestos de estudios e información completan el presente número. M. P.

LE XVème CONGRES INTERNATIONAL DE DEFENSE SOCIALE

XV^{ème} Congrès International de Défense Sociale
Tolède, Espagne
20-22 Septembre 2007

Le Droit Pénal entre la guerre et la paix:
Justice et coopération pénale dans les interventions militaires internationales

avec la coopération de
Office des Nations Unies contre les drogues et le crime (UNODC)
Conseil de l'Union Européen

sous les auspices du
Ministère de Défense Espagnol

en collaboration avec
Institut de Droit Pénal Européen et International, Université de Castilla-La Mancha
Centro Nazionale di Prevenzione e Difesa Sociale, Milan.
Centre de Droit Pénal Comparé de l'UMR de Droit Comparé de Paris.
Max-Planck-Institut für ausländisches und internationales Strafrecht, Freiburg
Centre d'Études de Droit International Humanitaire, Croix-Rouge Espagnole
Société Internationale de Droit militaire et de Droit de la Guerre

Présentation du Congrès

La Société Internationale de Défense Sociale a pris naissance au lendemain de la deuxième Guerre mondiale et s'est donnée le but de fournir – au niveau international – une réponse scientifique aux problèmes posés par la criminalité et par sa prévention, à travers une analyse sociale et une politique criminelle humaniste. Le thème retenu pour son XVème Congrès international amène la Société, une fois de plus, à présenter sur la scène internationale des questions essentielles et encore peu étudiées à l'heure actuelle. Dans le cadre du thème général, le Congrès abordera des sujets spécifiques qui peuvent être groupés comme suit:

1. La modernisation de la Justice pénale militaire, avec une attention

particulière à l'apport des Cours pour les Droits de l'Homme Européenne et Interaméricaine, y compris l'évolution de la peine de mort. Les tensions et les régressions provoquées par la multiplication des conflits et par le discours politique et juridique sur la "guerre contre le terrorisme" seront également abordées.

2. Le cadre pénal applicable aux missions militaires à l'étranger, notamment en ce qui concerne le fondement et les conséquences dans le domaine pénal des accords sur le statut des forces d'intervention (*Status of Forces Agreements / SOFA*) et des règles d'engagement (*Rules of Engagement / ROE),* ainsi que les fonctions de police judiciaire des forces armées à l'étranger.

3. La paix comme valeur à protéger, même par le droit pénal. Par rapport au crime d'agression, l'attention portera sur sa définition au niveau interne et international, notamment en relation avec le Statut de la Cour Pénale Internationale.

4. Les violations le plus graves des droits fondamentaux apparues au cours des nouveaux conflits, telles que les privations de liberté interdites par les Conventions de Genève et les traités internationaux contre la torture, seront également analysés.

5. Afin de garantir la paix de manière adéquate et de lutter contre les dérives de la guerre, il est nécessaire que l'opinion publique soit informée d'une manière correcte. Dans ce but, la question des instruments internationaux pour la protection pénale des journalistes et des moyens de communication de masse dans les théâtres de guerre sera présentée.

6. La liste des problèmes concernant les menaces contre la paix qui revêtent une dimension pénale ne peut que rester ouverte: l'on peut évoquer ultérieurement des thèmes tels que les violations de la réglementation internationale en matière d'armes nucléaires ainsi que la protection des systèmes et des banques de données stratégiques vis-à-vis d'attaques informatiques.

La Société se propose de contribuer – à travers le thème débattu à Tolède – au développement du Droit pénal international, à la prévention des conflits et à la formation d'une éthique de la mondialisation.

Entre la guerre et la paix: quelle place pour le pénal?

par
STEFANO MANACORDA
Professeur de droit pénal à l'Université de Naples II (Italie)
et à l'Université de Paris I (France)

Introduction: un droit pénal "en suspension"

À l'automne 1907, la seconde Conférence internationale de la paix se clôturait à La Haye: dix nouvelles conventions étaient adoptées et trois anciennes, dites de Genève, étaient modifiées. Le droit international humanitaire venait ainsi s'enrichir sensiblement au travers de nouvelles normes sur la conduite des guerres terrestre et maritime et sur la protection des malades et des blessés[1].

Il paraît étonnant que, exactement un siècle après, certaines de ces règles qui sont longtemps apparues comme un patrimoine indépassable de l'humanité, renforcées par le choc de deux guerres mondiales, puissent être remises en doute. En effet, le danger surgit aujourd'hui que la guerre, sous l'impulsion des contingences dramatiques du terrorisme international et d'une volonté politique marquée par un fort unilatéralisme, s'affranchisse de plus en plus des impératifs de l'Etat de droit, mettant en échec l'espoir de *Hans Kelsen* d'atteindre la paix par le droit[2]. Le recours à "la guerre comme peine et à la peine comme guerre" – selon la formule du pénaliste allemand *Prittwitz*[3] – brouille nos catégories de juristes. Serions-nous

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1 Le droit pénal a été toujours en première ligne pour assurer l'effectivité du droit international humanitaire: v. H.H. JESCHECK, "Der strafrechtliche Schutz der internationalen humanitären Abkommen", *Zeitschrift für die gesamte Strafrechtswissenschaft*, 1953, p. 112 et s.

2 H. KELSEN, *Peace through law,* The University of North Carolina Press, 1944.

3 C. PRITTWITZ, Krieg als Strafe – Strafrecht als Krieg. Wird nach dem '11 September' nichts mehr sein, wie es war?", in *Festschrift für Klaus Lüderssen*, Baden-Baden, Nomos, 2002, p. 499 et s.

aujourd'hui devant un revirement dangereux du cours de l'histoire dont nous resterions les spectateurs impuissants?

C'est donc aux organisateurs de ce XV[e] Congrès international de Défense Sociale que revient le mérite d'avoir retenu le thème, que nous commençons à aborder aujourd'hui comme objet commun de notre réflexion, s'inspirant de la vocation humaniste inscrite dans le statut de la Société. Par la suite j'essaierai donc d'esquisser le fil conducteur du Congrès pour mettre en exergue certains des points fermes de la réflexion, mais aussi pour signaler quelques questions qui surgissent dans le débat actuel. Il reviendra aux rapporteurs qui interviendront au cours de ces trois journées de nous offrir des réponses dans un domaine si complexe.

Si je pouvais donner un titre pour cette introduction aux travaux, je dirais que le système pénal est aujourd'hui dans une position de très forte incertitude, "en suspension", et cela à plusieurs égards.

Premièrement, le pénal se trouve, pour ainsi dire, "écartelé entre la guerre et la paix". Très schématiquement, alors qu'il pénalise la guerre d'agression et les crimes de guerre, d'une part, et protège la paix des différentes atteintes auxquelles elle est exposée, d'autre part, cette logique binaire est bien loin de la réalité. Un nombre impressionnant de conflits a eu lieu au cours de ces dernières années, notamment après la chute du mur de Berlin, et ne relève d'aucune de ces deux catégories. Je me passerai ici de la qualification variée de telles interventions militaires à l'étranger qui est venue s'esquisser, d'abord dans la pratique et, de plus en plus, dans les textes. Je tournerai plutôt autour de la question de savoir quel est le rôle que la justice pénale est appelée à jouer: quelles sont ses potentialités et ses limites face à la panoplie de conflits que la réalité actuelle nous présente? Car, sauf à revendiquer une sorte d'anomie du recours à la violence, nous sommes – bon gré, mal gré – obligés de nous pencher sur la question. Le constat formulé par *Herbert Jaeger*, dans les années soixante, est toujours d'actualité: la criminologie ne s'est pas intéressée suffisamment à la violence systématique liée aux conflits, alors qu'il est évident que le nombre de victimes des *Makroverbrechen* excède de loin celui des *Private-Verbrechen*.[4] Et une telle insuffisance de la réflexion se manifeste aussi sur le plan du droit pénal, qui est resté longtemps éloigné de ces problématiques.

Mais "l'entre-deux" de la justice ne tient pas seulement au constat empirique qu'une "zone grise" s'esquisse entre la guerre et la paix. C'est aussi d'un point de vue strictement juridique que le droit pénal, dès lors

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[4] H. JÄGER, *Makrokriminalität. Studien zur Kriminologie kollektiver Gewalt*, Frankfurt a.M., Suhrkamp, 1989, p. 11 et s.

qu'il est appelé à réglementer des conflits à la définition incertaine, se trouve aujourd'hui comme "suspendu": il est en effet partagé entre sa dimension interne et sa dimension internationale. Ainsi, le visage des systèmes pénaux nationaux se veut rassurant: pour encadrer les conduites de forces armées, tout ordre juridique offre des réponses apparemment satisfaisantes, dont l'application extraterritoriale est prévue à l'occasion des missions à l'étranger. Mais le "repli nationaliste" cède progressivement la place à la recherche de solutions partagées, sous l'impulsion de conflits et interventions militaires de plus en plus interétatiques. D'où la mise en place par la communauté internationale de normes, qui depuis un siècle au moins – comme on l'a signalé au tout début de cette introduction – encadrent la conduite des hostilités. Plusieurs sous-ensembles normatifs sont à l'oeuvre (droit humanitaire, droits de l'homme, droit pénal international), mais un cadre juridique stabilisé et réellement contraignant a encore du mal à s'affirmer.

C'est donc autour de ces deux pôles normatifs, spécifiquement entre *un droit pénal militaire partagé* (I) et *un cadre international contrasté* (II), que les quelques réflexions qui vont suivre s'organisent.

I. Le droit pénal militaire partagé entre repli et ouverture

Je commencerai par présenter quelques éléments du droit pénal militaire s'appliquant aux missions. J'avancerai sur ce terrain avec la conscience qu'aborder une réalité si complexe oblige, peut-être, à revoir certains de nos acquis méthodologiques de pénalistes. Il n'est pas sûr, comme *Wolfgang Naucke* se charge de nous le rappeler, que la *Schöneswetterdogmatik* ("la dogmatique du beau temps") puisse tenir la route, face à cette criminalité extraordinaire.[5] Voilà l'une des interrogations auxquelles les rapporteurs qui vont suivre pourraient contribuer à donner une réponse.

Aux fins de mon introduction, je me limiterai à signaler deux tendances en cours: l'une, pour ainsi dire, ancienne et spontanée, tenant au repli nationaliste de la justice pénale militaire, qui est par nature réfractaire à toute tentative d'intégration et se montre ainsi fortement *autarcique* (*a*). L'autre, en revanche, plus récente, montrant des ouvertures progressives de ce sous-système normatif, par l'*intégration* tant d'actes de nature infra-législative que d'engagements internationaux (*b*).

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[5] W. NAUCKE, *Die strafjuristische Privilegierung staatsverstärkter Kriminalität*, Frankfurt am Main, Klostermann, 1996, p. 15 et s.

a) Un droit traditionnellement autarcique

Bien au-delà de la difficulté que toute analyse comparative de droit pénal présente, tenant à la divergence des modèles nationaux, accentuée aujourd'hui par la complexité croissante des sources (multiplication, dénationalisation, instabilité temporelle, etc.), le domaine de la justice pénale militaire présente une problématique supplémentaire.

La spécialité / spécialisation de ce sous-ensemble normatif représente, à quelques exceptions près, une constante, même si elle a tendance à se présenter dans des formes extrêmement variées d'un ordre juridique à l'autre. Un survol comparatif, que nous avons essayé récemment d'esquisser en relation avec quelques ordres juridiques européens, a permis de dégager une pluralité de modèles.[6] Sur le plan du droit pénal de fond, l'on passe de systèmes extrêmement complexes, prévoyant un triple régime (commun, militaire de paix, militaire de guerre), à des modèles simples, ayant renoncé à des codifications séparées pour incorporer dans le droit commun les quelques incriminations propres aux membres des forces armées. D'ailleurs, cela se combine avec une variabilité extrême des normes sur l'organisation de la justice: parfois c'est la magistrature ordinaire qui est en charge des affaires militaires; le plus souvent, toutefois, ce régime de droit commun connaît des assouplissements, par la prévision, dans la plupart des cas, de règles statutaires différentes pour les magistrats militaires, au niveau du parquet ou du jugement.

Dans l'ensemble, le cadre comparatif de la justice pénale militaire se présente comme étant extrêmement fragmentaire, relevant d'une logique fortement nationaliste qui correspond à une situation substantielle d'*autarcie normative*. Un tel "repli nationaliste" des systèmes de justice pénale n'a pas pu être efficacement contrecarré dans le temps: même à l'échelle de l'Europe, laboratoire par excellence de la régionalisation du droit de punir, l'ancien projet d'une Communauté européenne de défense, intégrant des dispositions pénales communes, a échoué déjà en 1952 et depuis n'a pas été repris.[7]

Le caractère spécial de la justice pénale militaire peut d'ailleurs se traduire par un éloignement des impératifs auxquels la justice pénale

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6 Voir "European Models of Criminal Integration in Missions Abroad: Analysis and Possible Developments", in S. MANACORDA (dir.), *European Common Defence and Criminal Judicial Area*, Roma, Consiglio della Magistratura Militare, 2005, p. 247 et s.

7 H.H. JESCHECK, "Das Strafrecht des Europäischen Verteidigungsgemeinschaft", *Zeitschrift für die gesamte Strafrechtswissenschaft*, 1953, p. 118 et s.

ordinaire est assujettie. Assouplissement des garanties procédurales, recours à la nécessité militaire, construction idéologiquement orientée de la partie spéciale, immixtion de l'exécutif dans l'administration de la justice: nombreux sont les doutes qu'un tel cadre soulève. Les inquiétudes s'accroissent si l'on considère que, dans certains ordres juridiques, la justice militaire a été récemment étendue au terrorisme, et que par-là une tendance dérogatoire importante par rapport aux garanties s'observe.[8] Pour ma part, je me bornerai à demander quelles sont les conséquences découlant de l'excentricité du sous-système militaire par rapport aux garanties, dès lors qu'il acquiert une importance croissante en termes de politique criminelle. Bon nombre de ces questions, et certainement bien d'autres, seront abordées dans la première session de nos travaux, à partir de ce matin, avec les rapports très attendus de Monsieur le président Jiménez Villarejo et du professeur Fiandaca.

Face à de telles divergences d'un ordre juridique à l'autre, il pourrait apparaître quelque peu paradoxal que tous les systèmes pénaux étudiés maintiennent, malgré tout, une attitude identique en ce qui concerne l'application de leurs propres règles aux contingents militaires envoyés à l'étranger. Le prolongement du territoire aux navires et aux avions ("territoire flottant") et le recours à la loi du pays d'envoi pour les faits extraterritoriaux ("la loi dans le sac à dos", selon la formule italienne), s'imposent partout, assujettissant les militaires qui se trouvent en dehors des frontières à leur juge national.

Les solutions techniques pour aboutir à l'extraterritorialité divergent sensiblement d'un pays à l'autre. Le plus souvent, un tel résultat est atteint par la prévision des principes de personnalité active et passive, qui ramènent au juge interne l'ensemble des affaires impliquant les soldats nationaux. Quant à l'organisation judiciaire, le dispositif est normalement complété par une centralisation des procédures devant un seul juge ou, parfois, par la mise en place d'un organe judicaire spécialisé, ce qui ne fait qu'accroître la spécialité/spécialisation du système.

En définitive, le même repli nationaliste qui commande les choix du droit pénal militaire à l'intérieur de chaque Etat, caractérise aussi son application en dehors des frontières. Au fond, c'est le rejet de toute forme d'intégration avec les autres ordres juridiques qui se manifeste, rejet qui semble toutefois être destiné à s'assouplir.

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[8] Voir notamment le cadre comparatif présenté dans l'ouvrage d'E. LAMBERT ABDELGAWAD (dir.), *Juridictions militaires, tribunaux d'exception en mutation: perspectives comparées et internationales*, Paris, Editions des archives contemporaines, 2007.

b) Un droit progressivement ouvert à l'intégration

Tout en restant fidèle à l'exigence de réglementer de manière autonome les comportements des militaires, la justice pénale militaire a dû faire face progressivement aux contraintes découlant de la nature internationale des interventions militaires à l'étranger. Plusieurs facteurs poussent dans le sens d'une intégration entre les ordres juridiques et assouplissent ainsi, au moins à première vue, la tendance nationaliste des systèmes. Je ferai état de deux questions principales qui ont récemment surgi dans le débat et qui seront abordées dans la deuxième session de notre Congrès, dans la journée de demain.

Tout d'abord, la norme pénale militaire interne s'ouvre à une *intégration "vers le bas"*, par la prise en compte de dispositions infra-législatives, et notamment des règles d'engagement. Ces règles, visant la réglementation de la force, s'exposent à une série de réserves critiques, dont la doctrine commence à faire état, telles que: l'absence d'une procédure législative ordinaire pour leur adoption, le rôle dominant de l'exécutif et des hiérarchies militaires, leur caractère confidentiel et leur qualification incertaine sur le plan des sources. Ici, j'entends me référer exclusivement à la question, clairement apparue dans une série importante de décisions judiciaires, de l'incidence des règles d'engagement sur le procès pénal.[9] La question tient à leur intégration dans l'interdit pénal, tant en fonction de renfort (pour définir par exemple les paramètres de la faute d'imprudence ou de négligence), qu'en fonction d'exonération de la responsabilité (et notamment en tant que fait justificatif). Dans ce dernier sens, il importe de savoir si un comportement, interdit à la lumière de dispositions pénales militaires, peut être justifié en raison de sa conformité aux règles régissant la conduite des hostilités. Le débat n'échappe pas aux acquis consolidés en matière de faits justificatifs, au moins dans les systèmes connaissant une application stricte du principe de la légalité: des normes de rang inférieur à la loi ne peuvent pas, en elles seules, modifier les marges d'application des faits justificatifs prévus en termes généraux par les codifications nationales (ordre de la loi, légitime défense, état de nécessité, etc.). Cependant, en tant qu'ordres légitimement impartis par l'autorité supérieure, les règles d'engagement peuvent concrétiser certains des éléments (par exemple le danger imminent) exigés par la norme générale. Je suis persuadé – tout en renvoyant au débat qui aura lieu sur ce thème – que prétendre, comme

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[9] M. UBEDA-SAILLARD, "L'invocabilité en droit interne des règles d'engagement applicables aux opérations militaires multinationales", *Revue Générale de Droit International Public*, 2004, p. 150 et s.

certains le voudraient, que la conformité du comportement du soldat à la règle d'engagement l'exonère de toute responsabilité, est une solution à ne pas retenir.

La problématique de l'ouverture des normes pénales internes se pose en termes quelques peu différents en ce qui concerne l'exercice de la juridiction. Là encore, on sait bien que se pose le problème de limiter l'exercice de la juridiction locale, à supposer qu'elle existe, pour éviter que les forces militaires étrangères y soient soumises. Les accords sur le statut des forces (SOFA) ont précisément ce but. Qu'il s'agisse de clauses contenues à l'intérieur de traités multilatéraux (dont le modèle est sans doute l'article VII du Traité de l'Otan)[10] ou d'accords bilatéraux, ces normes impliquent la prise en compte des exigences de coordination entre pays d'envoi et pays de destination. Traditionnellement, ces accords prévoient une juridiction prioritaire de la part du *sending state*, accompagnée par une juridiction de substitution de la part du *receiving state*, au cas où le premier n'agirait pas (article VII (3) (*c*) SOFA Otan). Cela explique pourquoi – comme le Professeur *Cherif Bassiouni* le rappelle[11] – en Iraq les pays de la coalition n'ont pas voulu recourir à un accord SOFA et l'ont remplacé par une ordonnance de la CPA, affirmant la juridiction exclusive de la part de l'Etat d'envoi sur ses propres militaires, et en garantissant ainsi une immunité pénale devant les juridictions iraquiennes.[12]

En définitive, les règles nationales sur la juridiction doivent êtres intégrées par le recours, "vers le haut", à des accords de nature internationale. Comme dans le cas des règles d'engagement, toutefois, l'ouverture du système de justice pénale militaire est plus apparente que réelle: c'est encore un but fortement nationaliste qui est poursuivi. Ce qui

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[10] Voir S. G. HEMMERT, "Peace Keeping Mission SOFA's: U.S. Interest in Criminal Jurisdiction", *Boston University International Law Journal*, 1999, p. 215 et s.

[11] Voir A. FAHIM, "The perils of colonial justice in Iraq", *Middle East*, Jul. 6, 2005, visible à l'adresse *www.atimes.com/atimes/Middle_East/GG06Ak02.html*, visitée le 15 septembre 2007.

[12] *Coalition Provisional Authority Order Number 17 (Revised), Status of the Coalition Provisional Authority, MNF - Iraq, Certain Missions and Personnel in Iraq*, § 2(1) (June 27, 2004), visibile à l'adresse *http://www.iraqcoalition.org/regulations/ 20040627_CPAORD_17_Status_ of_Coalition__Rev__with_Annex_A.pdf* ("*Unless provided otherwise herein, the MNF, the CPA, Foreign Liaison Missions, their Personnel, property, funds and assets, and all International Consultants shall be immune from Iraqi legal process*").

nous pousse à regarder comment les normes de source internationale assouplissent le nationalisme exaspéré du droit pénal militaire, par une tentative d'encadrement de cette branche du droit.

II. Un encadrement international controversé

Les normes de source internationale, affectant en profondeur les systèmes pénaux, peuvent limiter fortement l'autarcie des systèmes de justice militaire: "raisonner la raison d'Etat", selon la célèbre formule de *Mireille Delmas-Marty*[13] représente ici – plus que dans tout autre domaine – le but poursuivi. Cependant, l'encadrement international montre aussi des faiblesses, tenant tant aux limites propres à ces normes, qu'à la volonté de certains Etats de se soustraire à leur application. Nous allons constater cet aspect en relation avec différents sous-ensembles normatifs.

a) Les limites du droit des droits de l'homme

Alors qu'on pourrait espérer que les droits de l'homme aient une portée absolue et qu'ils soient applicables sans frontières, certaines réserves apparaissent en relation avec les nouveaux conflits. Renvoyant aux rapports qui, dès ce matin, seront consacrés à l'analyse des conventions de protection des droits fondamentaux, je me limiterai à signaler quelques aspects qui me paraissent particulièrement problématiques.

Tout d'abord, une certaine faiblesse est liée à la nature du droit pénal militaire, largement imperméable à tout encadrement international. Aux termes de l'article 15, para. 2 de la Cesdh, par exemple, des actes licites de guerre justifient la violation de l'article 2 reconnaissant le droit à la vie. Ainsi, un certain retard est apparu, dans ce domaine, en relation avec l'abolition de la peine capitale: il suffirait de penser à cet égard au Protocole n° 13 de la Cesdh qui n'est entré en vigueur que récemment.[14] L'actualité du débat est réapparue tragiquement à l'occasion de l'exécution de Saddam Hussein, fin 2006, suite à la condamnation par le Tribunal spécial pour l'Iraq, mais en relation avec le droit pénal international.[15]

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[13] M. DELMAS MARTY, *Raisonner la raison d'Éta : Vers une Europe des droits de l'homme*, Paris, P.U.F., Coll. Les voies du droit, 1989.

[14] V. notre article "Restraints on Death Penalty in Europe: a Circular Process", *Journal of International Criminal Justice*, 2003, p. 263 et s.

[15] M. DONNINI, "La condanna a morte di Saddam Hussein. Riflessioni sul divieto di pena capitale e sulla "necessaria sproporzione" della pena nelle gross

Ensuite, alors que les instruments internationaux de protection des droits de l'homme n'admettent aucune dérogation à l'interdiction de la torture et des traitements inhumains et dégradants, ces interdits fondateurs se trouvent aujourd'hui menacés.[16] On se réfère ici au recours, par certains Etats, à des pratiques d'interrogatoire et de détention, contraires aux textes onusiens et régionaux. Les différents *memoranda* de l'administration américaine et les actes normatifs adoptés par le Président Bush,[17] ont eu comme conséquence que – comme l'internationaliste de la Columbia University *José Alvarez* l'a écrit avec justesse – la loi même a fini par être "torturée".[18]

Enfin, c'est dans l'interprétation jurisprudentielle que d'autres limites sont apparues en ce qui concerne l'exercice de la juridiction par rapport à des faits commis en dehors du territoire des Etats parties. Il n'est pas étonnant que les affaires les plus significatives portées devant les juges de Strasbourg concernent précisément des violations soupçonnées d'avoir été commises par des forces militaires européennes sur le territoire d'un Etat tiers. Tant dans la célèbre affaire *Banković,*[19] relative à la frappe par les forces aériennes de l'Otan de cibles civiles au Kosovo, que dans les affaires plus récentes *Behrami et Saramati,*[20] portant sur la détention par les forces

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violations", *Diritti umani e diritto internazionale*, 2007, p. 343 et s.

16 F. JESSBERGER, "Bad Torture – Good Torture?: What International Criminal Lawyers May Learn from the Recent Trial of Police Officers in Germany", *Journal of International Criminal Justice*, 2005, p. 1059 et s.

17 J.J. PAUST, "Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees", *Columbia Journal of Transnational Law*, 2005, p. 811 et s.

18 J.E. ALVAREZ, "Torture and the War on Terror: Torturing the Law", *Case Western Reserve Journal of International Law*, 2006, p. 175 et s.; sur les affaires portées devant la justice allemande voir W. Kalec et al. (dir.), *International prosecution of human rights crimes*, Berlin- New York, Springer, 2007.

19 Cour européenne des droits de l'homme, Grande Chambre, *Vlastimir et Borka Banković, Zivana Stojadinović, Mirjana Stoimenovski, Dragana Joksimović Et Dragan Suković contre la Belgique, la République tchèque, le Danemark, la France, l'Allemagne, la Grèce, la Hongrie, l'Islande, l'Italie, le Luxembourg, les Pays-Bas, la Norvège, la Pologne, le Portugal, l'Espagne, la Turquie et le Royaume-Uni*, 12 décembre 2001. En doctrine: M. HAPPOLD, "Bankovic v Belgium and the Territorial Scope of the European Convention on Human Rights", *Human Rights Law Review*, 2003, p. 77 et s.

20 Cour européenne des droits de l'homme, Grande Chambre, *Agim Behrami et Bekir Behrami contre la France et Ruzhdi Saramati, contre la France*

militaires, d'individus soupçonnés de crimes graves, la Cour européenne des droits de l'homme a déclaré les demandes inadmissibles. Les nombreuses critiques émanant de la doctrine qui seront probablement reprises par certains des intervenants de nos journées, mettent en exergue les hésitations du droit des droits de l'homme, précisément en relation avec le contrôle des missions militaires à l'étranger.

b) Les incertitudes du droit international humanitaire

La question de l'applicabilité du droit international humanitaire, et notamment de l'ensemble des garanties prévues par les Conventions de Genève de 1949 et par leurs Protocoles additionnels, aux missions militaires à l'étranger a été longuement discutée et sera approfondie dans la troisième session de notre Congrès. Traditionnellement, ces règles ont été élaborées en rapport avec les conflits armés, élément considéré comme inexistant lors de simples missions de maintien de la paix et, à plus forte raison, lors des opérations de police internationale. C'est pourquoi la doctrine dénonce donc à cet égard un véritable "*peace keeping gap in International Law*".[21]

Les Nations Unies restent d'ailleurs un peu ambiguës concernant le recours intégral au droit international humanitaire à l'occasion de missions qui se déroulent sous leur égide: alors que le *Bulletin* du Secrétaire général y renvoie largement,[22] d'autres textes successifs apparaissent plus prudents.[23] Récemment toutefois, les Conventions de Genève et leurs protocoles additionnels ont été intégralement repris dans le cadre de la mission des Nations Unies en support au Timor Oriental.[24]

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l'Allemagne et la Norvège, 2 mai 2007. P. PALCHETTI, "Azioni di forze istituite o autorizzate dalle Nazioni Unite davanti alla Corte europea dei diritti dell'uomo: i casi Behrami e Saramati", *Rivista di diritto internazionale*, 2007, p. 681 et s.; A. SARI, "Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases", *Human Rights Law Review*, 200, p. 151 et s.

21 R.O. WEINER – F.A. AOLAIN, "Beyond the Laws of War: Peace keeping in Search of a Legal Framework", *Columbia Human Rights Law Review*, 1996, p. 307 et s.

22 Secretary-General's Bulletin on Observance by United Nations forces of international humanitarian law, UN Doc. ST/SGB/1993/3.

23 V. R. MURPHY, "United Nations Military Operations and International Humanitarian Law: What Rules Apply to Peacekeepers?", *Criminal Law Forum*, 2003, p. 153 et s.

24 Agreement between the Democratic Republic of East Timor and the United

Cependant, le droit international humanitaire est lui aussi, à l'instar du droit des droits de l'homme, sous attaque, les Etats-Unis ayant procédé unilatéralement à une interprétation restrictive du statut de combattant ennemi.[25] Heureusement les juges américains ont limité ces dérogations dans la célèbre affaire *Hamdam*, discutée devant la Cour Suprême des Etats-Unis en 2006, qui à l'occasion a rendu une décision fortement encourageante pour les défenseurs de l'Etat de droit.[26] Comme on le sait, la décision a été suivie par l'adoption du *Military Commission Act*[27] qui, cependant, n'a pas été considéré comme étant applicable au prévenu par une décision du 5 juin 2007.

c) Les faiblesses du droit pénal international

C'est aussi le droit pénal international qui montre un double visage: alors que sa montée en puissance au cours de la dernière décennie est indéniable, il présente un certain nombre de faiblesses chroniques dont il faut faire état.

Ainsi, la très grande sélectivité de l'instrument apparaît déjà avec le choix de constituer des Tribunaux *ad hoc* relatifs à des conflits spécifiques.[28] D'ailleurs, le refus du Procureur du Tribunal pénal

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Nations Concerning the Status of the United Nations Mission of Support in East Timor, 20.5.2002, article 6 (*a*) "The United Nations shall ensure that UNMISET shall conduct its operation in East Timor with full respect for the principles and rules of the international conventions applicable to the conduct of military personnel. These international conventions include the four Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977 and the UNESCO Convention of 14 May 1954 on the Protection of Cultural Property in the event of armed conflict".

[25] M. HENZELIN, "Statut de combattants et privation de liberté", in K. BANNELIER et al. (dir.), *L'intervention en Irak et le droit international*, Paris, Pedone, 2004, p. 171 et s.

[26] Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006). Sur l'ensemble de ces développements v. D. AMANN. "La justice militaire et les Juridictions d'exception aux Etats-Unis", in E. LAMBERT ABDELGAWAD (dir.), *Juridictions militaires, tribunaux d'exception en mutation*, *cit*., p. 265 et s.

[27] *Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006), enacting Chapter 47A of title 10 of the United States Code*. Voir les différents articles parus au *Journal of International Criminal Justice*, 2007, p. 2 et s.

[28] Sur la sélectivité v. R. CRYER, *Prosecuting International Crimes. Selectivity and the International Criminal Law Regime*, Cambridge University Press,

international pour l'ex-Yougoslavie d'enquêter sur les bombardements des forces de l'Otan sur la radiotélévision serbe et sur l'ambassade de la République populaire de Chine à Belgrade,[29] montre bien les limites propres à un droit qui est toujours soumis, dans sa mise en œuvre, à la prise de décision politique.

La mise en place de la Cour pénale internationale laisse préconiser un accroissement des chances de réussite de la justice pénale internationale au cours des prochaines années. Cependant, les éléments d'inquiétude ne manquent pas. Je me limiterai à signaler, sous forme interrogative, les quelques points qui me paraissent les plus significatifs. Tout d'abord, des mécanismes de limitation de la juridiction ont été mis en place, tant par les règles statutaires que par les accords conclus par les Etats-Unis sur la base de l'article 98,[30] ainsi que par les résolutions adoptées par le Conseil de Sécurité pour la protection de militaires américains.[31] Ensuite, les procédures de filtre aux poursuites, tenant tant au rôle du Conseil de Sécurité qu'à la formule vague des "intérêts de la justice" de l'article 53 du règlement de procédure et de preuve,[32] nécessitent d'être ultérieurement précisées dans la pratique. Enfin, sur le plan du droit pénal de fond, parmi les nombreuses difficultés que le Statut de la CPI soulève, apparaissent ici les réserves apportées par la France à l'application des crimes de guerre et le nœud gordien représenté par le crime d'agression, formule vide qui attend d'être remplie par un contenu.

En définitive, qu'il s'agisse du droit des droits de l'homme, du droit international humanitaire ou du droit pénal international, avec toutes les imbrications d'un secteur à l'autre, ainsi que les risques de divergence qui y sont inhérents, il nous semble que l'encadrement international de nos sous-

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Cambridge, 2005.

29 M. COTTIER, "Did NATO Forces Commit War Crimes During the Kosovo Conflict? Reflections on the Prosecutor's Report of 13 June 2000", in H. FISCHER – C. KRESS – F. LATTANZI, *International and National Prosecutions of Crimes Under International Law. Current Developments*, Berlin, Berlin Verlag, 2001, p. 505 et s.

30 D. FLECK, "Are Foreign Military Personnel Exempt from International Criminal Jurisdiction under Status of Forces Agreements?", *Journal of International Criminal Justice*, 2003, p. 651 et s.

31 S. ZAPPALÀ, "Are Some Peacekeepers Better Than Others? UN Security Council Resolution 1497 (2003) and the ICC", *Journal of International Criminal Justice*, 2003, p. 671 et s.

32 M. DELMAS-MARTY, "Interactions between National and International Criminal Law in the Preliminary Phase of Trial at the ICC", *Journal of International Criminal Justice*, 2006, p. 2 ss.

systèmes de justice militaire est loin d'être définitivement acquis.

III. Remarques conclusives

Je suis conscient de ne pas avoir épuisé l'ensemble riche et complexe de questions que notre Congrès abordera. Il faudrait, entre autres, faire mention des efforts pour une *post-conflict justice*, perspective entamée par les Nations Unies avec les codes-modèle de droit et de procédure pénale,[33] ainsi que de la problématique du recours aux missions militaires ayant une fonction de police judiciaire, au service des juridictions internes et internationales.[34]

Les quelques remarques qui précèdent montrent cependant que les menaces à la paix se font de plus en plus réelles et concrètes et que le droit pénal est appelé à jouer un rôle important pour le contrecarrer. La table ronde permettra de jeter notre regard plus loin et de dépasser le strict cadre des conflits armés, pour nous mettre face à de nouveaux dangers.

Mais les risques pour la paix – comme nous avons essayé de le montrer – découlent aussi de la fragilité de certaines composantes du système normatif interne et international. C'est pour cela que la conférence de clôture de *Mireille Delmas-Marty* essaiera d'esquisser le rôle que le droit pénal est appelé à avoir dans ce cadre, un rempart contre les dérives qu'elle voit – à juste titre – dans les crimes de guerre et dans la "guerre contre le crime".[35]

Pour conclure, je crois que l'occasion est propice pour réfléchir sur notre présence aujourd'hui, si nombreux, à Tolède. Il me semble, en effet, que si nous sommes réunis ici c'est qu'au fond nous tous partageons ce que *Karl Jaspers*, le grand philosophe allemand qui, en 1945, s'interrogea sur la

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[33] V. notamment V. O' CONNOR – C. RAUSCH, (dir.), *Model Codes for Post-Conflict Criminal Justice*, Vol. I, 2007, USIP Press Books, 2007 et M. SASSOLI, "Droit international pénal et droit pénal interne. Le cas des territoires se trouvant sous administration internationale", in M. HENZELIN – R. ROTH (dir.), *Le droit pénal à l'épreuve de l'internationalisation*, Paris, LGDJ, 2002, p. 119 et s., spéc. p. 137 et s.

[34] G. GIUDICELLI, "Missions abroad and police cooperation", *in European Common Defence and Criminal Judicial Area*, *cit*., p. 206 et s.

[35] M. DELMAS-MARTY, "The Paradigm of the War on Crime: Legitimating Inhuman Treatment?", *Journal of International Criminal Justice*, 2007, p. 584 et s.

Schuldfrage, avait appelé la "responsabilité métaphysique":[36] le principe de solidarité entre êtres humains nous appelle tous à répondre à de tels événements, qui menacent de près l'appartenance même à l'espèce humaine. Les analyser et les critiquer, selon les instruments qui sont propres au droit, c'est la tâche que – j'en suis persuadé – nous essaierons d'accomplir tout au long de nos travaux.

[36] K. JASPERS, *Die Schuldfrage*, München, 1965 (trad. it.: *La questione della colpa. Sulla responsabilità politica della Germania*, Milan, Cortina, 1996, p. 22 et s.).

Le Droit Pénal Comme Éthique de la Mondialisation

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L'intitulé de notre Congrès laisse entendre que le droit pénal pourrait être le moyen de réduire les tensions entre guerre et paix. Il suggère que la modernisation de la justice pénale militaire, notamment dans le cadre international, pourrait réconcilier la force et la justice autour de valeurs communes, telles que les droits de l'homme et la paix, et en ce sens contribuer à construire une éthique de la mondialisation.

J'emploie le conditionnel car une telle hypothèse peut sembler quelque peu utopique dans le climat de violences que nous connaissons; paradoxale aussi, dans la mesure où elle place le droit pénal en première ligne de la mondialisation, alors que le droit de punir est traditionnellement perçu comme l'emblème politique de la souveraineté des Etats et l'interdit pénal du crime comme l'expression propre à chaque communauté particulière.

On peut s'étonner de voir ainsi placer en première ligne de la mondialisation ce droit pénal qui est peut-être le moins universalisable de tous les droits. A moins que ce soit au contraire cette capacité de résister à une mondialisation trop uniforme et d'inspirer une vision pluraliste du monde qui lui donne, même à l'échelle mondiale, un rôle fondateur.

Certes le droit pénal peut être instrumentalisé à des fins diverses, et le risque de sur pénalisation est plus présent que jamais, mais à mesure que l'interdit du crime se détache de ses origines religieuses, il tente aussi de subordonner le pouvoir et la technique à une raison humaine.

C'est ainsi que la plupart des communautés de droit se sont constituées et structurées autour de quelques interdits, à la fois symboliques et juridiques, à tel point que le droit, dans un pays aussi vaste que la Chine, s'est pendant des siècles identifié au droit pénal. À l'heure où la globalisation des flux économiques et financiers, mais aussi des risques,

annonce l'émergence d'une communauté mondiale, il n'est donc pas surprenant de faire appel au droit pénal pour tenter de "mettre à la raison" les pratiques humaines si peu raisonnables et de rééquilibrer la globalisation des échanges par l'universalisme des valeurs. Et ce n'est sans doute pas un hasard si nous posons la question d'une éthique de la mondialisation aujourd'hui, à ce moment de l'histoire où l'on observe un double mouvement: l'internationalisation du droit pénal interne par l'intégration de normes internationales (régionales et mondiales) et la pénalisation du droit international par la création de juridictions internationales de nature pénale. Nous posons la question mais la réponse n'est pas donnée d'avance: aux optimistes qui pensent que ce droit pénal mondial en formation accompagne déjà l'émergence d'une communauté mondiale de valeurs, s'opposent en effet les sceptiques qui y voient plutôt une ruse pour imposer une conception hégémonique (à dominante occidentale) du système pénal. Pour tenter de les réconcilier, je dirai que l'éthique mondiale reste à construire et que le droit pénal peut y contribuer, mais à condition de répondre à trois critiques principales: les *contradictions* dans la définition d'une éthique commune, le *désordre* dans son application, et l'*incertitude* quant à la structure du futur ordre pénal mondial.

1. Contradictions dans la définition d'une éthique commune

On sait depuis Héraclite que la guerre est à la fois ce qui nous oppose et ce qui nous est commun ("*ton polemon eonta zunon"*). Il n'est donc étonnant ni que les premiers interdits fondateurs d'une éthique mondiale soient apparus à propos de la guerre, ni qu'ils aient échoué à l'interdire, tant la question morale reste ambiguë; car la guerre est toujours jugée deux fois: d'abord en considérant les raisons qu'ont les Etats de faire la guerre (*jus ad bellum*), ensuite en considérant les moyens qu'ils adoptent (*jus in bello*). Cette ambiguïté traduit deux fonctions différentes: interdire (ou au moins limiter) le recours à la guerre en encadrant le concept d'agression et son corollaire de la légitime défense; en cas de guerre, interdire les traitements inhumains en protégeant les combattants, les prisonniers et les non combattants. On retrouve ce double interdit dans les statuts des tribunaux de Nuremberg et Tokyo (crime contre la paix ou crime d'agression, et crime de guerre ou "violation des lois et coutumes de la guerre", prolongés par la création du crime contre l'humanité). Mais on constate que ces crimes ont connu des évolutions différentes: consolidation pour le crime de guerre et le crime contre l'humanité, mais stagnation pour

le crime d'agression, pourtant qualifié à Nuremberg de "crime international suprême", encore suspendu à un accord sur sa définition (la conférence de révision du Statut de Rome est prévue en 2009). En revanche, l'agression est devenue, après le 11 septembre 2001, le fait justificatif qui légitime la guerre contre le terrorisme. Ainsi, de deux crimes complémentaires, on est passé à deux paradigmes contradictoires, celui de crime de guerre et celui de guerre contre le crime. Un moyen de résoudre cette contradiction peut consister à fonder l'éthique mondiale sur l'autonomisation déjà amorcée du crime contre l'humanité, nouveau paradigme d'un jus commune in pace.

Deux paradigmes contradictoires

Le *paradigme du crime de guerre*, qu'il s'agisse du droit de La Haye ou du droit de Genève, est caractérisé par l'universalisme de l'interdit (actes inhumains) mais construit sur la séparation guerre/paix, ennemis combattants/civils innocents. Or ces distinctions sont en partie dépassées. Entre guerre et paix, les opérations liées au maintien de la paix sont difficiles à situer. Qu'elles soient nationales (le plus souvent américaines), *a fortiori* quand elles sont multinationales (ONU, Otan, UE, UA), les forces de maintien de la paix, répondent à une gradation subtile: elles vont de maintenir la paix (*peace keeping*) à l'imposer (peace enforcement), voire à la construire (*peace building*). Ce qui les rapproche tantôt de forces de maintien de l'ordre (police), tantôt de forces armées lancées à la conquête de territoires, ou même de forces d'occupation (exemple du Darfour). L'envoi de troupes à l'étranger ne peut donc être assimilé à un acte d'hostilité dans la mesure où l'Etat hôte garde théoriquement pleine juridiction sur son territoire, et que l'Etat d'origine cherche à exempter ses soldats de la juridiction du pays hôte, notamment quand les opérations se déroulent dans des pays dotés de systèmes pénaux incompatibles avec le sien (appliquant, par exemple, la *charia*). Quand les opérations sont sous le contrôle des Nations Unies, une directive du Secrétaire général impose le respect du droit humanitaire, mais donne compétence, en cas de violations graves, au pays d'origine. Or la compétence nationale se révèle mal adaptée à des forces multinationales, d'autant que leurs opérations, en se rapprochant d'opérations policières, estompent comme on l'a vu la différence entre militaires et témoins, voire auxiliaires de justice. De même s'est estompée la différence entre les ennemis combattants et les civils éventuellement criminels, avec la nouvelle catégorie des "combattants illégaux". Esquissée par la jurisprudence américaine pendant la Deuxième guerre mondiale, l'expression a été reprise dans l'ordonnance Bush du 13

novembre 2001 à propos des terroristes. La formule a été explicitée par la Cour Suprême d'Israël (décision du 14 décembre 2006) à propos des "assassinats ciblés": les "combattants illégaux" n'ont ni les droits des prisonniers de guerre – s'ils sont arrêtés ils seront jugés comme criminels –, ni ceux des civils – ils peuvent être assassinés sans jugement préalable, comme des ennemis combattants – et les "dommages collatéraux", y compris la mort de civils innocents, sont alors admis. Refusant de décider à l'avance que tout assassinat ciblé est contraire, ou conforme, au droit international, la Cour a le mérite de poser un principe de proportionnalité qui, appliqué au cas par cas, conditionne la légitimité de "l'exécution". Pourtant, en écartant le paradigme du crime de guerre, la Cour Suprême d'Israël a été amenée à esquisser, comme aux Etats-Unis, un nouveau paradigme – celui de la guerre contre le crime –, dont le risque, en légitimant l'inhumain, est de ruiner l'idée même de valeurs communes.[1] Le *paradigme de la "guerre contre le crime"* a consisté d'abord en un slogan politique, une propagande idéologique ciblée sur des crimes qui frappent l'opinion (drogue, crime organisé, corruption, terrorisme), utilisée comme métaphore pour populariser le durcissement de la répression. Avec le choc du 11 septembre 2001, la métaphore guerrière, comme libérée de toute contrainte, devient un véritable paradigme: considérés comme équivalent d'une agression armée, les attentats terroristes ont déclenché aux Etats Unis la mise en place d'un dispositif nouveau, encore renforcé (après le scandale de la prison d'Abu Ghraib) par le *Military Commissions Act* d'octobre 2006, moins protecteur que le *War Crimes Act*, qui affaiblit l'interdit de la torture et donne autorité au Président des Etats-Unis pour interpréter le sens des conventions de Genève. En découle une renationalisation de l'inhumain, qui remet en cause la possibilité d'une éthique mondiale. La renationalisation était en germe dans les résolutions des 12 et 28 septembre 2001 du Conseil de sécurité qui admettaient qu'un Etat victime d'un attentat terroriste puisse invoquer la légitime défense, donc apprécier souverainement les moyens et l'ampleur de la riposte. Certes, l'élargissement à la défense préventive n'a pas été consacré. Mais il pourrait devenir inéluctable à une époque où les technologies, notamment nucléaires, mettent des armes de destruction de masse à la portée des groupes terroristes. Est ainsi envisagé de modifier la Charte des Nations Unies pour autoriser la légitime défense préventive, tout en la définissant

[1] M. DELMAS-MARTY, "Le paradigme de la guerre contre le crime: légitimer l'inhumain?" RSC, 2007, pp. 461- 472; en version anglaise, JICL, 2007, pp. 584-598.

(preuves de la menace ou proportionnalité de la riposte, procédure d'arbitrage et dédommagement en cas de transgression)[2].

Or le problème n'est pas seulement la légitimité de la défense, mais aussi celui de la légitimité de la riposte: les instruments internationaux de protection des droits de l'homme font en effet une différence majeure entre le droit à la vie, qui n'exclut pas, si la proportionnalité est respectée, de tuer en état de légitime défense, et le droit à la dignité qui exclut toute dérogation à l'interdit de la torture et des traitements inhumains ou dégradants. A défaut d'une Cour mondiale des droits de l'homme, les tribunaux pénaux internationaux sont les premiers (affaire *Furundzija*, en 1998) à avoir affirmé à l'échelle mondiale que l'interdiction de la torture est devenue une norme impérative (jus cogens), c'est-à-dire une norme qui se situe dans la hiérarchie internationale au rang le plus élevé: "il s'agit là d'une valeur absolue que nul ne peut transgresser". Si la Charte des Nations Unies devait être modifiée, il serait indispensable de rappeler ces principes pour encadrer, au regard de valeurs universelles, le paradigme de la guerre contre le crime. Mais il s'agirait d'un cadre sans doute transitoire car seule l'autonomisation du crime contre l'humanité, dégagé de la métaphore guerrière, permettra de fonder durablement une éthique mondiale.

1.2. Autonomisation du paradigme du crime contre l'humanité: pour définir une éthique commune à la guerre et à la paix

Le crime contre l'humanité était privé d'autonomie dans le statut du Tribunal de Nuremberg qui évita de le séparer des autres crimes visés par le statut et le juge français Henri Donnedieu de Vabres put constater avec satisfaction, car il n'y croyait guère lui-même, que le crime s'était "volatilisé" au cours du procès.

C'est plus récemment que le crime contre l'humanité conquiert son autonomie, devenue manifeste en 1997, lorsque les juges du TPIY affirment, à l'appui de leur premier jugement de condamnation (*Erdemovic*, 1996): "Les crimes contre l'humanité transcendent l'individu puisqu'en attaquant l'homme, est visée, est niée, l'Humanité. C'est l'identité de la victime, l'Humanité, qui marque la spécificité du crime contre l'humanité". Les juges en tirent un classement en termes de gravité: "Le fait que les crimes contre l'humanité portent atteinte à un intérêt plus large que celui de la victime directe et qu'ils sont, dès lors, d'une nature plus grave que les

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[2] A. CASSESE, "Article 51", in La Charte des Nations Unies, Commentaire article par article, dir. J-P. COT, A. PELLET et M. FORTEAU, Paris, Economica, 2005, p. 1341.

crimes de guerre se manifeste dans les éléments intrinsèques constitutifs d'un crime contre l'humanité".

Dans cette perspective, il serait juridiquement possible et politiquement souhaitable d'appliquer l'interdit de l'inhumain qui fonde le crime contre l'humanité non seulement aux interventions militaires, mais encore aux opérations civiles menées dans le cadre de la guerre contre le terrorisme.

Il est vrai que la difficulté n'est pas seulement de trouver un accord sur la définition d'une éthique commune, mais aussi de l'appliquer, donc de réduire le désordre judiciaire entre les divers niveaux d'application.

2. Désordre dans l'application

La justice pénale internationale fut pendant longtemps un rêve. Quand on quitte le rêve pour entrer dans la réalité, on découvre que juger au nom d'une communauté humaine qui n'existe pas politiquement, et qui socialement émerge à peine, exclut tout parti pris, universaliste ou souverainiste, donc toute solution simple et univoque: le désordre judiciaire apparaît. La justice est éclatée entre quatre niveaux différents (national, mondial et "internationalisé" pour la justice pénale et essentiellement régional pour les droits de l'homme). La solution n'est sans doute pas d'unifier l'ensemble, mais d'en organiser les interactions.

2.1. Multiplication des niveaux d'application pourtant inévitable en raison des faiblesses observées à chaque niveau.

Au niveau national, on constate l'inadaptation d'une justice qui surprotège les dirigeants, comme on l'a vu à propos des affaires *Abu Graïb* et *Rumsfeld*. Et les efforts pour instaurer une justice sans frontières fondée sur la compétence universelle, ne seront réussis qu'à la double condition d'échapper au reproche du néocolonialisme – en s'appliquant également à tous les pays – et d'être suffisamment harmonisés pour éviter l'ouverture d'un grand marché où chaque victime choisirait sa juridiction en fonction de ses intérêts (*forum shopping*), au risque de déclencher une véritable "guerre des juges". Le *niveau international* semble à première vue mieux adapté, mais l'absence de toute police mondiale affaiblit tout à la fois la justice limitée dans l'espace et le temps des tribunaux *ad hoc* et la justice permanente de la Cour pénale internationale.

Si la nécessité de doter la Cour pénale internationale de sa propre force de police commence à être débattue en doctrine, elle a peu de chances

d'aboutir dans un avenir proche. En attendant, l'un des défis majeurs à relever est de trouver un moyen pour mener les enquêtes ou faire exécuter les mandats d'arrêt dans des pays en proie à des violences constantes. On sait que les forces armées ont un rôle à jouer, de même que les journalistes, à condition de clarifier les règles et de protéger les acteurs (exemple du Darfour).

Certes une justice dite "internationalisée" a été instaurée précisément pour tenter de pallier ces faiblesses: restant localisée sur le territoire national, la justice pénale peut utiliser la police étatique, tout en associant des juges étrangers, dits "internationaux". Mais cette mixité crée à son tour des difficultés qui tiennent non seulement à la présence de ces juges internationaux aux côtés des juges nationaux, mais encore à l'hybridation entre les normes pénales nationales et internationales (ex. Cambodge). Enfin le niveau régional reste nécessaire, à défaut de cour mondiale des droits de l'homme, pour résoudre les conflits entre justice pénale militaire et droits de l'homme.

Mais le risque d'incohérence subsiste au niveau mondial. Aussi, pour appliquer une véritable éthique mondiale, est-il nécessaire d'ordonner les interactions entre les niveaux.

2.2. Ordonner les interactions

Du niveau national au niveau international, la relation semble hiérarchique et verticale: la primauté de la justice internationale a été inscrite dans le statut des premiers tribunaux pénaux internationaux. Mais la résistance des Etats a conduit les rédacteurs de la convention de Rome à transformer la primauté en complémentarité: c'est seulement si un Etat n'a pas la volonté, ou est dans l'incapacité de mener à bien l'enquête ou les poursuites, que la Cour pénale internationale sera compétente. La formule a progressivement été étendue aux tribunaux pénaux internationaux sur l'initiative des juges eux-mêmes.

Cette initiative donne à penser que la complémentarité n'a pas seulement l'avantage politique de préserver la souveraineté nationale. Outre l'utilité pratique d'éviter l'engorgement des juridictions internationales, peut-être faut-il lui reconnaître aussi une signification éthique si la complémentarité, accompagnée de mesures d'harmonisation, devait à terme favoriser l'émergence d'une communauté judiciaire transculturelle. Qu'il s'agisse des tribunaux pénaux internationaux ou de la Cour pénale internationale, procureurs et juges contribuent à des programmes de formation et au transfert de documents et de savoir-faire, les procureurs internationaux envoyant des observateurs dans les Etats pour

contrôler la loyauté de la procédure et la qualité des conditions de détention qui leur permettront d'apprécier la capacité de juger l'affaire.

Mais dans des pays dévastés dont tout l'appareil juridique et judiciaire est à reconstruire, une harmonisation des pratiques pénales pour respecter à la fois la diversité culturelle et le droit international (notamment le droit international des droits de l'homme) semble s'imposer. *D'où le deuxième type d'interactions, entre droit pénal et droits de l'homme*. Leur relation a toujours été tendue: les droits de l'homme sont-ils le bouclier ou l'épée du droit pénal; à l'inverse le droit pénal peut-il apparaître comme bouclier ou épée des droits de l'homme? Dans les pratiques, le droit pénal est à la fois encadré, c'est-à-dire limité, et légitimé, voire étendu par les droits de l'homme dont sont criminalisées les violations[3]. Mais la tension est encore accrue dans la perspective des interventions militaires internationales, où l'on observe un écart croissant entre les normes pénales et les instruments de protection des droits de l'homme. Nous en avons rencontré plusieurs exemples, dont le camp d'Abu Graïb ou les vols secrets de la CIA. En théorie, l'article 21§3 du statut de la Cour pénale internationale, qui impose la compatibilité du droit pénal avec "les droits de l'homme internationalement reconnus", renvoie sans doute, à tout un ensemble de textes et de jurisprudence (rôle de la jurisprudence régionale, et notamment les récents arrêts de la Cour interaméricaine des droits de l'homme). A défaut de Cour mondiale des droits de l'homme, c'est à la Cour pénale internationale, ou plus largement à la Cour internationale de Justice (CIJ) qu'il reviendra sans doute d'innover dans l'interprétation de l'article 21. Il s'agira soit de reconnaître aux dispositifs internationaux de protection des droits de l'homme, comme l'a suggéré le TPIY à propos de la torture, la valeur de jus cogens; soit de considérer la jurisprudence des cours régionales évoquées ci-dessus au titre du droit coutumier. Ne le fait-elle pas déjà en partie, comme on le voit dans l'arrêt de la CIJ du 26 février 2007 qui réaffirme la valeur de jus cogens de l'interdiction du génocide? Si de telles interprétations peuvent contribuer à l'application d'une éthique universelle, elles n'obéissent à aucune des conceptions traditionnelles qui réduisent l'ordre international à deux modèles: dualisme (souverainiste) et monisme (universaliste) et semblent inviter à diversifier les modèles de référence afin de lever les incertitudes sur la structure de ce droit pénal mondial en formation. Ce qui conduit à la troisième et dernière critique.

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[3] Voir Les droits de l'homme bouclier ou épée du droit pénal?, dir. M. VAN DE KERCHOVE, Facultés universitaires de Saint Louis, 2007.

3. Incertitudes quant à la structure d'un ordre pénal mondial

Les deux modèles classiques (souverainisme dualiste et universalisme moniste) se sont révélés inadaptés. La solution pourrait s'inspirer de la recherche qui nous a menés, entre 2004 et 2007, sur Les chemins de l'harmonisation pénale (de Paris à Tolède, puis à Freiburg et Bâle, et enfin à Naples):[4] elle consiste à dépasser les 2 modèles traditionnels apparemment inadaptés pour explorer trois nouveaux modèles que notre recherche a mis en lumière.

3.1. Deux modèles traditionnels inadaptés

Le modèle souverainiste (dualiste) est contraire à l'idée même d'éthique mondiale, ou d'éthique universelle. Mais le modèle universaliste (moniste: pyramide à l'échelle mondiale) est également critiqué, notamment quand il est refusé par les Etats les plus puissants pour eux-mêmes (USA), mais utilisé par ces mêmes Etats comme instrument pour dominer les autres. Rejoignant la crainte déjà exprimée par Emmanuel Kant d'un universalisme de type despotique, de nombreux auteurs identifient aujourd'hui universalisme au risque d'hégémonie, d'impérialisme, voire de néocolonialisme, conduisant ainsi non seulement à la résistance de nombreux Etats, mais aussi de la société civile. Même pour la Cour pénale internationale, le modèle universaliste a été écarté dans sa conception (cf. complémentarité). En somme pour imaginer comment le droit pénal pourrait fonder une éthique mondiale, on a besoin de dépasser cette opposition binaire (intégration/non intégration) et concevoir une structure diversifiée incluant trois nouveaux modèles.

3.2. Trois nouveaux modèles

D'abord un nouveau modèle moniste mais *à dominante libérale*, ou *ultra-libérale*– qui remplace la pyramide par le réseau, l'intégration étant supposée se faire de façon spontanée (autopoïèse), par le jeu d'interactions horizontales et par autorégulation – apparaît lui aussi inadapté. Même en droit économique, où certains rêvent d'un marché autorégulé, on constate une tendance à la "verticalisation" (harmonisation) et à la force contraignante d'un droit national qui assure un relais et participe au

[4] Les chemins de l'harmonisation pénale, dir. M. DELMAS-MARTY, M. PIETH et U. SIEBER, à paraître, Paris, SLC 2007.

contrôle. *A fortiori* ce modèle semble exclu pour un droit pénal mondial qui aurait vocation à s'appliquer dans les interventions militaires internationales.

Nous rejoignons ainsi le constat de notre groupe de recherche selon lequel les modèles purs ou parfaits ne fonctionnent pas, ou peu, dans le monde réel. La plupart des exemples étudiés sont marqués par des processus mixtes. Hypercomplexes – car ils sont à la fois verticaux et horizontaux (pyramide et réseau), combinant plusieurs paradigmes du crime et les appliquant à divers niveaux – ces processus dessinent encore deux autres modèles.

Ni monistes ni dualistes, on peut les nommer *pluralistes* car ils combinent universalisme du droit international et relativisme qui tient à la diversité des droits nationaux. Ils préservent en effet dans l'organisation de la justice militaire une sorte de "marge nationale d'appréciation" qui permet de réduire les contradictions d'un paradigme à l'autre (incohérences) et les discontinuités d'un niveau à l'autre (incomplétude, donc insécurité juridique). On peut y retrouver les deux variantes du pluralisme: la variante *légaliste* qui tente de réduire l'insécurité juridique, en réintroduisant de la rigueur et de la prévisibilité (on pense, par ex., aux efforts pour préciser le cadre pénal des missions militaires à l'étranger et mieux définir les règles d'engagement (ROE) ou le statut des forces d'intervention (SOFA); et la variante *humaniste* qui tente de corriger les incohérences par le jeu d'interprétations croisées entre le droit pénal et les droits de l'homme (on pense ici, par *ex*., au rôle des cours européenne et interaméricaine). Il s'agit donc pour nous de retrouver ici l'esprit qui inspirait les fondateurs de la Société internationale de Défense Sociale – les Présidents Marc Ancel et Simone Rozès, ainsi que le Secrétaire général, Adolfo Beria di Argentine – qui définissaient la société comme un "mouvement de politique criminelle humaniste". Cet esprit anime plus que jamais leurs successeurs – le Président Luis Arroyo et le Secrétaire général, Edmondo Bruti Liberati –, qui poursuivent inlassablement la tâche entreprise. Cet esprit est plus que jamais nécessaire si nous voulons construire une future communauté mondiale qui ne soit pas seulement une communauté économique, ni même une communauté interétatique, mais une communauté éthique, à la fois universelle et pluraliste.

Conclusions du XVème Congres Internationale de la SIDS

En attendant la publication des Actes du Congrès, après la fin des travaux et se basant sur les rapports, les débats et les diverses interventions ainsi que sur un important rapport de synthèse effectué par un comité scientifique *ad hoc*, un groupe de travail – composé de Luis Arroyo Zapatero, Stefano Manacorda, Manuel Maroto, Adàn Nieto, Daniel Scheunemann et Joachim Vogel – a elaboré les dix conclusions suivantes, qui contribueront à enrichir l'histoire des Congrès de la SIDS:

Première. Les droits de l'homme doivent être respectés en toute situation de conflit armé. Dans ce but, leur application effective doit être assurée. Cela implique l' application extraterritoriale dans les interventions réalisées dans des pays tiers, au moyen d'un contrôle effectif de la part des tribunaux régionaux de protection des droits de l'homme. L'application effective des droits de l'homme exige aussi leur application dans les missions dirigées par les organisations internationales. Cet objectif peut être atteint au moyen de l'adhésion expresse des organisations aux Conventions internationales, en responsabilisant les membres nationaux quant au respect des droits de l'homme dans les conflits armés où ces organisations interviennent.

Deuxième. La collaboration pénale ou policière avec un système pénal qui ne garantit pas le respect des droits de l'homme doit être considérée une violation des droits des sujets affectés. En aucun cas on ne doit collaborer avec des procédures qui imposent la peine capitale.

Troisième. Le crime d'agression doit avoir une définition plus ample que celle découlant du droit consuétudinaire dérivé de Nuremberg et Tokyo, sans faire de ce délit une norme pénale qui dépende des décisions du Conseil de Sécurité des Nations Unies.

Quatrième. Les délits contre les personnes et les biens protégés en cas de conflit armé doivent s'étendre aux comportements similaires perpétrés dans le cadre des missions de paix et de la guerre contre le terrorisme.

Cinquième Il est urgent de mettre en oeuvre une convention internationale établissant la responsabilité pénale des membres de l'ONU pour les délits perpétrés dans le cadre des missions de maintien de la paix, d'une étendue

similaire à celle des membres des contingents nationaux.

Sixième. Il faut garantir l'efficacité du droit pénal afin de punir la fraude et la corruption perpétrées par les entreprises obtenant des marchés de fourniture d'armement ou d'exécution de travaux publics dans les zones de conflits. L'intervention du droit pénal doit être accompagnée de l'amélioration de la transparence de ce type de marchés et de l'établissement de rigoureuses procédures de contrôle.

Septième. La spécificité du droit pénal militaire réside dans la protection des fonctions que les Constitutions démocratiques attribuent aux forces armées et, en particulier, le respect des principes et des normes visant à humaniser et à atténuer la violence des conflits armés. La juridiction militaire doit bénéficier d'une indépendance identique à la juridiction civile et la procédure pénale militaire doit intégrer les principes d'un procès juste. Les ordres juridiques restreignant le droit pénal militaire aux temps de guerre ou disposant d'un code pénal spécifique à ces périodes doivent l'appliquer également aux délits perpétrés dans le cadre des missions de maintien de la paix.

Huitième. La collaboration entre les institutions représente le modèle idéal pour résoudre les problèmes d'interlégalité découlant de la présence des troupes d'un pays sur le territoire d'un autre pays. Les délits perpétrés par des militaires ou des civils intégrés dans une mission de paix dans l'État d'accueil devraient ainsi être jugés par des tribunaux mixtes formés de juges de cet État et de celui qui envoie les troupes. Également, et s'il y a lieu, la collaboration avec les autorités nationales est le système le plus adéquat pour réaliser les fonctions policières de maintien de l'ordre public et d'enquête sur les faits délictueux.

Neuvième. Les Cours pénales internationales tendent à attribuer aux règles d'engagement (ROE) une efficacité normative immédiate, que ce soit dans le cadre des causes de justification (légitime défense, exercice d'un droit, etc.) ou comme éléments de types pénaux renvoyant à des éléments normatifs étrangers à la loi pénale. Cette efficacité des ROE, entraînant normalement comme effet la limitation de la responsabilité pénale des forces intervenant dans les conflits armés, tranche sur le manque de légitimité et de transparence de leur procès d'élaboration, dominé par les États-Majors. L'intégration des règles d'engagement (ROE), nationales ou internationales, par l'ordre juridique pénal doit être subordonnée *ex ante* à l'existence d'un contrôle parlementaire, au moyen d'un comité spécial, et

ex post à un contrôle judiciaire effectif, concernant la compatibilité des ces dispositions non seulement avec le droit interne de chaque pays mais aussi avec le droit international humanitaire.

Dixième. Pour augmenter l'efficacité de la loi et des droits de l'homme dans les situations de conflit, il faut encourager l'autorégulation des sujets publics et privés impliqués. Il serait, ainsi, souhaitable d'élaborer un code de conduite type établissant les normes de comportement auxquelles doivent se soumettre les soldats d'un État lorsqu'ils assument des fonctions policières. Les entreprises et les ONG participant dans des missions de maintien de la paix devraient également mettre en oeuvre des systèmes d'autorégulation spécifiques (compliance programs) afin de respecter les droits de l'homme, le droit du travail et éviter la fraude et la corruption.

Conclusions of the fifteenth International Congress of the ISSD

Before the publication of the Congress proceedings at the end of the Congress, a working group – including Luis Arroyo Zapatero, Stefano Manacorda, Manuel Maroto, Adàn Nieto, Daniel Scheunemann and Joachim Vogel – drafted, on the basis of the presentations, debates and other interventions, as well as on an important summary report prepared by an ad hoc scientific committee, the following ten conclusions which will further enrich the history of ISSD Congresses:

First. *Human Rights should be respected in any situation of armed conflict, that is to say that their effective application must be ensured. This also implies ensuring their extraterritorial application in operations carried out in third-party countries, by effectively controlling the protection of human rights by regional courts. The validity of human rights also requires their application in missions that are led by international organisations. This can be achieved through the express support of international organisations to international conventions, making national components responsible for respecting human rights during armed conflicts where they are involved.*

Second. *Judicial or police collaboration with a criminal system that does not guarantee respect for human rights should be considered as a violation of human rights. Under no circumstances should there be collaboration*

with proceedings that may impose the death penalty.

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

Fourth. *The notion of crimes against individuals and assets that are protected in the event of armed conflict should be extended to cover similar conduct carried out during peace-keeping missions and the fight against terrorism.*

Fifth. *It is urgent to draw up an international convention establishing the criminal responsibility of UN members for crimes committed during peace-keeping missions; this responsibility should also include the members of national contingents.*

Sixth. *The efficiency of criminal law should be guaranteed in order to punish fraud and corruption carried out by companies obtaining contracts to supply arms or that are connected with the execution of public works in areas of conflicts. The intervention of criminal law should be accompanied by as much transparency as possible for these types of contracts and by the establishment of rigorous auditing procedures.*

Seventh. *The specificity of military criminal law lies in the protection of the functions that democratic constitutions guarantee for the armed forces and, in particular, in procuring respect for the principles and norms related to humanising and making armed conflicts less violent. The military jurisdiction should enjoy a level of independence from civil jurisdiction and the criminal military procedure should accommodate the principles of a just process. The legislation which restricts criminal military law in times of war and which provides a criminal code specific for times of war should also apply to crimes committed during peace-keeping missions.*

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

Ninth. *The national criminal courts normally give immediate normative effectiveness to the ROE, whether as defence (legitimate defence, exercise of a right etc.), or as material elements of crimes with normative characteristics different from criminal law. This efficiency of the ROE, which normally has the criminal responsibility of the armed forces as an effective limit, is in contrast to the scant legitimacy and transparency of its process of development, dominated by larger states. The integration of the ROE, whether national or international, into the criminal justice system, should make itself subordinate ex ante to the existence of a parliamentary control, through the example of a special commission, and ex post to an effective judicial control related to the compatibility of these laws, not only with the internal of each country, but also with the IHL.*

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

Conclusiones del XV Congreso Internacional de da Asociación Internacional de Defensa Social

Antes de la publicación de los resultados del Congreso, al final del evento un grupo de trabajo – que incluía a Luis Arroyo Zapatero, Stefano Manacorda, Manuel Maroto, Adán Nieto, Daniel Scheunemann y Joachim Vogel – elaboró, basándose en las ponencias, debates y otras intervenciones, así como en un importante informe elaborado por un comité científico ad hoc, las siguientes diez conclusiones que enriquecerán aun más la historia de los Congresos de la SIDS:

Primera. Los derechos humanos deben ser respetados en cualquier situación de conflicto armado. Para ello debe asegurarse su aplicación efectiva. Ello implica asegurar su aplicación extraterritorial en las intervenciones realizadas en terceros países, mediante un control efectivo

por parte de los tribunales regionales de protección de los derechos humanos. La vigencia efectiva de los Derechos humanos requiere también su aplicación en aquellas misiones dirigidas por organizaciones internacionales. Ello puede lograrse bien mediante la adhesión expresa de las organizaciones a los Convenios internacionales, bien responsabilizando a los componentes nacionales del respeto a los derechos humanos en los conflictos armados en los que intervengan.

Segunda. La colaboración penal o policial con un sistema penal que no garantice el respeto de los derechos humanos debe considerarse una violación de los derechos humanos previsiblemente afectados. En ningún caso debe colaborarse con procedimientos en los que pueda resultar impuesta la pena de muerte.

Tercera. El crimen de agresión debe tener una definición más amplia que la que resulta del derecho consetudinario procedente de Nuremberg y Tokio, sin convertir este delito en una norma penal dependiente de las decisiones del Consejo de Seguridad de Naciones Unidas.

Cuarta. Los delitos contra las personas y bienes protegidos en caso de conflicto armado deben extenderse a las conductas similares realizadas en misiones de paz y la guerra contra el terrorismo.

Quinta. Resulta urgente la elaboración de una convención internacional que establezca la responsabilidad penal de los miembros de Naciones Unidas por los delitos cometidos en misiones de mantenimiento de la paz, con una extensión similar a la de los miembros de los contingentes nacionales.

Sexta. Debe garantizarse la eficacia del derecho penal con el fin de castgar el fraude y la corrupción realizada por empresas que obtienen contratos para el suministro de armas o tendentes a la ejecución de obras públicas en zonas de conflictos. La intervención del derecho penal debe ir acompañada de la mejora de la transparencia de este tipo de contratos y del establecimiento deberes rigurosos de auditoria.

Séptima. La especificidad del derecho penal militar radica en la protección de las funciones que las constituciones democráticas asignan a las fuerzas armadas y, en especial, en procurar el respeto de los principios y normas tendentes a humanizar y hacer menos violentos los conflictos bélicos. La jurisdicción militar debe gozar de un grado de independencia idéntico a la jurisdicción civil y el proceso penal militar debe acomodarse a los

principios del proceso justo. Los ordenamientos que restrinjan el derecho penal militar a los tiempos de guerra o que dispongan de un Código penal específico para tiempos de guerra deben aplicarlo también a los delitos cometidos durante las misiones de mantenimiento de la paz.

Octava. La colaboración entre instituciones representa el modelo ideal para resolver los problemas de interlegalidad derivados de la presencia de tropas de un país en otro. De este modo los delitos cometidos por militares o civiles integrantes de una misión de paz en el estado de acogida deberían juzgarse por tribunales mixtos compuestos por jueces del Estado de acogida y que envía las tropas. Igualmente, y allí donde resulte posible, la colaboración con las autoridades nacionales resulta el sistema de organización más adecuado para realizar las funciones policiales de mantenimiento de orden público y de investigación de hechos delicitivos.

Novena. Los tribunales penales nacionales suelen dar eficacia normativa inmediata a las reglas de enfrentamiento (ROE), ya sea como concreciones de causas de justificación (legítima defensa, ejercicio de un derecho etc), ya sea como parte integrantes de aquellos tipos penales que remiten a elementos normativos ajenos a la ley penal. Esta eficacia de las ROE, que tiene normalmente como efecto limitar la responsabilidad penal de las fuerzas de combate, contrasta con la escasa legitimidad y transparencia de su proceso de elaboración, dominado por los Estados Mayores. La integración de las reglas de enfretamiento, nacionales o internacionales, por el ordenamiento jurídico penal, debiera subordinarse ex ante a la existencia de un control parlamentario, a través por ejemplo de una comisión especial, y ex post a un control judicial efectivo, relativo a la compatibilidad de estas disposiciones no sólo con el derecho inter-no de cada país, sino con el derecho internacional humanitario.

Décima. Para incrementar la eficacia de la ley y los derechos humanos en las situaciones de conflicto debe fomentarse la autorregulación de los sujetos, públicos y privados implicados, implicados. De este modo sería conveniente la elaboración de un código de conducta tipo que estableciese las normas de conducta a que deben some-terse los soldados de un país cuando realizan funciones de policía. Igualmente, las empresas y ONG que participen en misiones de mantenimiento de la paz deben confeccionar sistemas de autorregulación específicos (compliance programs) a fin de respetar los derechos humanos, laborales y prevenir el fraude y la corrupción.

Buscando una justicia penal militar más modernizada

Casi doscientos expertos de 15 nacionalidades distintas participan en Toledo en un Congreso que pretende realizar exportaciones cientiicas para lograr un marco global de derecho penal aplicable a las intervenciones militares en el exterior. En la inauguración del Congreso, a la que no pudo asistir el ministro de Defensa, José Antonio Alonso, se fijó como objetico avanzar en la modernización de la justicia penal militar (ABC, 21.9.2007, p. 58).

ISSD Resolution on
A Moratorium on the death penalty

1. In 2007, the international movement for the abolition of the death penalty made significant progress when a proposal for a resolution regarding a moratorium on the death penalty was submitted to the United Nations.

The death penalty is still applied in many countries around the world including the USA and China, the biggest in terms of size and political influence, which are permanent members of the United Nations of the Security Council.

2. However, the historic trend towards the progressive reduction of the death penalty in the world is now clear and irreversible: the number of abolitionist countries, *de jure* or *de facto*, has increased to 130. Even in those countries who have most often resorted to capital punishment, we can observe a tendency to limit the number of executions. Finally, in the countries of the European Union, the death penalty is only a remote memory and is often explicitly banned by their Constitutions.

3. The debate on the death penalty has traditionally focused on ethical and utilitarian arguments. However, it is today undeniable that such a penalty is equivalent to a negation of our modern perception of human rights which is based on the respect of human life and human dignity.

Public opinion is also becoming more sensitive to the issue; the spectacular presentation of cases involving the death penalty by the media and the subsequent offence to human dignity has created a deep sense of repulsion around the world.

4. We should also not forget that the Statute of the International Criminal Court formally sanctions the refusal of the international community to punish even the most serious war crimes and crimes against humanity with death. 50 years after the Nuremberg trials this constitutes a major step towards the humanization of international criminal law.

5. On September 28th, at the initiative of Italy and Portugal, a meeting

of the Ministers of Foreign Affairs of the 95 countries that have signed the request for a moratorium, will be held at the UN headquarters.

In this context and at the end of its 15th International Congress (Toledo, 20-22 September 2007), the General Assembly of the Société internationale de défense sociale, a movement for the promotion of a humane criminal policy which also draws inspiration from the teachings of of Cesare Beccaria, wishes to express its firm and unanimous support of the proposal for a moratorium on the death penalty, as a first step towards the complete abolition of capital punishment worldwide.

ISSD Resolution on Mercenary activities: a new threat to the peace and security of mankind

1. Mercenary activities and the phenomenon of delegating military activities to private security companies have been increasing significantly on all five continents. The *Working Group on the use of mercenarie as a means of violating human rights and impeding the exercise of the rights of peoples to self-determination*[1], the United Nations General Assembly as well as many civil society organizations have condemned the impunity with which human rights violations are treated as well as the lack of an effective application of national and international regulations of military law.

2. The particular cruelty of situations such as the recruitment of minors and new problems regarding, for instance, the fraudulent use of subsidiaries which are legally established in one country, work out of another country and recruit personnel from a third, greatly preoccupy the International Society of Social Defence.

3. Therefore, in our capacity as a scientific organization promoting humane criminal policies, we wish to join the United Nations and other international organizations in stressing the urgent need to ratify the *International Convention against the Recruitment, Use, Financing and Training of Mercenaries*, drafted in 1989 and ratified by 28 countries, the need for a full revision and reinforcement of the said Convention as well as

[1] Promoted by the Office of the High Commissioner of the United Nations for Human Rights, see *http://www.ohchr.org/spanish/issues/mercenaries/wgissues.htm*

the need for a greater commitment by the international community to combat this phenomenon on a world level.

San Pedro Martir, Toledo, 22 September 2007.

LA MEDAILLE BECCARIA 2006
THE BECCARIA MEDAL 2006

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Juan Guzmán: "En el borde del mundo"

por
HERNÁN HORMAZÁBAL MALARÉE*
Catedrático de Derecho Penal – Gerona (14.10.2005)

En el proceso de transición a la democracia en Chile el profesor Juan Guzmán Tapia, hasta hace poco tiempo Magistrato de la Corte de Apelaciones de Santiago de Chile, ha sido y es una persona que se ha destacado specialmente por su compromiso con los derechos humanos. Hace un par de meses muy a su pesar, tuvo que jubilar por las presiones que recibió por parte de Magistrados de la cúpula judicial chilena. No obstante hoy, del Poder Judcial chileno y desde su cargo de Decano de la Facultad de Derecho de la Universidad Central de Santiago, dedica todos sus esfuerzos a la lucha por establecimiento de una justicia penal universal que en Chile incluso en este momento es especialmente difficil por la fuerza que aún tienen sectores vinculados a la dictadura de Pinochet.

El profesor Guzmán Tapia cuando era titular de la Corte de Apelaciones de Santiago, fue designado previo sorteo para instruir un proceso criminal por crímenes cometidos durante la dictadura de Pinochet. La legislación chilena establece que cuando aparecen implicados en una causa criminal personas que gozan de fuero, en este caso aparecía directamente implicado el General Pinochet ex Presidente de la Republica y posteriormente Senador Vitalicio, la causa tiene que ser instruida por un Magistrado de un Tribunal Superior que actúa como órgano unipersonal. La causa se inició por una querella, a la cual se sumaron muchas otras, que acusaban directamente a Pinochet y a sus colaboradores de haber participado en delitos de homicidio, secuestro y torturas, entre otros ilícitos, utilizando los aparatos del Estado, en contra de personas que el régimen estimaban peligrosas para su estabilidad.

Esta no había sido la primera vez que se presentaban denuncias de este

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* Texte publié dans les *Cahiers de défense sociale* 2005, p. 173.

tipo. Prácticamente durante toda la dictadura fueron presentándose y sistemáticamente eran archivadas por los Jueces y Magistrados que estaban sometidos a un férreo control por parte de la Corte Suprema chilena, cuyos integrantes apoyaron abiertamente el golpe de Estado contra el Gobierno de Salvador Allende. El Magistrado Juan Guzmán, sin embargo, comenzó a instruir la causa acuciosamente. Visitó los lugares donde habían ocurrido los hechos, citó a las víctimas, interrogó a los querellados comenzando por los de menor jerarquia y ordenó diligencias que lo llevaron a descubrir numerosos cementerios clandestinos. Esta actividad judicial desconocida hasta ese momento en Chile, empezó a alarmar por supuesto a los militares, al Gobierno que no se sentía lo suficientemente fuerte para resistir una reacción de éstos, a la prensa adicta a Pinochet, pero también a muchos, especialmente a los de mayor jerarquía, de los Magistrados chilenos. Así fue como con firmeza y sin aceptar presiones pudo sacar a la luz cientos de crímenes y sometió a proceso a numerosos militares muy cercanos a Pinochet, hasta que finalmente cuando ya tuvo la suficiente información, decidió someter a interrogatorio al propio Pinochet y más tarde encausarlo con cargos tan graves como asesinatos, secuentros y torturas. En total tuvo en sus manos 99 causas que implicaban directamente a los más altos cargos de la dictadura militar.

Como él lo relata en sus memorias recientemente publicadas y que tituló "En el borde del mundo", las presiones y hasta amenazas que recibió fueron múltiples. No sólo de sus compañeros del Poder Judicial, sino también de su propio entorno social y sobre todo de la prensa que con el objeto de presionarlo se estableció de forma permanente las 24 horas del día en la puerta de su casa. La presión llegó a extremos intolerables no sólo para él, sino también para su mujer y sus hijas.

Este año se vio obligado a jubilar anticipadamente. Su firmeza ante las presiones, su coraje para enfrentar las amenazas, su inquebrantable fe en la fuerza de la justicia para la protección de los derechos humanos reflejadas en hechos protagonizados muy a su pesar por él forman parte de la historia judicial chilena. Lejos de sentirse decepcionado por haber tenido que abandonar una carrera que en circunstancias normales lo hubiera llevado a seguramente al Tribunal de Casación chileno, la Corte Suprema, sin ningún resentimiento en sus memorias lanza un mensaje de optimismo cuando señala "...en Chile, donde la justicia relacionada con la violación de los derechos humanos no actuó durante tanto tiempo, hoy se han dictado catorce sentencias más por crímenes de secuestro o desaparición forzada de personas durante el período que cubría el decreto-ley de amnistía de 1978. Esas sentencias rechazan la amnistía, como también la prescripción, puesto que la calidad permanente de aquellos secuestros los convierte en crímenes

inamnistiables e imprescriptibles. Existen numerosas causas por las que se procesa a agentes estatales y civiles, y una treintena de jueces está a cargo de los procesos. Asimismo, la Corte Suprema, rechazando un recurso de casación en el fondo, confirmó una sentencia dictada por el magistrado Alejandro Solís Muñoz, sentando finalmente a doctrina del secuestro de personas desaparecidas por obra de agentes estatales y otros cuando los cuerpos no son hallados o las personas no aparecen, consagrando así la calidad de inamnistiable e imprescreptible de esos crímenes".

Discours de Juan Guzmàn Tapia lors de la remise de la médaille Beccaria à Tolède, le 22 septembre 2008

Muchas gracias a todos, a todas ustedes quiete me honran hoy con la medalla Beccaria en memoria al gran filósofo, literato, jurista y economista italiano que humanizó la ciencia del derecho penal y por ende de la humanidad misma. Ensu introducción del libro de Cesare Beccaria, *De los delitos y de las penas*, Juan Antonio del Vall resume las ideas del sabio italiano quien establece: "Sólo las leyes pueden determinar las penas con respecto de los delitos y no la voluta del juez. La atrocidad de la penas es inútil y perniciosa por lo tanto las penas deben humanizarse al máximo. La tortura debe abolirse pues en muchos casos – dice – sólo sirve para que se condene al débil e inocente y se absuelva al delicuente fuerte. El fundamento de las penas no es atormentar ne afligir sino a impedir al reo causar nuevos daños e impedir que los demás cometan delitos. No es la crueldad de las penas el mayor freno de los delitos sino la infalibilidad de las mismas. Las penas deban ser proporcionadas a los delitos, las penas deben ser las mismas para el primero como para el último d los ciudadanos, para los nobles como para los vassalos. La pena de muerte no es útil ni necesaria, es sí en cambio útil fijar plazos breves pero suficientes para la presentación de las pruebas de la defensa del reo y para la abdicación de la pena", continua el professor del Vall diciendo, resumiendo el pensamiento de Beccaria, "perfeccionar la educación constituye el medio más seguro para evitar los delitos". Antes de que se hablara de Derechos Humanos, Cesare Bonesana marqués de Beccaria, enciende la antorcha profunda de la humanidad como precursor de estos principios y de estos derechos que doscientos años más tarde están contenidos en los Tratados, Convenciones Internacionales y en las Constituiones de las naciones más avanzadas. Para su creación y salvaguarda transforma, en 1764, la mentalidad represiva y retributiva del derecho penal en una especialmente preventiva.

Combate la crueldad y la arbitrariedad para lograr el triunfo del imperio del derecho y reemplaza la severidad de las sanciones por la necesidad de

que estas sean reales y que se apliquen en definitiva.

Así Beccaria, hace dos cientos cincuenta años va formulando las normas del debido proceso, el principio de legalidad dentro del cual va inserto el de tipicidad de los delitos y especificación de las penas y el de la celeridad procesual. Vislumbra también cuáles son los derechos de los imputados y de las partes y aboga por la supresión de la totura y de la pena de muerte, lo que se esta logrando en todos, en casi todos los rincones del mundo. Todos estos principios se incorporan en la normativa internacional sólo despues de la Segunda Guerra Mundial, como la saben ustedes mil veces más que yo, puesto que han estado luchando permanentemente por ellos, y si no fuera así el mundo ya estaría entrando en una de sus fases terminales. Gracias a estos principios, derechos y obligaciones la Comunidad Internacional vigila el respecto de los Derechos Humanos y previene los excesos y, obviamente, los crímenes. Sin embargo, debido a la fragilidad de muchas democracias y la impervisión de sus sistemas, se perpetran aún los mayores crímenes por parte de personeros a cargo de algunos países, pues se consideran impunes. La Comunidad Internacional empero, contempla hoy los mecanismos para establecer la igualdad de la ley penal y el término de la impunidad. Una justicia universal plena se deberá aplicar un día y tenderá al término finalmente, de la impunidad. Muchos jueces la han aplicado, ejemplo de ello son el juez balthasar Garzón y muchos otros fiscales españoles, suizos, italianos, y si no mi equivoco, alemanes y belgas, disculpándome las omisiones por no poder decirlos todos. Debido a esto, pienso yo, los potenciales dictadores o eventuales golpistas deberán ser más prudentes en el futuro ya que saben lo que les puede pasar.

Pero, la solidaridad debe desempeñar su rol más fundamental adoptando el principio de Beccaria de que la educación puede más que las penas, el ejemplo lo deberán dar los países más poderosos en relación a los más débiles y no hacer lo contrario, y los más poderosos en favor de los más débiles. La antorcha que se encendió en el corazón del filósofo y jurista italiano sólo puede revitalizarse en todos los hombres y en todas las mujeres para acrecentar la solidaridad indispensable que tiende a una justicia social que permite a las personas de desarrollarse plenamente en un mundo en el cual perdure, sin amenazas, sin privaciones, en plena libertad creativa, nuestra especie y todas las demás.

Muchas gracias.

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Les travaux porteront sur l'une des matières abordées lors du Congrès ou en rapport avec le Droit pénal international ou le Droit humanitaire.

Les travaux devront être individuels, originaux et inédits, et ne dépasseront pas les 8000 mots. Ils devront respecter les normes académiques en ce qui concerne le style et la forme de présentation. Les travaux seront rédigés en français, en anglais ou en espagnol. En vue de leur sélection, ils seront aussi acceptés en portugais, en italien ou en allemand.

Les travaux devront être envoyés accompagnés:

du nom et prénom de l'auteur et centre de recherche ou équivalent où il exerce habituellement son activité.

Curriculum vitae abrégé.

Domicile habituel, téléphone et courriel de contact.

Les travaux devront être envoyés avant le 15 août 2007 au courriel suivant: *congresosociete@uclm.es*

Les travaux seront évalués par un Jury composé de spécialistes en droit pénal et en droit international.

Le 3 septembre le Jury publiera sur la page web de la SIDS, *www.defensesociale.org*, la liste des travaux sélectionnés pour être présentés oralement au cours du Congrès, ainsi que celle des travaux qui auront été admis pour la publication. Pour la présentation orale et pour la publication les auteurs doivent utiliser l'une des trois langues officielles du Congrès. L'organisation du Congrès prendra en charge les frais de logement et d'inscription des participants dont les travaux auront été sélectionnés.

Le prix Cesare Beccaria pour jeunes chercheurs est doté de 1000 euros. Trois mentions d'honneur seront aussi descernées. Le prix sera publié le samedi 22 septembre.

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KARSAI KRISZTINA
The hidden primer jurisdiction of the ICC

Accesit 1

FLORÉNCIO FIDALGO SÓNIA MARIZA
Os crimes sexuais no Direito International Penal

Accesit 2

SCHÜLER ANDREAS
Can the International Criminal Court prosecute military personnel of United Nations peace support operations?

Accesit 3

RODRIGUEZ ARIAS MIGUEL ANGEL
De Clausewitz a Enron: La guera como prolongación del mercado por otros mediosy el regreso del Cargo I de Nuremberg

Autres rapports choisis / *Other selected papers*

AIRES DE SOUSA SUSANA
Sobre o bem jurídico penal protegido nos crimenes contra a humanidade

BENITEZ MANDIZABÁBAL ARKEL
Ecuaciones simbólicas y reales de la víctima en la expansión del Derecho penal del enemigo y detectables en el Derecho penal internacional: el caso de los soldados guatemantecos ejecutados en la República democrática del Congo y su exclusión de la función protectiva

BIA MARIA TERESA
La cooperazione europea di polizia e giustizia in materia penale e il crimine di genocidio

BRANDAO NUNO
A obediência desculpante no direito penal militar português e comparado

CRUCIANI ANDREA
Applicable law in peace support operations

FARIA CORACINI CELSO EDUARDO
Targeted killing of suspected terrorists during armed conflicts: compatibility with the rights to life and to a due process?

HOFFMAN TAMAS
Individual criminal responsibility for crimes committed in non-international armed conflicts – the Hungarian jurisprudence on the 1956 volley cases

MELONI CHANTAL
Superior responsibility for acts of torture committed by subordinates under international criminal law – the case of U.S. Abuse against Iraqui prisoners

OEHMICHEN ANNA / SAUX SOLEDAD
La guera y la paz: la situación del terrorismo internacional

RODRIGUEZ MORALES ALEJANDRO
Racionalización de la intervención penal vs. punitivismo. De Livorno a Guantánamo

SPRICIGO BIANCAMARIA
Democracies dealing with suspected terrorists

TAKEMURA HITOMI
A critical analysis of critical complementarity

ZAPICO BARBEITO MONICA
El crimen de agresión y la Corte penal internacional

Nueva modernidad de las corporaciones y protección internacionál de los derechos umanos

por
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Veo acercándose en un futuro próximo una crisis que me intranquiliza y que me hace dudar de la seguridad de mi país. Como resultado de la guerra, las empresas han sido entronizadas y se avecina una era de gran corrupción, en la que el poder económico del país intentará por todos los medios prolongar su reinado estimulando los prejuicios de la gente, hasta que todo esté en pocas manos y se destruya la República. Siento en estos momentos más que nunca ansiedad por la seguridad de mi país, incluso más que en el período de guerra. Por Dios espero que mis sospechas nunca se confirmen.
Abraham Lincoln
21 de noviembre de 1864,
Carta al Coronel William F. Elkins.

* Texto revisado del estudio que con el título "De Clausewitz a Enron: La guerra como prolongación *del mercado* por otros medios y el regreso del Cargo I de Nuremberg" fue galardonado con *accesit* al *Premio Cesare Beccaria para Jóvenes Investigadores* el pasado 22 de Septiembre de 2007. El autor quiere agradecer a los profesores Rosario De Vicente Martínez y Luis Arroyo Zapatero su dirección y apoyo a lo largo del desarrollo de toda esta línea de investigación en materia de transparencia y nuevos instrumentos de tutela penal internacional de los derechos humanos frente al poder de las corporaciones internacionales en la Segunda Modernidad.

I. Introducción

Habitualmente considerado como precursor de la idea de la *Totaler Krieg*, o guerra total, una de las más conocidas formulaciones de Von Clausewitz sería su definición de la guerra como continuación de la política por otros medios. Para éste la guerra moderna – entiéndase con ello la guerra en la *primera* modernidad – suponía ante todo un "acto político", constituyendo ello, de hecho, su único elemento racional, de sujeción a los ritmos de la vida social de la nación-Estado, referente absoluto de su teorización.[1]

Sin embargo, una vez transcurridos más de cincuenta años tras la última gran conflagración mundial, y más de una década después de la caída del muro de Berlín, la reciente – e igualmente sobrecogedora – "guerra-fraude" de las armas de destrucción masiva que nunca existieron vendrá a suponer la última constatación de un profundo cambio operado en este ámbito: la toma de conciencia de que la única verdadera amenaza de "destrucción masiva" sería la que – para la castigada población civil de Irak – vendría representada por la rica presencia de recursos naturales en su territorio nacional, la necesidad de justificar y sostener unos altos niveles de producción industrial armamentística, y la oportunidad de los suculentos beneficios de la reconstrucción en relación a toda un amplia serie de servicios de carácter civil asociados.

Esto es, toda una nueva perspectiva de amenaza potencial a la paz y seguridad internacional representada, en definitiva, por una suerte de conducta desviada de penetración y apoderamiento funcional de las estructuras de gobierno por parte de determinadas macro-corporaciones petroquímicas y del negocio de la guerra en sus distintos formatos.

No es que pensadores del renombre de Arendt[2] o Russell[3], presidentes

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[1] De hecho dicha supeditación sería precisamente sometida a fuerte crítica por Ludendorf, verdadero precursor de dicho concepto de *guerra total*, como apuntarán autores como NAVILLE o el propio SCHMITT, que ya en su teoría del partisano y a diferencia de lo que suele concluirse precipitadamente como su concepto de "guerra absoluta" no incorpora la eliminación del enemigo sino que se enmarca en las reglas tradicionales de la guerra Europea. Véase respectivamente el apartado "Karl Von Clausewitz y la teoría de la guerra", en: VON CLAUSEWITZ, K (1992): *De la Guerra*, Ed. Labor, Barcelona, págs. 7-25 así como el apartado "Von Clausewitz zu Lenin", en: SCHMITT C., (2006): *Theorie des Partisanen. Zwischenbemerkung zum Begriff des Politischen*, Duncker and Humboldt. Berlin, pág 52 y ss.

[2] Vid, en particular ARENDT HANNAH, (2000): *Macht und Gewalt*, Pipper Verlag, München.

americanos como Eisenhower con su conocida alocución sobre los peligros del complejo-industrial militar o, más tempranamente, el propio LINCOLN tras la experiencia de la industrialización bélica durante la guerra civil, no hubiesen expresado ya sus hondas preocupaciones a tal respecto, sino que de lo que se tratará ahora será de la necesidad de repensar todo ello en el actual momento de *globalización corporativa*; esto es respecto el mercado y la sociedad resultante del marco de las nuevas relaciones Estado-corporación – de ésta última a su vez con los derechos humanos, la paz y la seguridad internacional – *después de Enron,*[4] paradigma del nuevo e inmenso poder no ya estatal, sino transnacional, y apenas sujeto a controles efectivos; especialmente en la actuación de dicho nuevo poder respecto las frágiles estructuras de un enorme número de países descolonizados y en desarrollo, y sin que dicho poder quede sometido tampoco a refrendo democrático alguno, lo que ha de representar un trascendente referente de la realidad internacional contemporánea del que es obligado tomar plena constancia en esta *nueva* modernidad nuestra tan distinta a la de Clausewitz.[5]

Y, con ello mismo, la toma de conciencia respecto la correlativa idea, en

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[3] Será aquí igualmente de obligada referencia igualmente el simbólico *Tribunal Bertrand Russell* de 1967 sobre los crímenes internacionales de guerra en Vietnam cuyas sesiones fueron realizadas el 2-10 de mayo de 1967 en Estocolmo, y el 20 de Noviembre-1 de Diciembre del mismo año en Roskilde, Dinamarca; respectivamente sobre dicho tribunal, véase *http://www.vietnamese-american.org/contents.html*, dónde se encuentran descargables entre otros: la disertación inaugural de Jean Paul Sastre, la lista de sus componentes, o la propia presentación del *veredicto condenatorio* a Estados Unidos por crimen de agresión conforme la doctrina establecida por el Tribunal de Nuremberg además de la propia clausura de RUSSELL, Presidente honorario del mismo. El Tribunal de Russell sería igualmente precursor del también actual *World Tribunal on Iraq*: *http://www.worldtribunal.org*.

[4] Véase así, por ejemplo y de forma más amplia el estudio *Human Rights Watch* (1999): *The Enron Corporation: corporate complicity in human rights violations, Human Rights Watch. New York* .Véase igualmente el interesante artículo de ORTS E.W., (2002): "War and the Business Corporation", en: *Vanderbil Journal of Transnational Law*, Vol. 35. pág. 549-584.

[5] Nos limitamos aquí pues a remitirnos al conjunto de de la teoría de la Segunda Modernidad desarrollada por BECK como trasfondo interpretativo de nuestras tesis, y en particular BECK ULRICH, (1997): *Was ist Globalisierung?: Irrtümer des Globalismus – Antworten auf Globalisierung*, Frankfurt am Main, Suhrkamp; BECK ULRICH, (1996):*Reflexive Modernisierung: Eine Kontroverse;* BECK ULRICH, (2002): *Macht und Gegenmacht im globalen Zeitalter*, *Neue Weltpolitische Ökonomie*, Frankfurt am Main, Suhrkamp.

definitiva, de una ulterior transformación de la guerra como "acto económico-corporativo", sometida, por tanto, a un nuevo elemento rector de "racionalidad", si bien estrictamente circunscrito ahora en términos de dinámica autoreferencial, reflexiva, de obtención de balances saneados y sostenimiento de la productividad a cualquier precio, de forma desvinculada incluso del concepto de Estado-nación, más allá de su mera invocación – tan instrumental ésta última como la propia posición a la que corre el riesgo de quedar reducido el aparato estatal como mero "juguete" en manos de un poder corporativo constituido en poder tras el poder como formularía ya RUSSELL[6] de forma genuina en los años treinta del pasado siglo –.

Una tal hipótesis de trabajo habrá de partir pues, a la búsqueda de su pleno sentido jurídico y antecedentes, de la experiencia abordada en sede del largamente olvidado *legado de Nuremberg* en materia de responsabilidades de la industria petroquímica y armamentística "alemana",[7] especialmente en el contexto de los que serían denominados *Nachfolgeprozesse*, o procesos subsiguientes, a los juicios contra los principales jerarcas nazis, pero también respecto del olvidado cargo primero de estos últimos, que habrá de mostrar ya su singular valor en términos doblemente vertebradores para toda esta cuestión.

Por un lado en cuanto al claro precedente de condena penal internacional de responsables de un *agente no estatal* – el partido nazi – por conspiración para apoderarse del Estado, desencadenando la voladura desde dentro de las garantías constitucionales, y con la finalidad última del desencadenamiento de dicha guerra de agresión, debiendo representar, por tanto, el primer paso de nuestra reflexión en torno a tales posibles nuevas perspectivas de responsabilidad penal internacional corporativa en el contexto de conflictos armados.

Por otro lado, el cargo primero nos llevará a una plena toma en consideración de la propia *conspiración* necesaria para todo ello, de el concreto papel jugado por la industria petroquímica y armamentística alemana en el establecimiento de la dictadura nazi – y el desencadenamiento de la propia Segunda Guerra Mundial – tanto como del previo establecimiento de las condiciones de manipulación informativa de la opinión pública, aptas para poder llevar a todo un conmocionado país

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6 RUSSELL BERNARD, (2001): *Mach*t, Europa verlag, Hamburg-Wien, pág. 261.

7 Como veremos a continuación las más elementales consideraciones de transparencia en torno la real composición de la propiedad accionarial de algunas de tales compañías todavía a finales de 1940, dejarán cuando menos en entre dicho la plenitud de dicha adjetivación.

hacia dicha conflagración, siguiendo la secuencia del incendio "terrorista" del *Reichstag* por los "enemigos" del Estado*,* la subsiguiente aceptación general de la legislación patriótica de *excepción* en nombre de la defensa de Alemania frente a estos últimos, y la inmediata puesta en marcha, tan sólo semanas después, del campo de concentración de *Dachau*, todo ello junto a la concesión de carta blanca a determinadas agencias del nuevo Estado como la GESTAPO para la detención de sospechosos al margen los derechos constitucionales, etc; en lo que constituiría toda una secuencia de actos concatenados en los que la guerra de agresión, altamente lucrativa para emporios económicos como *IG Farben*, *Krupp* y otros, no sería sino una fase subsiguiente a todo lo anterior como pondrían de manifiesto desde el exilio autores como Neumann.[8]

Todo un auténtico espejo, en definitiva, desde el que repensar las implicaciones de fondo de otros contextos más actuales de excepción a los derechos fundamentales, otros conocidos campos de concentración, otras guerras de agresión, y preguntarnos, igualmente, por el concreto papel desempeñado por algunas de las corporaciones internacionales más poderosas del planeta a la luz de todo ello, como paso previo para poder aprestar nuevos instrumentos de tutela de la paz y seguridad de la humanidad en nuestro propio tiempo.

II. Lo aparente y lo real: el enjuiciamiento de los dirigentes del *agente no estatal "NSDAP"* como primer cargo acusatorio internacional ejercido por la humanidad

Tal y como señalaría Jackson en su *indictment* en Nuremberg*,* la conspiración nazi comenzaría con el plan de apoderamiento y retención del dominio total del Estado alemán utilizándolo después para perpetrar las agresiones en el exterior, llevando los conspiradores a cabo su plan o

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[8] Como este señalará la "fuerza tractora" del sistema económico alemán de grandes grupos económicos monopolistas, que no de libre mercado, será el imperialismo agresivo y expansionista del gran capital , liberado de efectivos controles de los sindicatos, de toda amenaza por parte de pequeños competidores y apenas sometido a controles efectivos y reales, notas éstas definitorias de la situación privilegiada creada por los nazis para estos grandes grupos por lo demás ciertamente no tan lejanas en nuestros días en virtud de la globalización.Vid. En particular el apartado "Das Gewinnstreben", NEUMANN F. L., (2004): *Behemoth. Struktur und Praxis des Nationalsozialismus 1933-1944*, Fischer Taschen buch, Frankfurt am Main, pág. 414 y ss.

conspiración con crueldad y desprecio absoluto de las leyes de humanidad[9] y abarcando, por tanto, su incriminación el propio momento de (re)fundación y desarrollo del partido nazi,[10] esto es, no meramente desde la efectiva toma del poder en 1933 sino ya desde 1921 con el acceso de Hitler a su condición de *Führer* del partido tras el fracasado *Putsch* de Munich, o intentona de toma *directa* del poder, siendo refundado el *Deutsche Arbeiterpartei* como *Nationalsozialistische Deutsche Arbeiterpartei (NSDAP).*[11] Simplemente se daría un cambio de estrategia en la intención de hacerse con el gobierno alemán mediante "formas legales" apoyadas con terrorismo:[12]

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9 Vid "*(g) War crimes and crimes against humanity committed in the course of executing the conspiracy for which the conspirators are responsible", Count I*, *Nuremberg Trial Proceedings Vol. 1, Indictment*, texto completo disponible en *The Avalon Project at Yale Law School*, *http://www.yale.edu/lawweb/avalon/imt/proc/count.htm*.
Junto a ello una fuente de especial valor vendrá representada, a su vez, por los ocho volúmenes del informe *Nazi Conspiracy and Aggression,* Office of the United States Chief Counsel for Prosecution of Axis Criminality Washington, DC : United States Government Printing Office, 1946. Washington DC, igualmente rescatados del olvido por el *Avalon Project* y disponibles online en: *http://www.yale.edu/lawweb/avalon/imt/imt.htm*.

10 QUINTANO RIPOLLES (1955): *Tratado de Derecho penal Internacional e Internacional penal*, Tomo I, Consejo Superior de Investigaciones Científicas, Madrid, pág. 421; véase igualmente el apartado "(*g*) War crimes and crimes against humanity committed in the course of executing the conspiracy for which the conspirators are responsible". *Count I, ob cit*.; finalmente y por el especial interés de su perspectiva partiendo en términos de reflexión en torno a la actualización del legado de Nuremberg remitimos aquí igualmente a RATNER S. R., y ABRAMS J.S., (2001): *Accountability for Humans Rights Atrocities in Internacional Law, Beyond the Nuremberg Legacy,* Oxford University Press, New York.

11 Véase más ampliamente: "The origin and aims of the nazi party" Avalon Project, *http://www.yale.edu/lawweb/avalon/imt/proc/judnazi.htm#origin*

12 Vid. Apdo "First steps in acquisition of control of State machinery". *Count I, ob cit.*Y así JACKSON y el equipo de fiscales de Nuremberg describirán con idéntica claridad la actuación de los patrióticos nazis; inducción del miedo a la población y privación de derechos serán las notas prevalentes: *In order to make their rule secure from attack and to instill fear in the hearts of the German people, the Nazi conspirators established and extended a system of terror against opponents and supposed or suspected opponents of the regime. They imprisoned such persons without judicial process, holding them in "protective custody" and concentration camps, and subjected them to persecution,*

En definitiva, y de forma contundente con el que fuera fiscal de los juicios principales, *"the Nazi Party, together with certain of its subsidiary organizations, became the instrument of cohesion among the defendants and their co-conspirators and an instrument for the carrying out of the aims and purposes of their conspiracy"*.[13]

Otros actos inhumanos anteriores al desencadenamiento de la II Guerra Mundial, pero una vez ya consumado el apoderamiento del control del Estado por parte del partido nazi, concernirían ya, de hecho, a la posterior fase de nazificación de Alemania, igualmente abordada en Nuremberg incluyendo éstos la temprana puesta en marcha del campo de *Dachau*, el 22 de marzo de 1933 – ni tan siquiera dos meses después de alcanzado el poder, el 30 de enero de 1933, y al abrigo de la aceptación de tales medidas por un país hondamente conmocionado tras el incendio "terrorista" del *Reichstag* el 27 de febrero de 1933 – para pasar a crear posteriormente el de *Sachsenhausen*, 12 de julio de 1936, y los nuevos campos de *Buchenwald*, 15 de julio de 1937, *Flossenbürg*, 3 de mayo de 1938, y Mauthausen, 8 de agosto de 1938, o emprender otros inhumanos actos de *persecución* como la *kristallnacht* el 9 de noviembre de 1938.

Pero, con todo, el hecho fundamental, y profundamente olvidado sería que al margen de su diferente responsabilidad en otros cargos Goering, Jodl, Keitel, Ribbentrop, Rosenberg y Hess serían condenados en Nuremberg *ex* cargo primero como responsables de dicha conspiración del

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degradation, despoilment, enslavement, torture, and murder. These concentration camps were established early in 1933 under the direction of the Defendant Goering and expanded as a fixed part of the terroristic policy and method of the conspirators and used by them for the commission of the Crimes against Humanity hereinafter alleged. Among the principal agencies utilized in the perpetration of these crimes were the SS and the GESTAPO, which, together with other favored branches or agencies of the State and Party, were permitted to operate without restraint of law. Apdo: "(*d*) The acquiring of totalitarian control of Germany: political".

[13] *Vid. el apartado* "(*a*) nazi party as the central core of the common plan or conspiracy*" Count 1. ob cit.*; Véase también, más ampliamente Chapter VII, "Means used by the nazi conspirators in gaining control of the German State", en: *Nazi Conspiracy and Aggression Volume 1, ob cit.*; y así en el "apéndice B" del mismo *indictment* al reflejar los grupos u organizaciones que según la acusación debían ser considerados criminalmente responsables de los cargos acusatorios, y tras el propio gobierno de Alemania, esto es, una vez más de forma independiente a las propias responsabilidades atribuibles al mismo, se señalará nuevamente dicho partido.

agente no estatal "partido nazi" contra la República de Weimar, de forma externa a la misma por tanto.[14]

De este modo, si hasta ahora se ha venido dando por sentado, de modo mayoritario – aún en un incipiente clima de debate a tal respecto[15] –, que el Derecho penal internacional viene a limitarse, esencialmente, a la responsabilidad de los crímenes cometidos desde el aparato estatal – salvo formas marginales de autoría individual en todo caso siempre en conexión con una política estatal –, la atenta revisión del propio cargo primero de Nuremberg arrojará un panorama susceptible de generar nuevas reflexiones

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[14] Por citar los juicios principales, vid. *Tratado de Derecho penal Internacional e Internacional penal*, *ob cit,* pág. 425-426.

[15] Tómese por ejemplo constancia de la propuesta de BAIGÚN D., (2001): "Responsabilidad penal de las transnacionales", en: *Les activités des sociétés transnationales et la nécessité de leur encadrement juridique, Séminaire de travail,* Céligny, Genève, 4-5 mai 2001; *Directrices de Maastricht sobre las Violaciones de los Derechos Económicos, Sociales y Culturales*, Consejo Económico y Social de Naciones Unidas, doc. ONU E/C.12/2000/13, pto. 2,. Véanse igualmente antecedente de éstas, los Principios de Limburgo sobre la aplicación del pacto internacional de Derechos Económicos Sociales y Culturales, igualmente recogidos en el doc. ONU E/C.12/2000/13; *Informe de la Alta Comisionada de las Naciones Unidas para los Derechos Humanos sobre las responsabilidades de las empresas transnacionales y otras empresas comerciales en la esfera de los derechos humanos*, 15 de febrero de 2005, Subcomisión de Promoción y Protección de los Derechos Humanos, Consejo Económico y Social de Naciones Unidas, Doc. ONU E/CN.4/2005/91, pág. 19; Internacional Council on Human Rights Policy (2002): *Más allá de lo Discrecional: Los derechos humanos y la emergencia de obligaciones legales internacionales para las empresas*, Versoix, pág. 5. *http://www.ichrp.org/*;véase la versión completa del estudio: Internacional Council on Human Rights Policy (2002): *Beyond voluntarism, Human Rights and the developing internacional legal obligations of companies*, Versoix; Así como del *Expert Legal Panel on Corporate Complicity in International Crimes* de la Comisión Internacional de Juritas, puesto en marcha en 2006, que partirá también de idénticos posicionamientos a lo anteriormente señalado: "*businesses have been involved in serious violations of human rights and humanitarian law that amount to international crimes",* entre los que serán expresamente enumerados: "*Acts that are widely recognized as international crimes include: genocide; war crimes; and crimes against humanity e.g. apartheid, enforced disappearance, enslavement, extrajudicial killing, torture. This list is not comprehensive and is intended only as a guide for those seeking explanation of the phrase "international crimes", véase su web http://www.business-humanrights.org/Documents/ICJComplicityPanelInvitationforSubmissions.*

al respecto, en tanto que supuesto de conspiración *contra* el Estado, de forma externa al mismo, para su apoderamiento; escenario éste justamente opuesto a la habitual toma en consideración de la mera complicidad no estatal con la política del Estado, o instrumentalización por parte de éste último de otros grupos privados, como cuestiones en torno a las que hasta ahora habían venido quedando circunscritas las coordenadas del debate de la responsabilidad de los actores no estatales en Derecho penal internacional.

III. ¿Excepción alemana o terrible lección desatendida?: la *conspiración corporativa* contra F. D. Roosevelt en 1933 y otros supuestos a la luz de los *Nachfolgeprozesse* de Nuremberg y el *Behemoth* de Neumann

Junto a todo lo anterior el legado de Nuremberg pondría a su vez de manifiesto otro elemento de esencial valor para nosotros: el agente no estatal *NSDAP* no actuaría solo en su conspiración, sino en estrecha colaboración *con otros agentes* igualmente no estatales, pero esta vez, además, de carácter netamente económico; o nuevamente con JACKSON: los conspiradores nazis actuarían con toda una serie de industriales en torno a estos.[16]

Así, y una vez verificada la imposibilidad de realizar otros juicios bajo el mismo Tribunal Internacional de Nuremberg – tal y como de hecho se pretendió con especial atención puesta en los industriales alemanes implicados en los crímenes nazis y con distintos grupos económicos en perspectiva, tanto por parte de americanos como de franceses y británicos, [17] – todo ello sería finalmente abordado para la zona ocupada occidental mediante la ley n. 10 promulgada por el Consejo de Control, en virtud de la cual serían abordados los que serían conocidos como *Nachfolgeprozesse* de Nuremberg[18] en los que, – entre otros casos más conocidos como el de los

[16] "*e*) The acquiring of totalitarian control in Germany: economic; and the economic planning and mobilization for aggressive war". *Count I, ob cit*, así como, más ampliamente, "Chapter VIII – economic aspects of the conspiracy", *Nazi Conspiracy and Aggression Volume 1, ob cit.*

[17] BORKIN J., (1979) *The Crime and punishment of IG Farben,* ed. Andre Deutsch, London, pág. 136.

[18] Y así conforme el art. 2. 2 de la ley n 10 del Consejo de Control de la zona americana: *"Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of*

Einsatzsgruppen o el de los médicos nazis – serían igualmente abordados los *industriellen Prozesse*, los juicios a los altos ejecutivos empresariales del nazismo, muy especialmente *The United States of America vs. Carl Krauch, et al.*, el mayor de todos ellos, o caso del Cartel *IG Farben*, formado por Bayer, Hoechst and BASF, en el que el fiscal telford TAYLOR, formularía cargos contra 24 altos directivos alemanes de dicho Cartel internacional como cargos principales por *planificación, preparación, e iniciación de una guerra de agresión e invasión de otros países*, nuevamente comenzando por la temprana alianza de IG con Hitler y el partido nazi, así como los cargos de *saqueo y expolio*, y el de *esclavitud y asesinato en masa*, "en completa ausencia de toda decencia y consideración humana" por parte de IG y sus responsables.

IG Farben no sólo habría sido la organización matriz de la filial "IG Auschwitz" y por tanto responsable del régimen de trabajo forzado y los terribles experimentos con seres humanos allí realizados así como de la producción y suministro de las enormes cantidades del gas Zyklon-B utilizado para el exterminio de millones de seres humanos en las cámaras de gas, sino que antes del estallido de la propia guerra y aún de la propia fase de nazificación de Alemania desde el aparato estatal-rehen, *IG Farben* sería el mayor de los financiadores industriales del partido nazi con la finalidad de que "las elecciones de 1933 fuesen las últimas",[19] en lo que

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*this Article, if he was (...) or (*f*) with reference to paragraph 1 (*a*) if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country"*. Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945, 3 Official Gazette Control Council for Germany 50-55 (1946). Texto integro disponible en: *http://www.yale.edu/lawweb/avalon/imt/imt10.htm*. Para una aproximación de conjunto véase igualmente la web de los *nachfolgeprozesse: http://www.nachfolgeprozesse.nuernberg.de/prozesse/prozesse7.html*.

[19] Sobre las gestiones de Schacht, ex presidente del *Reichsbank*, y posteriormente ministro de economía del Reich, con distintos industriales para reunir tres millones de markos con los que financiar la campaña del partido nazi y los en torno a 400.000 markos que se estiman aportados por IG "para que esas fuesen las últimas elecciones" en palabras de su representante en la reunión, Georg von Schnitzler, véase AAVV (2007): *Von Anilin bis Zwangasarbeit, Der Wegs eines Monopols durch die Geschichte. Zu Entstehung und Entwicklung der deutschen chemischen Industrie*, aparatado "3.2.1 Wahlspenden, damit es die letzte Wahl werden sollte", pág. 43-45, así como KÖHLER O., (1986): *...Und Heute die ganze Welt, die Geschichte der IG-Farben und ihrer Väter,* Rash und

para Taylor había quedado sobradamente demostrado como voluntad de los directivos de *IG* del advenimiento de una dictadura mediante la conquista del poder por parte de Hitler que les permitiese actuar sin tener que tomar en consideración las demandas de las masas, y de modo que les permitiese alcanzar el control de la industria química europea y, de ser posible, incluso de fuera de Europa.

Como señalaría este último con especial contundencia en su *indictmen*, IG marchó con la *Whermacht*, concibió, inició y preparó un detallado plan para hacerse, al amparo de ésta, con la industria química de Austria, Checoslovaquia, Polonia, Noruega, Francia, Rusia y otros países.[20]

En idéntico y no menos significativo sentido nos cabrá entender, de hecho, la propia ley del Consejo de Control precedente, la n. 9, "*Beschlagnahme und Kontrolle des Vermögens der I. G. Farbenindustrie*", de 20 de septiembre de 1945, finalmente en vigor desde el 4 de diciembre del mismo año, que supondría la disolución del cartel, en si mismo todo antecedente de exigencia de responsabilidad internacional a la propia persona jurídica, fundamentada además la misma, según las palabras de su propio preámbulo, en la expresa consideración de "impedir que pudiese

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Röhring Verlag, Zurich, en especial el apartado "Die höchste Spende von der IG – damit die letzte Wahl ist", pág. 215-228; En cuanto a las relaciones con Wall Street y grupos financieros americanos como la General Motors o la Stándar Oil nos remitimos aquí a la obra de SUTTON A., (2002): *Wall Street and the rise of Hitler*, GSG, California, de singular interés por lo demás los apdos "General Electrics and the Financing of Hitler", pág. 55-59, "Finanzing Hitler in the March 1933 General Election" pág. 107-110 y "Were American Industrialists and Financers Guilty of war crimes?" pág 159-162. Sobre el posterior devenir de las políticas económicas del régimen véase igualmente HAYES P., (2001): *Industry and Ideology, IG Farben in the Nazi Era*, Cambridge University Press, Cambridge, apartado "From Schacht to Göring", pág. 125-161.

20 Vid. *The crime and punishmen of IG Farben, ob cit.* pág. 137-138, una lista de dichos ejecutivos. Véase igualmente por su especial interés para la reflexión el análisis de los vínculos americanos de IG Farben en cuanto a lo que sería denominado por SCHREIBER como *comedia jurídica de once meses en formato americano* en cuanto a lo puramente simbólico de los resultados punitivos pese a la extrema gravedad de la implicación de los ejecutivos del Cartel en toda clase de crímenes. Vid a este respecto SCHREIBER (1978): *Die untschuldigen Kriegsplaner, Profit aus Krisen, Kriegen und KZs,* Neuer Weg, Sttutgart, pág. 151. Igualmente el apartado "Frühe Unterstutzung der NSDAP", en: ENZERBERGER [Ed.] (1986): *Ermitlungen gegen die I.G. Farben*, Office of Military Government for Germany Financial Investigation Section, Nördnlingen, pág. 161. y ss.

representar ninguna amenaza futura a sus vecinos o a la paz mundial *a través de Alemania"*.

Las conclusiones del informe BERNSTEIN no lo habrían podido expresar tampoco con mayor claridad: si la política de los aliados persigue el objetivo de que Alemania nunca más pueda amenazar a sus vecinos y la paz en el mundo *IG Farben* debe ser destruido.[21]

No parece por tanto exagerado sostener que "*Farben was Hitler and Hitler was Farben",*[22] pero aunque ninguno de los directos de la rama americana de IG fuesen procesados sostener sin más el carácter "alemán" de dicha corporación sería apresurado, habida cuenta de que, según el propio informe de la sección de investigación financiera del gobierno militar de ocupación, todavía en 1940 – por tanto una vez ya iniciada la II Guerra Mundial y ya perpetrados por parte de IG buena parte de los terribles crímenes antes aludidos en el contexto de la nazificación de Alemania –, únicamente 35.616 acciones, del total de las 324.766 de la compañía, estaban en mano de personas con residencia en Alemania, mientras que casi el triple de acciones de *IG Farben*, 86.671, estaban en manos de inversores de nacionalidad estadounidense y casi cinco veces más 166.100 estaban en manos de ciudadanos suizos; esto es más de un 80% del capital social entre ciudadanos de ambos países frente a algo más de un 10% alemán.[23]

En cualquier modo, el de la participación corporativa y financiera en la conspiración contra la República de Weimar no sería el único caso reconocible en dicho periodo, y así en el mismo 1933 otra conspiración, – en este caso para deponer al presidente F.D. Rooselvelt tal y como sería refrendado por el Comité de investigación McCormack-Dickstein –, sería desenmascarada en virtud de la denuncia pública formulada por propia iniciativa del general Smedley Darlington Butler al que se le había llegado a ofrecer el encabezamiento de la misma y del subisguiente gobierno resultante al frente de medio millón de hombres – buena parte de los cuales

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[21] Vid. "Erklärung des Bernard Bernstein, Direktor des Untersuchungsabteilung für Kartelle und Auslandsvermögen im Amt der Amerikanischen Militärregierung (OMGUS, Deutschland), vor dem Unterausschuss für militärische Mobilmachung im Ausschuss für militärische Angelegenheiten des Senats der Vereinigten Staaten (Kilgore-Unterausschuss)", integramente reproducido en: *Ermitlungen gegen die I.G. Farben, ob cit.* pág. 346.

[22] Como sostendría gráficamente el Senador HOMER T. BONE en su informe a la Comisión del Senado sobre Asuntos Militares el 4 de junio de 1943, vid. "The Empire of IG Farben", en: *Wall Street and the rise of Hitler*, *ob cit.* pág. 33.

[23] *Ermitlungen gegen die I.G. Farben, ob cit.* pág. 38.

veteranos de la Primera Guerra Mundial y descontentos por la crisis de 1929, así como miembros de distintas organizaciones paramilitares y de extrema derecha entre las que destacaría la *American Liberty League* – en lo que constituía un conglomerado instrumentalizado y financiado desde una serie de poderosos grupos económicos con idéntico protagonismo de la industria petroquímica, en el caso americano *Du pont*; un supuesto, en definitva, aún si frustrado todavía más paradigmático que el alemán de conspiración de carácter económico-corporativo y uno de los episodios menos conocidos de la historia de ese periodo.[24]

Tampoco sería éste el último supuesto en lo tocante al siglo XX, y así, en lo que supone una materia opaca y de difícil indagación por excelencia, nos cabe tomar constancia de otros casos puestos de manifiesto con ocasión de los debates de la Comisión de Derechos Humanos de Naciones Unidas sobre el impacto de la actividad de las corporaciones en la esfera de los derechos humanos entre los que se haría alusión a la presunta implicación de la multinacional ITT (*International Telephone and Telegraph*) en el derrocamiento del Gobierno constitucional de Salvador Allende en Chile, la de la *Gulf Oil Company* en el golpe militar de Hugo Banzer contra J.J. Torres en Bolivia en 1971, o la injerencia de la *United Fruit Company* contra del Gobierno de Jacobo Arbenz en Guatemala en 1954,[25] hasta llegar, todavía más recientemente, a la constatación de la existencia de hechos documentados que dan evidencia de una intentona de golpe de Estado en Guinea Ecuatorial en 2004 por parte de un grupo de conspiradores en el que se encontraban tanto mercenarios como ejecutivos de empresas privadas de seguridad, tal y como pondría de manifiesto la propia Presidenta del Grupo de Trabajo de Naciones Unidas sobre la

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[24] Vid. ARCHER J., (1973): *The Plot to Seize the White House: The Shocking True Story of the Conspiracy to Overthrow FDR,* Hawthorne, New York.

[25] Comisión de Derechos Humanos, Subcomisión de promoción y protección de los derechos humanos, 52º período de sesiones, Acta Resumida de la 11ª sesión, celebrada en el Palacio de las Naciones, Ginebra, el miércoles 9 de agosto de 2000, a las 10.00 horas, E/CN.4/Sub.2/2000/SR.11, 1º de diciembre de 2003, Pto 6. Véase igualmente el apartado "Chile, Arbeiterblut fliesst, die Investitionen steigenm," sobre la actitud de colaboración de Hoesch Chile – una de las tres grandes empresas constituivas del Cartel IG Farben como hemos visto – dónde se reproduce íntegramente el texto de la carta de 17 de septiembre de 1973, informando a Frankfurt sobre *el largamente esperado alzamiento militar* que al fin había tenido lugar el 11 de septiembre de 1973 generando nuevas expectativas de beneficios para la compañía a raíz del mismo y *dando al gobierno Allende el final que merecía, Die untschuldigen Kriegsplaner, ob. cit.* pág. 211.

actividad de grupos mercenarios en su comunicación sobre la utilización de estos como medio de violar los derechos humanos y de obstaculizar el ejercicio de los pueblos a la libre determinación.[26]

Actitud hostil recurrente ésta hacia el sistema democrático, y preferencia de opciones de gobierno dictatoriales por parte de determinados macroagentes económicos, que DIONIS vendrá a señalar, por su parte, respecto a algunas de sus manifestaciones actuales en hispanoamérica como regreso de la dinámica amigo-enemigo implícita a la *teoría del partisano* de Carl Schmitt, y difundida por éste desde su retiro español en los sesenta, respecto la que un tal "estado de excepción de facto" llevado de lleno al orden económico representaría una de sus expresiones[27]. Las significativas conexiones de esto último dentro de la dinámica propia del denominado *Derecho penal del enemigo* y sus concretos respaldos materiales resultarán evidentes.

Pero si para Schmitt la excepción lo prueba todo[28] y la garantía de la

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[26] Intervención Oral de la Sra. AMADA BENAVIDES, Presidenta del Grupo de Trabajo de Naciones Unidas sobre la utilización de mercenarios como medio de violar los derechos humanos y de obstaculizar el ejercicio de los pueblos a la libre determinación, ante la Asamblea General de 6 de noviembre de 2006.

[27] Véase el trabajo del mismo en la web del equipo NIZKOR, DIONIS, G.D (2002): "Responsabilidad penal de las empresas sanitarias transnacionales", en: WALDER P., (2006): *El derecho al agua en el sur de las Américas. Exigibilidad ciudadana frente a procesos de privatización en servicios y recursos naturales. Negociaciones comerciales OMC, UE, ALCA, TLC*, Alianza Chilena por un Comercio Justo, Ético y Responsable, Santiago de Chile, 18 y 19 de noviembre de 2002, *http://www.derechos.org/nizkor/chile/libros/agua/index.html*; en cuanto a la propia obra de SCHMITT en sus reediciones más recientes a este respecto y junto a la teoría del partisano antes apuntada, vid. SCHMITT C., (2003): *Die Wendung zum diskriminierenden Kriegsbegriff*, Duncker and Humboldt, Berlin; – (2004): *Politische Theologie, Vier Kapitel zur Lehre von der Souveränität*, Duncker and Humboldt, Berlin; – (1994): *Die Diktatur*, Duncker and Humboldt, Berlin.

[28] Excepción entendida como intervalo o *Ausnahmezustand* en el que la legalidad constitucional y la discusión parlamentaria se ven interrumpidas, pero también en su ambivalencia como caso límite o *Ernstfall* que llama a una decisión soberana para preservar la unidad frente al enemigo, y por tanto a la guerra, superándose la *pretensión liberal* de ausencia de tal dinámica. O *c*omo señalará éste de forma tan gráfica como contundente en una de sus más conocidas afirmaciones, *Souverän ist, wer über den Ausnahmezustand entscheidet*: soberano es el que decide sobre el estado de excepción. SCHMITT C., (2004): *Politische Theologie, Vier Kapitel zur Lehere von der Souveränität*, Duncker and Humboldt, Berlin, pág 13.

voluntad soberana tendería a reclamar la dictadura permanente, Neumann nos ofrecerá el reverso de la moneda y elemento definitivo de nuestro análisis: el caso crítico, el estado de excepción, servirá también para revelar en términos de transparencia dónde reside, en concreto, el poder político. El caso crítico descubre lo que frecuentemente la normalidad oculta en cuanto al ejercicio real del poder.[29]

De modo que si para Schmitt en la excepción el poder de la vida real penetra a través de la corteza de un mecanismo que se ha tornado inerte por repetición, su seguimiento se tornará entonces en un útil instrumento de rastreo del poder efectivo y nos permitirá una efectiva actualización de sus límites y mecanismos de responsabilidad allí dónde éste se encuentre en realidad, tratándose, por tanto, de la dificultad de articular los mecanismos jurídicos de transparencia e imputación jurídica de la responsabilidad por el real ejercicio del poder, más allá de dicha *corteza* meramente aparente. Al menos en ese concreto sentido no podremos sino coincidir con SCHMITT en cuanto al significativo valor de la excepción, si bien de forma contraria, respecto la finalidad de aseguramiento defensa del régimen democrático y el orden social de derechos humanos, paz y seguridad internacional que le sirve de base, y no como aceptación resignada de una ineludible deriva hacia la dictadura y el estado de excepción mundial permanente.

En esto último vendrá a incidir Neumann, por su parte, como uno de los puntos fuertes de análisis en su conocido *Behemoth* dejando de manifiesto, como pocos otros textos relativos al nazismo, la efectiva conveniencia para las grandes organizaciones económicas en la Alemania del momento de dicho estado de excepción permanente, más allá de la mera invocación de una idea de libre competencia de un amplio número de emprendedores independientes en los distintos ámbitos percibida en realidad de forma hostil por éstas. La democracia misma lo era también como una amenaza para un tal sistema de grandes monopolios económicos,[30] y la libertad económica, tanto como libertad la política, entendida esta última como una *ingenua pretensión liberal*, un "lujo" para la sociedad alemana. De este modo, también en lo económico se hacía preciso una situación de *Ausnahmezustand* o situación de excepción de mercado – mantenido, como el propio Estado, en su apariencia de respetabilidad institucional – neutralizada para el soberano corporativo la conflictividad laboral y la

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[29] Sin duda la gran obra de referencia a este respecto habrá de ser NEUMANN F., L. (2004) *Behemoth. Struktur und Praxis des Nationalsozialismus 1933-1944*, Fischer Taschen buch, Frankfurt am Main, remitiendonos especialmente aquí a su segunda parte "Die totalitäre Monopolwirtschaft", págs. 269-449.

[30] *Behemoth, ob cit.* pág. 415.

amenza de la competencia, tanto como el soberano nazi precisaba de la excepción en lo político y constitucional.

Todos esos *sueños* de ganancias corporativas sin fin*,* tan megalómanos como los propios delirios nazis, se hicieron realidad a partir de 1933, y precisamente uno de los más valiosos rendimientos de la obra de Neumann será así el de llamar la atención sobre un tal espíritu expansionista, imperialista y agresivo de tales grupos económicos beneficiados, en muy distintos sentidos, por el estado de excepción general instaurado; así como colocar debidamente a los mismo en el primerísimo plano de su análisis de las responsabilidades como pieza esencial de la maquinaria que junto al partido nazi, la burocracia estatal copada por éste y el ejército llevaría a Alemania irremisiblemente hacia la guerra.

Un efecto que, ante el estado de excepción a la vigencia del sistema universal de derechos fundamentales de nuestro propio tiempo, ya no nazi-local sino corporativo-global, el Centro Europa-Tercer Mundo y la Asociación Americana de Juristas, vienen calificando como de "erosión" corporativa hasta de los mismos aspectos formales de la democracia representativa y del papel de las instituciones políticas, tanto nacionales como internacionales, como mediadores – o presuntos mediadores – entre intereses diferentes o contradictorios.[31]

Estas serían las *untschuldigen Kriegspläner* de nuestro propio tiempo, las inocentes planificadoras de la guerra que, parafraseando el título de la obra de Schreiber, habrían de obtener ahora los suculentos beneficios de crisis, guerra y campos de concentración.[32]

Y ante ello la pregunta a formularnos será, por tanto, hasta que punto cabe seguir hablando de forma predominantemente unidimensional de la voladura de la democracia alemana de Weimar en términos de *excepción mesiánica* o corresponde extraer otras lecciones de fondo respecto la gravedad de un tal estado de excepción inquietantemente cercano en distintos aspectos a nuestros días. ¿Cabe acaso reconocer hoy, en determinadas tendencias de la globalización, verdaderos elementos de identidad del régimen económico totalitario nazi como la neutralización del

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[31] Véase con especial atención, igualmente, a la cuestión de los organismos internacionales "C. Confusión entre el poder económico y el poder político". Pto.11-12, en: CETIM/AAJ (2002): *¿Las Naciones Unidas harán respetar a las sociedades transnacionales las normas internacionales en materia de derechos humanos?*, ed. CETIM, Ginebra.

[32] Como ya hemos apuntado en otro lugar nos referimos aquí a SCHREIBER (1978): *Die untschuldigen Kriegsplaner, Profit aus Krisen, Kriegen und KZs,* Neuer Weg, Sttutgart.

contrapoder sindical[33] y de las posibilidades reales de competencia?, ¿cabe reconocer elementos compartidos entre un tal estado de excepción nazi a la vigencia del sistema de derechos fundamentales y el cotidiano estado de excepción *corporativo* a los mismos en el contexto de la globalización?, ¿cabe reconocer nuevas reformulaciones de la idea nazi de *vida sin valor vital* para el Estado – para un determinado tipo de Estado – en unos nuevos y genuinos términos de *vida sin valor vital* para el mercado – para un determinado tipo de mercado – ante toda una serie de sobrecogedores casos en los que la vigencia material del derecho a la vida queda condicionada a la existencia, o no, de una efectiva capacidad económica para participar de determinados bienes insustituibles pero sujetos a un anómalo control corporativo?. Del caso de las patentes del VIH, al cotidiano exterminio infantil del agua, con más de 4000 muertes al día este último, y otros variados supuestos, parecen apuntar inquietantemente en un tal sentido.

A la luz de todo ello no creemos, ciertamente, que quepa calificar de otra forma distinta a verdadero "estado de excepción" el actual estado de observancia corporativa *a la carta,* en absoluta ausencia de efectivos mecanismos internacionales de sometimiento a responsabilidad y control, de lo que se pretende, por contra, todo un sistema universal de derechos humanos inalienables e indisponibles dotado de carácter *erga omnes* y constitutivo de *ius cogens*, adquiriendo así una renovada relevancia para nuestros días las reflexiones de Schmitt y Neumann y la relación entre excepción, poder soberano *real* y cambio sistémico *fáctico,* bastante más allá de la Declaración Universal de los Derechos Humanos.

IV. Repensando el Cargo I de Nuremberg: dominio de la decisión sobre la excepción y nuevas perspectivas de levantamiento del velo *gubernamental* como posibles líneas de desarrollo

El vigente modelo de impunidad corporativa ante el Derecho penal internacional ante posibles supuestos de conspiración y comisión de nuevas tipologías de violaciones a gran escala de la paz y seguridad de la humanidad, y el propio sistema de derechos humanos, quedará pues doblemente a la vista desde el legado de Nuremberg; esto, es, tanto desde la toma de constancia del enjuiciamiento por crímenes internacionales de aparatos organizativos de poder no estatal – caso del NSDAP como hemos

[33] Hoy en terminus de movilidad empresarial como nos enseña BECK particularmente en *Macht und Gegenmacht im globalen Zeitalte, ob cit.*

visto – como desde la paralela toma de constancia del propio carácter *menor* de las condenas a los altos ejecutivos de las corporaciones que financiaron la conspiración contra la República alemana y armaron después a Hitler – de modo que a las alturas de 1951, y a diferencia de sus homólogos en los altos puestos del Estado, estaban ya otra vez reincorporados al tejido corporativo ocupando nuevamente puestos de relieve –.

En ambos casos, uno y otro elemento nos mostrarán, por igual, lo necesario de reflexionar en torno a la revisión de estructuras de imputación de responsabilidad penal internacional a los actores no estatales, muy especialmente ante la guerra – supuesto de estado de excepción por excelencia a los derechos humanos, propiamente *Ausnahmezustand* a la vez que verdadero *Ernstfall* en terminología decisionista de Schmitt – y el aludido rastreo del verdadero poder tras el poder en su desencadenamiento, lo que nos llevará a la búsqueda de posibles nuevas estructuras que permitan identificar, e imputar, a los verdaderos responsables no estatales de esa influencia intolerable sobre la que nos alertaría Eisenhower, en la perpetración de crímenes de extrema gravedad como los que aquí nos ocupan.

La toma en consideración de nuevas perspectivas de una suerte de tipología de *gobierno filial,* sometido *de facto*, – no necesariamente en relación a todo acto de gobierno sino acaso de modo sectorial en determinados ámbitos decisionales por relevancia o especialidad –, a los designios de los conspiradores corporativos y sus cómplices, irrumpirá así en términos que por lo demás no dejan de reproducir las propias dificultades señaladas por Guisse respecto la identificación de los concretos elementos *de facto* cuando una empresa matriz tiene una parte en otra empresa y ejerce efectivamente una influencia dominante o la sucursal está bajo su dirección en materia de vulneración de derechos humanos.[34] O, como precisamente pondría de manifiesto Jackson en el caso de la conspiración del agente no estatal *NSDAP* contra Alemania: "a*) The Nazi conspirators reduced the Reichstag to a body of their own nominees and curtailed the freedom of popular elections throughout the country".*[35]

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[34] Vid. *Ejercicio de los derechos económicos, sociales y culturales: la cuestión de las empresas transnacionales*, Documento de trabajo relativo a los efectos de las actividades de las empresas transnacionales sobre el ejercicio de los derechos económicos, sociales y culturales, preparado por el Sr. El Hadji Guissé en virtud de la resolución 1997/11 de la Subcomisión, E/CN.4/Sub.2/1998/6, 10 de junio de 1998, pto. 5.

[35] "Consolidation of control", *Count 1, ob cit.*

Así, si bien esta ha de ser una cuestión cuyo detalle y desarrollo habrá de exceder ampliamente el ámbito de este estudio dirigido a la búsqueda de las bases de todo este nuevo ámbito científico, sí nos cabrá, cuando menos, tomar conciencia, partiendo de todo lo anterior, de la rica teorización existente en torno a la figura del *levantamiento del velo corporativo* cuya atenta toma en consideración creemos que pueden ofrecer los rendimientos deseados, si bien abordando ahora la dificultad adicional de que no se tratará ya de discernir la autoría tras un "títere" jurídico-privado sino – lo que resulta exponencialmente más grave y complejo – tras un "títere" jurídico-público; tras un gobierno materialmente usurpado a sus propios ciudadanos en buena parte de sus decisiones más relevantes para la nación, mantenida en el engaño a través de toda una variedad de posibilidades de control de los medios de comunicación en virtud de las relaciones ampliamente ramificadas de los grupos económicos implicados en el apoderamiento de los resortes del Estado. Precisamente porque si en la excepción, en el dominio decisional de su establecimiento, se manifiesta de modo especialmente perceptible la verdadera estructura del poder como hemos apuntado con Neumann, es por ello mismo que las medidas de manipulación y opacidad informativa habrán de hacerse en todo el proceso singularmente presentes.

Estado de excepción y desinformación pública se tornarán en elementos complementarios e interdependientes.

En definitiva, creemos que el posible camino a recorrer en una revisión del concepto de conspiración de la mano del legado de Nuremberg habría que hacer las cuentas con la toma en consideración – desde el amplio reconocimiento actual de un "*piercing of the corporate veil*" – de una suerte de "*piercing of the government veil*" en el ámbito específico de crímenes internacionales contra el sistema universal de derechos humanos, la paz y la seguridad de la humanidad que permita imputar jurídicamente a los verdaderos artífices y máximos responsables empresariales de la "decisión sobre el estado de excepción", la plenitud del rigor de los tipos penales internacionales de forma igualmente universal e imprescriptible, *hasta en las más alejadas regiones de la tierra,* y no únicamente ya a los responsables políticos.

Y así, al igual que la teoría del levantamiento del velo corporativo surgiría del reconocimiento por parte de la jurisprudencia, singularmente la estadounidense y la alemana,[36] de casos en los que resultaba necesario

[36] En Alemania, a mediados del siglo XX, se comienza también a preguntar cuándo es legítimo prescindir de la estructura formal de la persona jurídica para que se pueda decidir mejor el caso penetrando hasta el sustrato mismo de

traspasar el velo de la personalidad corporativa meramente aparente para descubrir la persona o personas que operaban tras ella ante determinadas situaciones lesivas como premisa para poder responsabilizarlas por los actos imputados a la entidad haciendo caso omiso de la personificación legal – idea de la "*disregard of legal entity*" –, se trataría ahora de tomar en consideración las dificultades y posibilidades de desarrollo de una tal modulación del instituto en el ámbito gubernamental, o más ampliamente institucional, tomando en consideración idénticas posibilidades de apoderamiento y control funcional de las instituciones nacionales, pero también internacionales precisamente en la línea del nuevo reclamo global de transparencia, lo que también aquí puede constituir instrumento necesario para la obtención de soluciones ajustadas a la justicia material tal y como viene siendo señalado como lugar común en la razón de ser de esta figura.[37]

O tal y como puntualizaría Thiam, aún si en muchos sistemas legales el concepto de conspiración ha venido siendo aplicado a los crímenes contra el Estado – pues es el Estado el objetivo cuando los crímenes van dirigidos contra sus instituciones, su integridad territorial o su seguridad[38] – una tal concepción podría llegar a mostrarse demasiado restrictiva en el caso de los crímenes contra la paz y la seguridad de la humanidad pues el Estado no es la única entidad implicada en todo ello.[39]

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aquélla, afectando a sus miembros. Se trató de encontrar una base jurídica objetivamente segura para esta «penetración» que permitiera lograr la transparencia ("*Durchgriff*") del fondo personal subyacente; y se creyó encontrarlo en la necesidad de neutralizar la utilización fraudulenta o abusiva de la técnica de la personificación ("*Missachtung der Rechtform der juristische Person*").

37 Vid entre otros, DE ÁNGEL YAGÜEZ (2006): *La doctrina del "levantamiento del velo" de la persona jurídica en la jurisprudencia*, Civitas, Madrid; ÁLVAREZ DE TOLEDO QUINTANA L., (1997): *Abuso de personificación, levantamiento del velo y desenmascaramiento*, Colex, Madrid; Mientras en términos jurisprudenciales nos cabe referirnos, entre otras sentencias recientes dada su complitud, a la Sentencia de la AP Madrid (Sección 17ª) de 29 enero 2005.

38 Vid. *Eighth report on the draft Code of Crimes Against the Peace and Security of Mankind* by Mr. Doudou Thiam, Special Rapporteur, Extract from the Yearbook of the International Law Commission: 1990 vol. II(1) A/CN.4/430 and Add.1, pág. 33, pto51.

39 Idem, pto.52; Y así THIAM apuntará otras distintas entidades más allá del Estado como objetivos de la conspiración sin abordar expresamente las instituciones internacionales como apuntamos por nuestra parte pero sí abriéndonos el camino para la consideración de otros supuestos. Todo está por

La idea habría de ser también aquí la de que quien maneja internamente de modo unitario y total un organismo Estatal o supraestatal, quién tiene el dominio real de la decisión sobre el establecimiento de la excepción, como hecho específico en materia de derechos humanos, no se sustraiga a la grave materialidad de sus responsabilidades invocando la apariencia formal de existencia de distintas organizaciones independientes, cabiéndonos tomar en consideración de modo especial de entre sus distintos criterios el del seguimiento de la dirección emprendida por el flujo de los beneficios resultantes del estado de excepción, la efectiva participación en la obtención del nombramiento,[40] si la persona dominante aparece como "la cabeza y el cerebro" de la excepción o el relativo al control funcional de la entidad dominada, bien sea constante y efectivo en los términos tradicionales del instituto o focalizado ahora en lo concerniente a la propia esfera de actividad corporativa; todo ello como congruente complemento además de todo un nuevo reconocimiento de nuevas responsabilidades en materia de derechos humanos, justamente de modo también sectorial o circunscrita a dicha misma esfera de actividad, conforme las nuevas normas ONU para empresas.[41]

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hacer en este ámbito tras la fugaz toma en consideración de la conspiración en el art. 2 del *Draft Code* de 1954 y en el art. 16 del subsiguiente *Draft Code* de THIAM, finalmente desaparecida como tal, Véase el *Eight Report* pág. 32 y 33, párr. 39 y 50. Como el mismo QUINTANO señalará, si frente a la posición contraria francesa, continental, del magistrado DONNEDIEU DE VABRES, los fallos de Nuremberg concedieron a la *conspiracy* "perfecta sustantividad, no exenta de confusión, sin embargo, respecto a las demás figuras delictivas", serían tales tesis francesas, por el contrario, y no las del propio Tribunal, "la que ha logrado la adhesión de la mejor doctrina científica que prefiere configurar los supuestos conspiratorios en los de cooperación o participación criminal", *Tratado de Derecho penal Internacional e Internacional penal, ob cit.* pág. 422; esto es de su sustantividad como tipo especial a su disolución o asimilación en torno a las cuestiones de autoría.

[40] Aquí el criterio de que las personas que dirigen los negocios de la dominada sean designadas por la dominante deberá ser interpretado, tal y como nos enseña el caso de *IG Farben*, como financiación y respaldo corporativo a la llegada al poder sin el cual en nuestro vigente – no exento de paradojas y contradicciones – sistema democrático actual es sabido que ello no es en modo alguno posible.

[41] Véase el *Comentario Relativo a las Normas sobre las responsabilidades de las empresas transnacionales y otras empresas comerciales en la esfera de los derechos humanos*, Consejo Económico y Social, Comisión de Derechos Humanos, de 26 de agosto de 2003, Doc. ONU. E/CN.4/Sub.2/2003/38/Rev.2; igualmente, AMNISTÍA INTERNACIONAL (2004): *Las normas de Derechos*

Y ello sin perjuicio de que, como hemos anticipado, la presunción de respetabilidad e independencia de la persona jurídica ante el levantamiento del velo corporativo haya de resultar aquí aún más fuerte y verdaderamente sometida a toda su debida carga *iuris tantum* – que no *iuris et de iure* – y por tanto dicho levantamiento sólo pueda producirse no ya respecto de cualquier abuso de derecho o utilización del ente jurídico para finalidades fraudulentas sino respecto de la instrumentalización del aparato estatal para perpetrar actos de la gravedad aludida, y que se nos muestran por tanto como plenamente congruentes para hacer decaer la presunción de persona jurídica independiente de carácter estatal, que actúa con independencia de los intereses de los miembros que la integran, para pasar a dar el debido tratamiento jurídico penal internacional a la realidad de su situación de cautividad institucional sometida al control *de facto* de actores privados extraordinariamente poderosos y por tanto al procesamiento de los máximos jerarcas corporativos tras el *gobierno filial*.

Una tal hipótesis de trabajo resultará, en definitiva, aún más planteable cuando, de hecho, la cuestión del levantamiento del velo en el ámbito de relación filial "corporación-Estado" ya ha llegado a ser abordada por la jurisprudencia, si bien en un sentido de dependencia a *sensu contrario*, en el ámbito del Derecho administrativo, respecto la cuestión de los entes públicos o de gestión a los que se reviste de una forma jurídica perteneciente al Derecho privado para encubrir la creación de un ente filial puro y simple, externamente regida por el Derecho privado, pero en realidad – internamente –, perteneciente a la Administración;[42] de modo que, debidamente tomado en consideración esto último, contemplar la posibilidad inversa de que, en determinadas circunstancias un órgano gubernamental externamente regido por los intereses generales y el derecho público, deberes de diligencia debida en la esfera de los derechos humanos, etc, en realidad, – internamente – sea regido por intereses privados de la corporación matriz *de facto* no resultará, en definitiva, sino un congruente paso más de indagación jurídica del instituto.

En resumen, tratar de deslindar suficientemente en cada caso las respectivas esferas de real *responsabilidad por el dominio de la excepción* al sistema internacional de Derechos humano o*,* más exactamente*,* del dominio sobre la decisión de su establecimiento, nos ayuda a entender las distintas posibilidades de colaboraciones, supeditaciones e

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Humanos de la ONU para Empresas. Hacia la responsabilidad legal, Madrid.

[42] *SAP 29 de enero de 2005, ob cit,* fto. 5; Junto a esto en el caso español otra sentencia de referencia en torno a esta figura se hallará en la doctrina establecida por la Sentencia de 28 de mayo de 1984 (RJ 1984, 2800), TS.

instrumentalizaciones recíprocas Corporación-Estado – en términos por tanto en realidad multidireccionales –, de modo que, junto a la hoy ya debatida cuestión de la complicidad corporativa en crímenes internacionales, otros aspectos como la propia autoría directa corporativa, la coautoría propiamente considerada y, porque no, nuevas modalidades de complicidad estatal o supraestatal en crímenes corporativos, se abran igualmente camino en el debate científico penal internacional contemporáneo, al tiempo que, paralelamente, nos ayuda a abordar también, desde el prisma contrario, el también reconocible fenómeno de la corporación bajo control gubernamental encubierto desde la que, en una suerte de fuerte fenómeno que entendemos como de *huida de Nuremberg,* de verdadero intento de *privatización de la gestión de ilícitos internacionales* – tortura, deportaciones, medidas de contrainsurgencia constitutivas de crímenes de guerra y contra la humanidad etc, mediante empresas privadas de seguridad o compañías aéreas, por ejemplo – dada, precisamente, la vigente percepción de inaplicabilidad del Derecho penal internacional a las corporaciones a diferencia de a los agentes del Estado y las beneficiosas consecuencias, para los autores de tales crímenes, de las actuales dificultades para el establecimiento de mecanismos de imputación corporativa en un Derecho penal internacional únicamente centrado hasta ahora en cuanto a sus desarrollos en el actor estatal.[43]

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[43] O como señalaría respecto dicha *huida de Nuremberg* de forma significativa la Presidenta del Grupo de Trabajo de Naciones Unidas sobre la utilización de mercenarios como medio de violar los derechos humanos y de obstaculizar el ejercicio de los pueblos a la libre determinación: "El Grupo de Trabajo también ha sido informado de violaciones de derechos humanos perpetradas en las prisiones de Abu Ghraib en Iraq, en las que estaban involucrados empleados de empresas militares y de seguridad privadas. Si bien las autoridades estadounidenses consideran que los contratos del personal estadounidense están sujetos a la jurisdicción penal de los tribunales federales de los Estados Unidos, el Grupo de Trabajo desconoce que los tribunales federales estadounidenses hayan juzgado o sancionado a empleados de empresas militares y de seguridad privadas implicadas en esas violaciones en Irak. (…) El Grupo de Trabajo desea llamar la atención sobre el creciente fenómeno en el que los Estados ceden funciones militares y de seguridad esenciales a empresa privadas y, le preocupa de manera particular, que en el marco de conflictos armados, algunas empresas militares privadas y compañías privadas de seguridad estén cometiendo violaciones de derechos humanos que quedan impunes. A menudo, esta situación se encuentra asociada a la creación, por parte de compañías transnacionales, de empresas satélites subsidiarias con personería jurídica en un país, que ofrecen sus servicios en otro país y contratan su personal en un

La pregunta sobre hasta que punto nos será posible seguir desatendiendo una tal espacio de manifiesta impunidad respecto este tipo de conductas en sus manifestaciones más graves, resultará por tanto determinante. Y ello sin olvidar que la excepción negativa, la propia decisión sobre la propia inhibición de la entrada en escena de los normales mecanismos que habrían de tender a la rectificación de la situación excepcional, forma parte consustancial y subsiguiente al propio establecimiento de la excepción positiva: tanto el ejercicio de la soberanía positiva como la negativa resultarán, en definitiva, parte del ejercicio de soberanía real, retomando nuevamente aquí nuestra reflexión precedente al respecto.

V. El regreso del Cargo I de Nuremberg como punto de partida de un nuevo Derecho penal internacional corporativo

La relectura de todo lo anterior resultará de especial utilidad para completar el cuadro de una joven Republica democrática, cultural y científicamente avanzada, como era la Alemania de Weimar, enfrentada no únicamente a un extraordinario azar protagonizado por una serie de perturbados agrupados en el partido nazi – y dotados de una inagotable capacidad para engañar al pueblo alemán, aprovecharse de las distintas coyunturas surgidas, e ir destruyendo sistemáticamente las defensas democráticas internas del Estado –; nos ayuda a ampliar la comprensión de la *conspiración* colocando en primera línea el escamoteado protagonismo de las corporaciones del momento, plenamente conscientes éstas de la "oportunidad de negocio" que un estado de excepción nacional podían representar para sus actividades como hemos visto con Neumann.

La posterior Guerra Mundial, los inenarrables crímenes perpetrados, dejan de manifiesto por si mismo la impactante trascendencia material – hoy con visos de auténtica *puerta trasera* desde la que burlar el entero aparataje del sistema penal internacional desarrollado en las últimas décadas – que implica la contradicción de poder perseguir de forma

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tercero. Sin embargo, las empresas militares y de seguridad privadas y sus empleados se encuentran en un área gris que la Convención de 1989 no cubre de manera específica". *Intervención Oral de la Sra. Amada Benavides, ob cit;* Véase igualmente, como referencia al creciente reclamo de una transparencia efectiva en tales relaciones formulado por distintas organizaciones de derechos humanos, "Transparencia, privatización y la Guerra contra el Terror"; *http://rsechile.wordpress.com/2007/04/24/transparencia-privatizacion-y-la-guerra-contra-terror/*

imprescriptible y universal a los *responsables políticos* del crimen, mientras, paradójicamente, los *responsables económicos* continúan sin haber sido suficientemente tomados en consideración en la posterior evolución experimentada por el Derecho penal internacional y por la propia transformación del esquema de poder internacional en el mundo actual como nos muestran autores como Beck con su teorización en torno la Segunda Modernidad.

Más aún, una vez tomada constancia de la especial fragilidad institucional de determinados Estados en desarrollo ante la definitiva eclosión de un tal "nuevo" poder corporativo transnacional, en tanto que cuestión esta igualmente pendiente, apenas abordada todavía en unos pocos instrumentos internacionales como el art. 2.2. *b*) de la *Carta de Derechos y Deberes Económicos de los Estados* desde la cual quedará formulado genéricamente el elemental principio de que "las empresas transnacionales no intervendrán en los asuntos internos del Estado al que acudan".

Con todo, el *nunca más de Nuremberg* no llegaría a hallar una efectiva articulación en las décadas subsiguientes ni respecto al cargo primero de los juicios principales, ni frente a la grave y decisiva implicación en el mismo de tales actores no estatales de carácter económico, que quedaría en un discreto segundo plano, a pesar de las aterradoras consecuencias sufridas por la entera humanidad tras la conspiración para el apoderamiento de la República de Weimar.

Y así, las figuras de líderes mesiánicos u otros individuos "solitarios" excepcionales – siempre dotados de sorprendentes capacidades para lo imposible, siempre de modo coincidentemente benigno a los intereses industriales militaristas y petroquímicos del momento y siempre antecediendo al subsiguiente estallido bélico y la terrible pérdida de vidas humanas –, recurrente en ya demasiados escenarios de impunidad de gravísimas consecuencias a lo largo del último siglo no deben hacernos perder de vista la idea fundamental, y que, pese a todo, comienza a abrirse camino con claridad en nuestros días, de que el poder corporativo no puede seguir siendo ignorado por el Derecho penal internacional en lo tocante a su actividad gravemente vulneradora de la paz, la seguridad internacional y los derechos humanos; sea tanto en el supuesto bélico aquí apuntado en cualquiera de sus fases de desarrollo, como en toda una amplia serie de casos en último término reconducibles a lo que Baigún califica como "de daño social".

En ese sentido, y al margen de las distintas reflexiones aquí formuladas en torno al cargo primero y la conspiración extremista-corporativa para el apoderamiento del Estado alemán – ¿corporativo-extremista como lo fue la intentona de derrocamiento de Roosevelt en términos de mera

instrumentalización del segundo elemento de la ecuación? –, la primera y genuina virtualidad de todo ello habrá de ser la de allanar el camino para la toma en consideración de un nuevo *Derecho penal internacional corporativo,* firme y legítimamente fundamentado en el legado de Nuremberg como hemos tratado de mostrar, en términos de debida actualización de los mecanismos de responsabilidad a la propia realidad, y capacidad de acción, de los nuevos protagonistas internacionales de nuestro tiempo.

ETUDES / *STUDIES*

Etica profesional: los trances del penalista y el dilema "Garantias individuales-defensa de la sociedad"

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I. Alcance de estas reflexiones

Dentro de la copiosa constelación de posibles trances éticos o conflictos de conciencia del defensor en causas penales, confino estas reflexiones a sólo uno, a buen seguro el más urticante; el que, en el sentir general y aun en opinión de no pocos jueces, políticos y periodistas, es el que más denigra y desprestigia al abogado defensor. Claro está, me estoy refiriendo al supuesto caso del abogado que, a sabiendas de que su defendido ha cometido el hecho que se le imputa, se esmera sin embargo en ocultar esa verdad frente a fiscales y jueces, empeñados en descubrirla. Debo precisar esta hipótesis: sólo me ocupa aquí el caso del defensor que, en ésta su actuación, únicamente de recursos lícitos se sirve, quiero decir que no se socorre, por ejemplo, de documentos fraguados o de testigos falsos ni de desleales emboscadas procesales. Estoy considerando, pues, pura y simplemente la situación del defensor que articula en el proceso afirmaciones que están en contradicción con la reralidad que él conoce, o que se atrinchera en silencios que obstruyen – lícitamente, se entiende – la pesquisa de la verdad.

¿Merece, en tal supuesto, un reproche ético el defensor?
¿No le provoca este acto de insiceridad un conflicto de conciencia?
¿Irroga esta actitud un desmedro de la administración de justicia?
¿Se da en tal emergencia una conducta socialmente desvaliosa en cuanto podría debilitar o minimizar la defensa de la sociedad?

Con el designio de afrontar estos interrogantes y tantos más que este trance judicial puede provocar o sugerir, considero útil ensayar su análisis a partir de las siguientes cuestiones:
- qué es lo que defiende el abogado en un juicio penal;
- a quién defiende en tales procesos:
- cuál es el momento del compromiso ético.

II. Qué defiende el abogado

Todo acto de defensa -lato sensu- de un imputado o acusado corre parejas, sin excepción, con la defensa de un sistema de garantías tributarias de la libertad; toda vez que se defiende a un acusado se defiende, a la par, la vigencia de la libertad a favor de los demás individuos de la comunidad.

La invocación de una garantía en pro de un caso particular funciona, a la vez, como afirmación de la vigencia general de esa garantía.

Es la aplicación práctica del principio lo que hace que éste, de una mera pretensión normativa, se transmute o corporice en vivencia, que un inerte dato intelectual pase a ser realidad vital. Así es: una cosa es el derecho declarado en las leyes y otra cosa su ejrcicio en los hechos, pues no ha de confundirse el menú con la ingesta de los platos que en él se enuncian.

En consecuencia,sea su defendido autor o no del hecho materia del proceso, el abogado trabaja en pro de la vigencia de la presunción de inocencia, de la observancia de la garantía del debido propceso, del respeto por la prohibición de declarar contra sí mismo; en suma, el defensor despliega en el proceso una fuerza coadyuvante, muchas veces decisiva, para el mantenimiento e inviolabilidad de los pilares de la libertad, los mismos que sustentan y posibilitan tanto la dignidad del individuo como la coexistencia civilizada de todos los miembros de la comunidad.

Todo eso, a la par que a su defendido, es lo que defiende el abogado. Basta con advertir cómo, durante los regímenes totalitarios o dictatoriales – civiles o militares – se procura el quebranto de las garantías libertarias mediante, entre otros atropellos, la persecución, cuando no el asesinato de los defensores. Ante estos hechos irrefutables y de pública notoriedad no es menester abundar en más argumentación.

Precisamente, al debatirse en el XII Congreso Internacional de Derecho Penal (Hamburgo, 16 al 22 de setiembre de 1979) la cuestión de “la protección de los derechos humanos en el proceso penal”, se advirtió que esta mención suscita a mnudo la formulación de la (aparente) oposición o situación conflictiva que puede darse entre la “defensa de la sociedad”, por

una parte, y “garantías individuales”, por la otra.

Así como se definen los derechos humanos, también ha de ser precisado qué es lo que se defiende cuando se habla de defensa de la sociedad. Bueno es tener en cuenta que la expresión “la sociedad” no es sino una abstracción, una categoría lógica, una herramienta del pensar; no es, por tanto, una realidad de hecho; sí, en cambio, lo son “las sociedades”, en plural, es decir, los diversos grupos y subgrupos sociales. Se trata, pues, esta contraposición entre garantías individuales y defensa de la sociedad, de un falso dilema, dado que el verdadero núcleo conflictivo o dilemático ha de darse en la contraposición “individuo-poder” y no en la fórmula “individuo-sociedad”.

Por supuesto que me estoy refiriendo aquí al poder público, al poder que compete al Estado concebido como organización política de la comunidad. Por consiguiente, la eventual confrontación en análisis es la que se da en el plano axiológico, es decir, entre los valores en que se sustentan las garantías individuales y los que hacen a los fines del Estado, fines éstos que se manifiestan en las distintas políticas instrumentadas, en suma, como medios en procura del bienestar común, destino en que se resumen aquéllas: políticas educativa, habitacional, laboral, militar,económica, etc.

El dilema surge cuando entran en pugna alguno o algunos de los valores que competen a las garantías individuales, contra alguno o algunos de los que hacen a los fines del Estado; en tal caso, la cuestión versa sobre la legitimidad o legalidad de la prevaleciente vigencia de un valor (garantía individual) sobre el otro (fines del Estado-poder público) o viceversa. Así llegamos a la entraña de la cuestión: la prevalencia en este conflicto de valores estará dada por la ideología política del Estado, sea un gobierno de facto o de derecho, democrático o totalitario.

Una de las más notorias consecuencias de esta confrontación entre poder e individuo la encontramos en materia de privación de libertad o de libertades. Esta tarea, a menudo ardua cuando no sacrificada en procura de la transformación de la aspiración normativa en pro del justiciable, en realidad viviente, esta brega en pos de la realización de los derechos humanos en el proceso penal, confiada a los abogados, muchas veces determinó que éstos terminaran acompañando o reemplazandoa sus defendidos como destinatarios de la hostilidad del poder dicatorial, totalitario, antidemcrático.

En suma, si todo este caudal libertario y justiciero es lo que custodia el abogado, mal puede éste merecer reproche por sostener la inocencia de quien sabe ser el autor del hecho ilícito materia del proceso, porque no está defendiendo una mentira, sino un conjunto de garantías que son salvaguardia de nuestra civilización, y que no dejan de ser válidas aunque

circunstancialmente faciliten el ensombrecimiento o la impenetrabilidad de alguna casuística verdad.

Por eso mismo se resolvió en el recordado congreso de Hamburgo, con referencia a los defensores en sede penal, que "nadie podrá ser descalificado por su empeño en proteger – con medios lícitos – los derechos humanos en el proceso penal" (Actas del XII Congreso Internacional de Derecho Penal, editadas por el Grupo Nacional Alemán de la Asociación Internacional de Drecho Penal, Hamburgo, 1980, pág. 562).

Quede así fundamentada mi respuesta negativa a todos y cada uno de los interrogantes formulados en el capitulillo I del prsente trabajo. Serán también fundamento de la respuesta negativa a los mismos interrogantes las razones que expongo a renglón seguido, al ocuparme de "a quién defiende el abogado".

III. A quién defiende el abogado

¿Quién es ese hombre (o mujer) llevado a rendir cuentas ante la justicia penal?

¿Cómo y por qué aparece articulado en la maquinaria penal?

Siempre en procura de esclarecer y evaluar el específico trance ético objerto de este trabajo, es preciso conocer a quíen defiende, en tal supuesto, el abogado.

Empecemos pr afirmar que al abogado que acepta el caso le compete defender y no juzgar a su patrocinado. Defender significa, en primer lugar, conocer y comprender al imputado, al igual que el hecho que se le carga en cuenta, y todo el complejo circunstancial en los que el uno y lo otro están articulados. Compenetrado de todo ello, defender es poner en acción, con denuedo, los derecchos y garantías de que da cuenta el ordenamiento jurídico, de las normas constitucionales para abajo.

Acerquémonos ahora a ese hombre a quien defiende el penalista. Varias son las vías de aproximación al justiciable: la jurídica, la sociológica, la antropológica, la criminológica, la criminalística, entre otras.

En la dimensión jurídica, ese hombre es alguien que tiene su lugar en las normas constitucionales, en el código penal, en el de procedimiento penal y en las disposiciones garantistas internacionales. El defensor lo auxilia en esa lucha desigual entre el imputado y las poderosas fuerzas del poder público, entre el imputado y la justicia penal, naturalmente orientada por una preocupación represiva. Defiende, pues, a un destinatario de garantías que lo asisten y que le competen, que lo eximen de probar su

inocencia y que obligan a quien lo acusa a aportar las pruebas de su autoría y culpabilidad.

También hemos de acercarnos al imputado o acusado por otros caminos, siempre con vistas a dirimir el (aparente) conflicto ético o de conciencia motivador de estas reflexiones. En los planos sociológico y criminológico es dable comprobar que sólo contados contados hechos delictivos, los menos, llegan al conocimiento de los jueces. El panorama de la criminalidad es mucho más cuantioso y extenso que el caudal de hechos ilícitos en sede judicial; y el número de sospechosos, imputados y acusados es harto menor que el de los hechos denunciados o desacubiertos. ¿Quiénes son esos pocos "elgidos" que recalan el los despachos del fuero penal? Algunos fueron traídos por los virentos del azar, otros cayeron al conjuro del poder selectivo policial, por ejemplo; por lo general, trátase de la gente más vulnerable en lo social o en lo económico, cuando no de vulnerabilidad política.

Mientras un gran contingente de infractores es agraciado por el azar y el anonimato, una minoría minúscula menos afortunada integra el equipo dramático de procesados y condenados.

El secreto del delincuente no descubierto no ha de ser social y jurídicamente más valioso que el del hombre atrapado en el tribunal. Su intimidad, confiada al defensor, no descalifica a éste por callarla ante los jueces y deferir en éstos y en los fiscales la tarea de aportar las pruebas aptas para fundamentar una condenación.

En definitiva, la absolución de un autor culpable no ha de ser reprochada a la defensa sino a las insuficiencias de la acusación.

Todo esto sea dicho sin olvidar que, muchas veces, el defensor ampara, con su silencio o alegación de inocemcia de un culpable, a terceros ajenos al hecho ilícito que se investiga o juzga, como ser familiares cuya suerte está ineluctablemente ligada a la del encartado.

IV. Momento del compromiso ético

Todo abogado es libre de aceptar o rechazar la defensa de quien le consta ser autor culpable de un delito y a quien ha de representar como inocente, socorrido por la insuficiencia de las pruebas de cargo.

Si acepta, pero durante el curso del proceso esta situación le provoca malestar de conciencia, puede liberarse de su compromiso sirempre que proceda tempestivamente, sin desmedro para la defensa y sin revelar ni dejar entrever ni sospechar la causa de su renuncia.

Una vez aceptada su intervención, se servirá de todos los recursos lícitos

a su alcance en pro de su defendido, y actuará con firme vocación pese a estar defendiendo como inocente a quie sabe culpable, porque también sabe que está sustentando, a la vez, los principios libertarios que dignifican al ser humano y porque sabe que la libertad no es ni puede ser un impedimento para la civilizada investigación de los delitos ni para el justiciero tratamientode los imputados y buen servicio del interés general.

Beyond extradition: Safeguards for "Extraterritorial" and "Sane Territory" surrender of individuals*

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1. Premise

Individuals are surrendered to foreign authorities in several situations which cannot properly be labeled as extradition because they don't represent a form of judicial cooperation (purpose isn't supporting a foreign criminal proceeding), or handover is disposed by military authorities, police officers and even privates vested with public functions.

The material handover of the individual may take place abroad (properly "*extraterritorial surrender*"), or in the same territory of the State and the individual is taken into custody by foreign authorities present in that State ("*same State surrender*").

Extradition has an established procedural framework (irrespective of the collocation of the statutes), even if proper guarantees and safeguards may be sought, and violations of individual rights may be prevented, relying on general legal remedies as the individual claim under constitutional law established in the German legal system or the *writ of habeas corpus* under statutes or *common law*. Other forms of surrender often lack a statutory framework, being the result – in civil law Countries – of the reluctance to discipline constitutionally weak exceptions to generally accepted principles and the equally questionable reliance on intrinsically weak legal construction based on an alleged *self executing* character of treaties and

* The present writing has been completed with the highest reliance on the "principle of non attribution" and therefore reflects only the opinion of the author and is in no way intended to reflect the opinion of the Italian Ministry of Defense or the Italian Navy, nor the opinion of NATO.

conventions to include restrictions of the freedom of the individual. In common law countries, and specifically in the Unites States legal system, these other forms of surrender may, in several situations, be expression of the executive's powers in the international arena.

Basic judicial review in respect of such other situations in which the individual is detained abroad and awaiting surrender to local authorities, or is waiting to be handed over the foreign authorities in the same State, is therefore mostly sought (even *ex post* facto) relying on the same general remedies established for extradition in several *Common law* Countries (civilian proceeding based on *habeas corpus*, whether statutory whether under *Common law*, "non statutory" interdictive remedies and remedies based on *human rights* statutes) and arguments raised pertain to *international humanitarian law*, *human rights law*, *constitutional law* and certain specific prohibitions under international law (prohibition of torture and inhumane and degrading treatments). The aspect is clearly tied up with the problem of the extraterritorial reach of *human rights* conventions and laws, constitutional rights and statutory rights.

In some cases, the absence of proper remedies in the form of *judicial review* induce to resort to domestic and international criminal law, in order to ensure at least an "indirect" review in the form of an assessment on criminal liability in respect of the surrender of individuals.[1]

In the following paragraph we will try to highlight the territorial and "extraterritorial" implications of extradition and then move, based on a "differential approach", to the other forms of surrender resulting in the detention and transfer of the individual.

We will not deal within this study with the *human rights* and the jurisdictional implications of "returns" and "renditions" in violation of the sovereignty of the State of refuge and its statutes (with or without the complicity of agents of the said State) and with the practice defined as *lurin*

[1] The presentation of a report to the prosecutor of the International Criminal Court in The Hague in respect of the transfer by Canadian military of Afghan detainees to Afghan police custody was announced by Prof. W. SCHABAS from the *Irish Centre for Human Rights at the National University of Ireland* – Galway.

2. Defining the territorial element and the aim of extradition

Extradition represents the most known form of international judicial cooperation and several principles, governing current extradition practices, have been subsequently applied to other forms of judicial cooperation, once defined as "minor judicial cooperation".

With the sole intent of comparing extradition with other forms of surrender, we can define extradition as the form of "judicial cooperation" by which an individual is handed over, with coactive means, by the authorities of the State on whose territory he could be apprehended to the authorities of another State, for the purpose of being prosecuted for a crime or offence or for the purpose of the execution of a sentence pronounced in his regards.[2] The basic distinction between "conventional" and "extra-

[2] As mentioned in the text the sole intent of the definition is to provide comparison pattern for the subsequent analysis of the extraterritorial and same territory hand over. The description provided in the texts refers to the basic definition of extradition. Several Constitutional texts simply refer to extradition and their effective reach may not overlap with extradition as defined in statutes and conventional texts and their effective reach is and remains a critical topic. So for example under the German Constitution, the reach of article 16 containing (initially) a complete bar of the extradition of nationals was deemed (BVerfGE, 10, 136) to be broader than the definition of extradition given by the *DAG* (*Deutsches Auslieferungsgesetz*) and later by the *IRG* (*Gesetz über die internationale rechtshilfe in Strafsache*), even if the said article was stricter construed than the correspondent provision (art. 112) in the Constitution of the *Republic of Waimar,* prohibiting the extradition "to a foreign government" rather than the extradition abroad. The "two State's territories requirement" is accordingly expressed with the purpose of progressively illustrating the differences between extradition and extraterritorial surrender. We acknowledge that, for example, the U.S. legislation deals under the same Title 18, chapter 209, with extradition (§ 3184), fugitives from State or territory to State, district, or territory (§ 3182), fugitives from country occupied or under control of the United States into the United States (§ 3185) and even fugitives from State, territory or possession into extraterritorial jurisdiction of the United States (§ 3183). The paragraph deals in the last mentioned case how the fugitive has to be transferred back to the United States from its extraterritorial jurisdiction. The last one is defined in 18 USC § 7, as amended by § 804 of the *Patriot Act*, and includes … *premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of those missions or entities, irrespective of ownership; and … residences in foreign States and the land appurtenant or ancillary thereto,*

conventional" or "statutory" extradition isn't really relevant for the purpose of analyzing extraterritorial and "same territory" surrenders; at least not in this phase.

The judicial cooperation character is a consequence of the link existing with the criminal proceeding conducted or still ongoing in the requesting State and the aim to "support this proceeding". The different theoretical models aimed at explaining the said link can be skipped for the purpose of investigating the nature of other forms of surrender.[3]

The "two States territories" element, according to which the individual is transferred from State A to State B, is a constant characteristic of extradition, at least in its "primary" version. An exception is represented by "subsequent or supplementary extradition", "re-extradition" and other forms of jurisdictional or executive lifting of the bars deriving from the specialty principle and removal of legal obstacles to the further extradition of the individual. These forms of judicial cooperation share the very essence of primary extradition and constitute a judicial and executive follow up of the last mentioned proceeding. In a certain sense, they are expression of a *prorogatio iurisdictionis* as an amendment to the (eventually implicit) conditions of the extradition requires a subsequent decision by the authorities which granted extradition. Subsequent

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irrespective of ownership, used for purposes of those missions or entities or used by United States personnel assigned to those missions or entities. On the reach of the *Patriot Act*, *see* C. DOYLE, *Terrorism: Section by Section Analysis of the USA Patriot Act, Congressional Research Service, Report for Congress*, 10th December 2001, p. 48ff. For an early case of extradition from the United States to the (at the time) occupied territories of Cuba, *see* U.S. Supreme Court, *Neely v. Henkel*, 180 U.S. 109 (1901). Specific legal questions arise from the coexistence in the territory of the United States of *tribal jurisdiction.* District courts have been vested with *habeas corpus* jurisdiction over *tribal courts* (25 U.S.C. §1303) even if tribal prosecutions are neither federal nor State prosecutions, but expression of the tribal court's inherent powers. *See* recently *US Supreme Court, US v. Lara,* 541 U.S. 3 – 107 (2004), dealing with the *dual jeopardy* principle in respect of tribal convictions and subsequent federal prosecutions.

[3] According to the different view as to the link mentioned in the text, the extradition proceeding is alternatively expression: of an international sharing of tasks in the exercise of criminal jurisdiction (*Internationale arbeitsteilige Strafrechtspflege*), by itself expression of the exercise of direct or indirect criminal jurisdiction, expression of a *sui generis* executive jurisdiction, expression of executive tasks fulfilled by the judiciary (so called *voluntary jurisdiction*).

proceedings, once the individual has already moved from the territory of the State which granted extradition, could in a recent narrow interpretation of the "effects theory", developed by the *European Human Rights Court* for contingent reasons (but not without alarming echoes), fall outside the protection of the Convention.[4]

The two States element lacks in the cooperation between Federal and State authorities where the federal powers are "overreaching" the State's

[4] In its decision on the *Bankovic case* (*Bankovic et al. v. Belgium & 16 Other Contracting States*, § 68), the Court seems to review the *rationale* of the decision adopted in the *Soering* case. The Court affirms that the decision in the *Soering* case was related to "*an action of the respondent State concerning a person while he or she is on its territory, clearly within its jurisdiction"*. The "territorial element" represented by the presence of the applicant in the respondent State wasn't really new and has been, some years before, alleged by the claimant in the *Charles Chitat Ng v. Canada case* in order to justify the *ratione loci* jurisdiction under the Covenant and the *UN HRC* didn't any further reproduce or rely on such an argument in his finding (*Charles Chitat Ng v. Canada case,* respectively §§ 4.1 and 6.2). Clearly extradition and expulsion proceedings require the presence of the individual within the territory of the concerned State at least at the initial stage of the proceeding – and some national rules impose the stay of the proceedings if the person sought for extradition flees before he or she is committed for extradition – but in *Soering* and in the mentioned *Charles Chitat Ng v. Canada case* the "territorial link" represented by the holding of the proceeding within the respondent State was deemed sufficient. Accordingly, it seems us that the *effects principle* has been developed starting from the "territoriality of the proceeding" rather than in respect of the further and merely executive acts consisting of the material "surrender" of the fugitive or the "deportation" of the person to be expelled. The reasons of the "re-drafting" of the effects principle's rationale while dealing with the bombing of the Serbian radio television station by the *NATO* and *Council of Europe* Member States, lies perhaps in the intention not to get tied up with an argument raised by the applicants with reference to the "effects" of the military planning, tasking and targeting process which took place in the territory of the contracting States hosting the concerned *NATO* headquarters. The wording is also reproduced by *Human Rights Chamber for Bosnia and Herzegovina,* in the *Boudellaa and others case*, § 260. The return to the pure effect theory after *Bankovic* was only a matter of time. Dealing with the application of *Mamatkulov* and *Askaro* v. Turkey the Court newly affirmed that the liability incurred by the respondent State in the *Soering* case was *by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment* (*Mamatkulov* and *Askaro* v. Turkey, 4 February 2005, § 67).

territory.[5] Surrender of individuals between associated or federated States is a matter of proper "inter-State cooperation" and may vary from "extradition look a like" procedures (sometimes with linguistic restraints) established conventionally or even by uniform domestic legislation, to the *backing of warrants*, to the direct enforcement of orders.

The *European arrest warrant* represents an attempt to overcome the burdensome extradition procedures within a "juridical space of security and justice" coinciding with the territories of the States of the *European Union* and established (at least in judicial and police matters) as a form of "inter-governmental cooperation"; its differential implementation shows that different approaches varying form the *sui generis* surrender to different degrees of simplification of traditional extradition procedures and even the "political phase" hasn't been abolished in all countries. "Post surrender" implications are, in principle, reduced, in line with a more flexible approach to the rule of specialty.

Within the executive phase of a traditional extradition proceeding, a "temporary extraterritorial surrender" of the person committed for extradition may take incidentally place as a consequence of transit for extradition purposes through the territory of a third State: pending the transmission of a "transit request" and the decision on the authorization, the person being extradited should be taken into custody by the authorities of the State in which the "non scheduled lading" occurred. The taking into custody of the individual by the State of transit is sometimes subordinated to a request by the *Escorting Officer* (which not necessary is an agent of the State requesting the extradition); so the *UN Model Treaty on Extradition*[6] (article 15, paragraph 4).[7] This would characterize the taking of the custody

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[5] Before the German reunification, rendition of individuals between the German Federal Republic and the *Länder* constituting the German Democratic Republic was labeled as *Zulieferung* rather than extradition (*Auslieferung*). On the question represented by the furtherance of the existence of Germany as a subject under international law despite the establishment of the German Federal Republic and specifically on the practice of negotiation, *see* B. KRENBERGER, *Deutschland im Spannungsfeld zwischen Europäischer Menschenrechtskonvention und nachzubefolgendem Besatzungsrecht*, Frankfurt am Mein, 2004, p. 30ff..

[6] *UNGA* Resolution 45/116, annex, 45 U.N. GAOR Supp. (No. 49A) at 212, U.N. Doc. A/45/49 (1990).

[7] At this purpose *See* also the *United Nations Office on Drug and Crime – Model Extradition Law* (2004), article 39. The *UN Revised Manual on the Model Treaty on Extradition*, § 234 affirms *that ... without transit permission from the third State, an escorting officer generally has no power and will not be*

as an essentially cooperative activity in respect of the authorities of the State in charge for the transfer rather than a necessary tribute to the jurisdiction of the State of transit, its concerns in respect of extradition and the individuals right to apply to a court. Sometimes a time limit is set for the custody of the person by the authorities of the State of transit, awaiting the transit request, at the expiration of which the person has to be released; this in order to comply with constitutional restraints of the said State. Where such provision has been inserted in a treaty, the holding into custody of the extradited persons by the agents in charge of his or her custody (*on board custody*) seems us to be contrary to the *bona fide* interpretation of the convention[8] and the transit State custody must be regarded as necessary. Domestic legislations mostly require directly the taking into custody of the

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accorded assistance by local police in respect of the person being extradited. The latter can simply leave or, at best, can bring an application for the issue of a writ of habeas corpus. Such applications have succeeded in the past. Some States would not consent to foreign police detaining in custody the person in transit. The following paragraph § 247 suggests the idea that the custody trough the State of transit is necessary in order to avoid legal challenges (based on the domestic legislation of the State of transit) against his detention under the control of the foreign escorting officers. The *Manual* states at this regards that *… legislation will be required to enable an extradited person to be held in custody; otherwise the person may use whatever legal mechanism is available to test whether his or her detention is expressly sanctioned by the law… while the details of the legislation will vary, the provisions usually enable an extradited person to be held in custody while passing through a State for periods not exceeding a certain number of hours*. Reference is made also to domestic provisions allowing the *foreign escort officer to hold the person in custody for, say, 24 hours or less without further authority*. Despite the reference in the *Model treaty* to the escorting officer's request to the transit State's authorities to hold the individual in custody, the apparent tolerance towards *on board* detentions of the individual, pending the decision on the authorization of the transit, is furthermore a matter of compliance with domestic legislation which implies, for States parties to the *ECHR* the implementation of the provision set out in article 5 paragraph 4 of the convention (*right to challenge the detention*).

[8] It seems to us that, in such a situation, there are no bars in respect of the exercise of the "supervisory jurisdiction" by the authorities of the State of transit, irrespective of the fact that the person is on board a State aircraft. Nevertheless practical problems may arise in respect of the ability of the individual to communicate with the local authorities. Some municipal law allows appointment of lawyers and/or legal steps by the dependants of the imprisoned individual.

person by its authorities. Obviously, the assistance of the transit State authorities for the temporary custody of the person may be asked, where necessary, also in the context of a "scheduled landing" and furthermore a "scheduled transit"[9] and should be requested in respect of incidental board to board transfer of the person being extradited. The *extraterritorial handover* of the individual being extradited to transit State authority for *interim* custody isn't subject to procedural safeguards under the regulations of the State in charge for the transfer. Nevertheless "transit State custody" may pose critical legal questions in respect of the essence of the specialty principle whereas the transit authorization is denied and the individual is sought for prosecution/extradition in the transit State.

The "two States" element lacks in the cooperation with international courts or tribunals. This form of cooperation is often labeled as "vertical cooperation" as opposed to a "horizontal cooperation" taking place between States, and refrains from the use of the term "extradition". The "vertical" character of this kind of cooperation has been variously explained and derives, in principle, form the over-ordination of the said jurisdictions according the constitutive convention – so for the *International criminal court* – or as a consequence of the cogency of the act by which they are established – the *ad hoc* tribunals.[10] In respect of the *international criminal court* the "verticality" of the cooperation derives also from the essentially territorial character of its jurisdiction whereas the territories of the States parties represent each a "fraction" of such a jurisdiction. Cooperation of the said Courts with the *Host State* represents a separate *sui generis* form of cooperation. The cooperation with "Internationalized court" hasn't the same cogent aspect of the previous and is based on *ad hoc* agreements and may also be based on cooperation with the *Host State* as a "medium".

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[9] This aspect is neglected by the Italian legislation on extradition as art. 712 paragraphs 4 of the code of criminal procedure recalls the provisions on the provisional arrest for extradition purposes only in respect of an "unscheduled landing".

[10] According to slightly different reconstruction, the International jurisdiction isn't regarded as something extraneous, but as an entity to the governance of which the Nation contributes (so called "*stock holder approach*") whether through the National judge (which in no case shall be bound by instructions issued by its Nation!) or come convincingly, through the directly participation to the process establishing the *ad hoc* jurisdiction by the State's representative in the *UN Security Council* or the indirect one through the State's representative in the *UN General Assembly*.

The content of the protection concretely granted to the individual sought in extradition varies from the classic bars to extradition represented by the "political (and/or military) character of the offence",[11] the lack of dual criminal liability[12] or the *fair trial guarantees* in the requesting State, to the more general prohibitions states in *human rights law* to contribute "indirectly" to violations of human dignity, discrimination, inhumane or degrading treatment, torture and arbitrary detention to take place in the requesting State.

Death penalty concerns are addressed in most Constitutions and descending statutes but death penalty cannot be considered *per se* violation of the core of the customary human rights, even if acknowledged in regional human rights instruments. Death penalty concerns may have a different relevance as several constitutional provisions provides for a *peace time* only prohibition of death penalty and the legitimacy of *war zone* hand over of individuals hasn't really been exploited under constitutional laws

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[11] This bar may have, according to different perceptions, a different latitude, from the traditional liberal concept according to which political offences or politically aimed offenses are a matter of opposition to an established political system, to a situational restricted notion of crimes committed in the context of an insurgency as long as justified by some kind of military necessity, to pragmatic considerations in respect of the advantages not interfering in the foreign political clash, up more modern conceptions not focusing on the offense itself but rather on the character of the prosecution and the trial; perspective which moves the very nature of the bar towards a protection in respect of political discrimination in the form of a political criminal proceeding.

[12] Also this clause is subject to different perceptions, based on an international law oriented approach or, at the opposite, on a criminal law oriented approach. In the first perspective the *dual criminal liability* is a matter of "reciprocity" whilst in the second one, dual criminal liability is an expression of the *nulla poena sine lege* principle or, at least, a requirement for the interferences with the freedom of the individual sought in extradition. Relevance of the *dual criminal liability* requirement is maintained in the regime established for the implementation of the *European arrest warrant* even if the ascertainment of the requirement is, in respect of a list of offenses presumed. The *European Court of Justice* seems to have a "territorial concept" of the *dual criminal liability* principle. At this regard, *see* the decision of the 7th of May 2007, C-303/05. In respect of certain forms of judicial cooperation extended to criminal proceedings led by an administrative body (so called *administrative criminal procedures*) or to administrative proceedings aimed at the ascertainment of violations of a non criminal character, the requirement is stated in the form of a *dual possibility to challenge the decision to an appellate court competent in criminal matters*

under the transferring and the receiving State's war time legislation.[13] Besides, the extraterritorial application of the *European Human Rights Convention* isn't without some relevant "grey areas": in the *Bankovic* decision of the *European Human Rights Court* affirmed the convention only exceptionally having an extraterritorial reach (traditional State's outpost and extraterritorial activities consented by the concerned territorial State), and after the control over an individual requirement was recalled in the *Issa* decision,[14] the Court, based on an apodictic theorization of the imputation of extraterritorial detention to the *UN Security Council*, seems to follow – with its *Saramati* decision – a line excluding jurisdiction *ratione personae* not only in respect of detention, but also in the case of surrender to the local authorities as an implication of the stabilization efforts.

Substantive principles have been briefly recalled because "*extraterritorial surrender*" and "*same territory surrender*" often imply, due to the circumstances in which the transfer of the individual takes place,

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[13] Also the sixth protocol to the *European Human Rights Convention* doesn't exclude lawful application of death penalty under war time legislation. It is only with the thirteenth protocol that the application of death penalty is excluded in any circumstance.

[14] *Issa and others v. Turkey*, judgment of 16th November 2004. The decision on the *Issa* case is interesting because the Court tries to remediate an apparent *lapsus* of the previous *Bankovic* decision in respect of the "control exercised over an individual abroad", as jurisdictional criteria under article 1 of the Convention. At this purpose the Court expressively cited the views adopted by the *Human Rights Committee* in the cases of *Lopez Burgos v. Uruguay* and *Celiberti de Casariego v. Uruguay*. The lack of references in *Bankovic* to jurisdiction over individuals as a consequence of the exercise of control over them, induced the *UK High Court of Justice* in the *Al Skeini* case (*High Court of Justice* in *Al Skeini and others v. the Queen,* 14 December 2004, § 287) to adjudicate the application of *Daoud Moussa*, which son died while detained in a British military prison in *Basra* – by considering that such a prison *operating in Iraq with the consent of the Iraqi sovereign authorities … falls within even a narrowly limited exception exemplified by embassies, consulates, vessels and aircraft* rather that empathizing the jurisdiction over the individual *per se*. Curiously the *High Court* recalls at this purpose, as an authority, the decision of the *US Supreme Court, R. Rasul et al v. Bush et al.,* 28th June 2004. In that case it was affirmed that the *habeas* statute would create federal-court jurisdiction over the claims because by the express terms of the agreements with Cuba, the *US* exercises "complete jurisdiction and control" over the *Guantanamo Bay* Naval Base, and may continue to exercise such control permanently if it so chooses.

a different relevance of the traditional bars to extradition.

3.1 *Surrender* of individuals in accordance with *Status of forces agreements*: a quasi extradition?

Status of forces agreements (*Sofa*) contains provisions on the sharing or at least on the boundaries of reciprocal exercise of jurisdiction.[15] Aim of these agreements is to provide a legal framework for the consented presence of what, in the perspective of the *Receiving State*, is a "*foreign military presence*". Such agreements depart from the absolute immunity/extraterritoriality of foreign armed forces[16] and move towards a discipline intended to mediate, on one side, the need of the Sending State to ensure discipline over their armed forces and, on the other side, the need of the receiving State non to be excessively impeded in the exercise of its territorial jurisdiction.[17]

Surrender or *hand over*, as it is mostly defined in *Sofa*, is aimed at providing the authorities of the State having exclusive or primary concurrent jurisdiction to exercise such jurisdiction. The said provisions aren't systematized and don't represent a specific *genus* "judicial

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[15] Recently, on the topic, M. TONDINI, *The exercise of jurisdiction on military personnel abroad in the practice of Status of Forces Agreements*, in *Rassegna dell'Arma dei Carabinieri*, 2007, n. 3, p. 19ff.

[16] The departure from what was felt as an established principle under international law, moved a request for a U.S. reservation to the NATO Sofa during the U.S. Congressional hearings. At this purpose *see House Committee on Foreign affairs, Hearings on H.R.J. Res*. 309, 84th Cong., 1st & 2s session (1956), p. 160. The opposite view according to which the jurisdictional immunity of visiting forces is based on an express waiver of the receiving State is, traditionally and convincingly advocated by G.P. BARTON, *Foreign Armed Forces: Immunity from criminal jurisdiction*, in *British Yearbook of International Law*, 1950, p. 186ff. On the British expectation for a reciprocal U.S. legislation following the adoption of the *United States of America (Visiting Forces) Act 1942*, and the content of the Public Law 384, 78 Congress and descending U.S. Presidential Proclamation 2626 of 11 October 1944, *see* M.E. BATHURST, *Jurisdiction over Friendly Foreign Armed Forces: The American Law*, in *British Yearbook of International Law*, 1946, p. 338ff.

[17] Operational *Sofa* have a different aim and as they provide for "Contributing State" exclusive jurisdiction they have, in theory, no surrender of service members, implications; this unless jurisdiction is waived. For our purpose we will no further deal with operational *Sofa*.

assistance" within the *Sofa's.*[18] In this sense the minute provisions on judicial cooperation address the specific issue represented by the coexistence of two State's powers within the same territory. As has been pointed out, the assistance provided to a foreign criminal proceeding to be hold in the receiving State goes beyond the "tolerance" of such a proceeding and represent an "active support" which may determine directly consequences for the individual.[19]

Offences committed in a third State fall out of the jurisdiction sharing agreement and may pose questions in respect of the receiving State's jurisdiction[20] to grant extradition of service members of the sending State to a third State;[21] question strictly linked to the configuration to be given to

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[18] In the sense that the provisions on judicial cooperation within the *NATO Sofa* aren't systematically included in a wider concept of judicial cooperation, *see* R. BIRKE, *Strafverfolgung nach dem NATO – Truppenstatut, cit*., p. 327.

[19] R. BIRKE, *Strafverfolgung nach dem NATO – Truppenstatut, cit*., p. 327. Article VII paragraph 5 lett. *a* of the *NATO Sofa* states that "the authorities of the receiving and sending State shall assist each other in the arrest of members of a force or civilian component or their dependants in the territory of the receiving State and handling them over to the authority which is to exercise the jurisdiction … (*omissis*)". Further article VII paragraph 6 lett. *a*, establish that the authorities of the receiving and sending State shall assist each other in the carrying out of all necessary investigation into offences, and in the collection and production of evidence, including the seizure and, in proper cases, the handing over of objects connected with an offence … (*omissis*).

[20] In the recent decision given by the German l'*OLG Stuttgart*, 13th September 2005, *Neue Zeitschrift für Strafrecht*, 2006, p. 117 in respect of an application 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, and in respect of one of the accused, the Court mentioned the sending state's jurisdiction. As no further reference to the legal base of such jurisdiction was made, 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* applicable to the mission in Iraq (based on the attribution of extraterritorial reach) or, finally, if the Court simply expressed a factual consideration in the view of the application of domestic law based on the mere existence of the foreign State's jurisdiction over its service members.

[21] Renounces to exercise such a jurisdiction have sometimes been included in supplementary agreements to the *NATO Sofa*. At this purpose *see* the declaratory provisions contained in the *Agreed minutes and Declarations concerning the NATO Status of Forces Agreement*, contained in the *Protocol of*

the "extradition jurisdiction". Offenses committed in the sending State or in violation of sending State duties in a third State represent a "grey area" to be addresses in theory by extradition law, but sometimes, as we will see, dealt within *Sofa.*[22]

Irrespective of the content of the jurisdiction sharing rules, all *Sofa* – even the ones asserting sending State exclusive and unrestricted jurisdiction over own personnel (and eventually also their relatives) – need to establish or at least to rely on *judicial cooperation framework* with the receiving State. The service member may be at large, far from the military premises and sending State officers are normally prevented from taking directly steps to apprehend the person (localization through *imsi catcher*, search of the private domicile of citizen of the *Receiving State* and so on). Judicial cooperation represents often the result "good liaisons" and "comity".

Moving from traditional distinction between active and passive extradition, arrest and handling over of fugitive service member (and their relatives) in accordance with *Sofas* may be divided, in the perspective of the *host State*, into "passive" and "active".

Accordingly, "passive" handover is the handling of the said individual, in accordance with the *Sofa*, to the foreign military authorities which are to exercise jurisdiction, as a proper measure of judicial assistance: handling over is aimed at allowing the exercise of foreign jurisdiction, whether adjudicative or executive.[23]

Having mind to the "two State element" of extradition, in the "passive" hand over of an individual from the receiving State's authorities to the

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Signature to the Supplementary Agreement of 3 August 1959, *sub* Art. VII which reads: … *in the view of [omissis] the Federal Republic of Germany does not consider it to be within its competence to decide on requests for extradition of members of a Force, of a civilian component or dependents"*. The question represent the main topic by "bilateral agreements" adopted by States receiving U.S. visiting forces in order to prevent the receiving State from extraditing service members, civilian elements, dependants and contractors to a third State or surrendering them to an international jurisdiction.

[22] For the case of a *US* citizen which deserted while in Vietnam and later arrested by Australian service authorities acting under *Defence (Visiting Forces)Act* 1963, *see* High *Court of Australia, Re Boulton, ex parte Beane,* 9 April 1987.

[23] Handling over for the execution of a sentence isn't expressively contemplated in the NATO *Sofa* which refers simply to the exercise of jurisdiction. As we will mention later, art. VII, paragraph 8 lett. *a* refer to the *receiving* cooperation in respect of the enforcement in its territory of a sentence pronounced by the *sending State*'s military authorities. This provision is a precursor of the modern judicial cooperation in the enforcement of foreign decisions.

authorities of the sending State something is missing. The individual is handed over to foreign authorities present in the same territory and normally exercising their non territorial jurisdiction there. That sending State's jurisdiction under *Sofa's* shall, in principle, be carried out on the territory of the receiving State. This emerges clearly from the narrow construed "*double jeopardy clause*" in the *NATO Sofa*, which bars a second proceeding "within the same territory" of the receiving State.[24]

Practice shows to be less restrictive and jurisdiction sharing clauses are interpreted in a broad sense to include sending State's "non military" jurisdiction, even if carried out in the sending State. Although, certain supplementary agreements expressively establish that the trial shall take place in the receiving State unless such a trial is prevented by the sending State laws, imperative military need or by the interest to a proper judicial finding.[25]

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[24] This implies that, whilst in the *Sending State* the *double jeopardy* principle applies mainly as a consequence of the "non local" (to say: *not foreign*) character of Courts Martial Jurisdiction, a double jeopardy bar in the receiving State presumes that the individual has been previously trialed on the same territory by the military authorities of the sending State. Accordingly, if the individual has been trialed by a Court in the sending State, the bar shouldn't work. Even between sending and receiving States otherwise bound by conventional *ne bis in idem* rules – admitting that the rules like the ones contained in the *Convention implementing the Schengen Agreement* (*CISA*) may complement the *Sofa* – the exception related to the territoriality of the conduct would mostly prevent the application of the principle. Besides the *double jeopardy* principle, as states in the *NATO Sofa*, refers to the "same offence" and not, as *ne bis in idem* provisions, to the "same conduct". Diverging legal qualifications are less relevant in respect of the *NATO Sofa* because the exercise of the jurisdiction by the sending/receiving State presumes a previous legal qualification of the conduct and divergences should be resolved by the means established in the *Sofa*. The *double jeopardy* provisions raises harsh legal questions in respect of "administrative" decisions of the sending State's authorities not to commit their service members to trail (e.g. for U.S. service members, if their right to a speedy trial under the sixth amendment has been violated or the similar stay of the proceeding ordered by the Court following a motion for speedy trial) and under supplementary agreements (e.g. the *Agreement to Supplement the agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany* of 3 August 1959) where the receiving State primary jurisdiction has been preventively renounced and following inactivity the renounce is withdrawn.

[25] So article 26 of the *Agreement to supplement the agreement between the*

Despite such exceptions, the handover of the individual to the military authorities of the sending State is normally aimed at the exercise of the jurisdiction in the territory of the receiving State. This distingue handover under *Status of forces agreements* from extradition with foreign military authorities in charge for transfer and escort of the individual.

The rationale of the simplification of the handover procedures according to *Status of forces agreements* can be found in the fact that the individual remains under the responsibility of the visiting forces. On the other side, the strict link with the sending State and the narrow application of *Status of forces agreements* to sole personnel detached to the receiving State has been considered as a reason from exempting the said personnel from the protection of *human rights* under the Conventions binding the receiving State and the statutes of the said State.[26] Another justification, strictly linked with the exercise of sending State jurisdiction in the receiving State is that the *Status of forces agreement* is implemented through a "cession of sovereignty"; it remains in the receiving State's attribution (in accordance with its Constitutional provisions) to establish a "partition of competencies" with the sending State in the fulfilling of tasks which essentially pertain to the first mentioned State.[27] In the exercise of such a power the receiving State is free to establish, in respect of tasks to be fulfilled by the *Sending State* derogations from the laws and rules normally applied, by referring for example to the *Sending State's* criminal procedure.

As to the handover procedures there are different "degrees of simplification", whilst request for the whereabouts of the fugitive person, apprehension and handover are often informally presented. Such requests

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Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany.

[26] *See* at this purpose, the *Legal Advice* given on 30th October 2003, by the *New Zealand Attorney General* on the *Consistency with the New Zealand Bill of Rights Act 1990: Visiting Forces Bill 2003*. which, while affirming the consistency of the Act with the *Bill of Rights* specifically takes into account "*the protection that will be available to service personnel under the domestic laws of States entering into a Status of Forces Agreement (a SOFA) with New Zealand*" (§§ 2, 22, 24). Further the *Legal Advice* refer to the entitlement of the persons subject to the *SOFA* to a "*similar degree of protection as that accorded to other persons in New Zealand*" and it is also affirmed that *when entering into a SOFA … the Government will have to ensure that rights and freedoms granted to the members of the visiting force, its civilian component, and their dependants under the service law of the sending State are of the appropriate level"* (§ 6).

[27] R. BIRKE, *Strafverfolgung nach dem NATO – Truppenstatut, cit*., p. 247.

may be based on an "administrative" decision or order to confine or restrict the individual. This may pose harsh questions of accountability for the deprivation of its freedom the individual is suffering as a measure of "judicial cooperation without judicial involvement".

In respect of the procedures established for the handover of an individual from the receiving State authorities to the military authorities of the receiving State we can fundamentally distinguish two different approaches.

A first approach to the problem is represented by the adoption of procedures which, if compared with the extradition proceeding in use in the same State, shows that some steps of the extradition procedure are replicated within a simplified framework. An example can be found in the German procedure implementing the *NATO Sofa* and the descending supplementary agreements, where the apprehended individual is presented to a judge, as the individual sought in extradition and arrested pursuant a request for extraditional arrest.[28]

A second approach is represented by the radical skipping of the traditional jurisdictional guarantees in favor of an informal cooperation with the military authorities and a "not codified handover" of the individuals sought.[29]

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[28] Article 4 § 3 (III-VII) of the *Gesetz zum NATO – Truppenstatut und zu den Zusatzvereinbarungen* (*NATO-TS-G*) of the 18th August 1961 as amended the 28th of September 1994, establish that the arrested person following a request of the sending State, has to be brought, at the latest the day after his arrest, before a judge (*Amtsgericht*). The judge questions the person on his conditions, citizenship and the reasons eventually preventing his/her handover to the military authorities of the sending State. If the judge deems the request founded he order the handover of the individual; otherwise he orders the release of the person. The decision can be appealed immediately. Pending appeal the person may not be handed over. The decision to handover the individual is enforced by the prosecuting office established by the territorially competent *Landgericht*. What is missing in the proceeding is the so called *Bewilligungsverfahren* having an administrative character. The simplified proceeding hold place of the usual judicial *Zulässigkeitsverfahren* even if conducted at a "lower judicial level". If compared with the procedure outlined in § 22 of the law on international judicial cooperation, the above provisions provide the judge with the power to decide directly on the issues raised by the individual without referring the questions to the higher judicial authority (the *OLG*).

[29] The handover of individuals in accordance with the *NATO Sofa* is dealt by the Italian Presidential Decree of 2 December 1956, n. 1666, within the broader *genus* represented by the "judicial cooperation". Accordingly, judicial

The preservation of a "core of jurisdictional safeguards" allows the individual to raise legal arguments which could prevent its handover, like death penalty concerns, especially where the receiving State has entered into conventional human rights obligations.[30]

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assistance is provided to the foreign military authorities by and through the chief of the prosecution office established for each district appellate court (art. 8) "*in the forms and by the means as he considers necessary*". The laconic provision survived, surprisingly, the definitive shifting away of all attributions resulting in an interference with the individual's personal freedoms from the prosecutor to independent judicial bodies. The legal literature seems to focus essentially on the perceived limitation of the territorial jurisdiction in respect of visiting forces. At this purpose, *see* R. BARBERINI, *Il Trattato di Londra sullo statuto delle Forze armate NATO: note a margine della vicenda Cavalese*, in *Cass. pen.*, 1999, p. 3599; S. PETTA, *La Costiuzione e la convenzione sullo status delle truppe Nato*, in *Giur. cost*., 1973, p. 977ff.; M. POLITI, *Basi militari straniere e giusdizione italiana*, in *Le basi militari della Nato e di paesi esteri in Italia*, Roma, 1990, p. 62ff; P.P. RIVELLO, *Giustizia penale italiana e reati commessi da militari stranieri appartenenti alle forze Nato*, in *Rass. Carab*., 1992, IV, p. 103; L. SALAZAR, *Nuovo riconoscimento da parte del giudice delle leggi del principio "La loi suit le drapeau"*, in *Cass. pen*., 1991, p. 1004; A TERROSI, *La giurisdizione penale sui militari Nato*, *ivi*, 1993, p. 1621; T. VASSALLI DI DACHENHAUSEN, *L'art. VII della convenzione di Londra sulle forze militari Nato ed il giudice penale italiano*, in *Comunicazioni e studi*, XVI, Milano, 1980, p. 511ff.. The Italian Constitutional court ruled several times on the conciveilability of the law authorizing the ratification of the NATO Sofa with the Constitution ans specificability the provision contained in article 25 which prohibits, trough a refernce to the "natural judge", the subjection of an individual to exceptional judges (decisions adopted the 14th of June 1973, n. 96 and the 26th of September 1990, n. 446). A later decision related to the jurisdictional provisions contained in article VIII of the *NATO Sofa* (decision of the 19th November 2001, n. 372). Withdrawal of the priority in the exercise of the jurisdiction seems to remain a legal *tabu* and the Parliament, while authorizing the ratification of the *EUROFOR Sofa*, considered an implementing legislation as not necessary.

30 According to the *Netherlands, Supreme Court* judgment in the so called *Short* case (decision adopted the 30th of March 1990, in *RvdW* (1990) No. 76, 24 MRT, 1990, p. 225), the fact that the State has undertaken by treaty to leave the trial of an offence to the authorities of the sending State does not detract from the existence of the State's jurisdiction within the meaning of article 1 of the European Human Rights Convention. Therefore the applicant, a *US* service member, was deemed being within the jurisdiction of the Netherlands since he was present in the territory of that State, and the Netherlands also had actual power over and responsibility for him; this since the very matter at issue is

Other questions which could be raised, having in mind the traditional bars to extradition are the well founded fear of arbitrary detention by the sending State military authorities or unfair trial.[31] At this purpose, it should

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whether or not the State will comply with the sending State's request for his surrender. In the case the applicant's assertion that the Convention takes precedence under international law over the obligations arising out of the *NATO Sofa* was held as being not supported in law. The approach of the *Netherlands, Supreme Court* to the critical issue of conflicting human rights and other international obligations, was rather pragmatic and relied more on the individual's position and the judicature's power to assert that an act violates the individual's human rights despite the conflicting obligation, than on the ordinary interpretative means to resolve such a conflict. The *Netherlands, Supreme Court's* assessment was that in such a situation, the principle should be that "*it is not acceptable that the mere fact that the State has bound itself by treaty to undertake a particular act can prevent the Dutch courts from assessing whether such act constitutes an infringement of another treaty norm under which individuals can derive rights directly and hence whether the State is acting unlawfully against them"*. The apparent dichotomy between State's obligations towards the individual and State's obligation towards another State and the prevalence of the actionable rights of the individual, becomes nevertheless more vanishing when the *Netherlands, Supreme Court* affirms the necessity to weight the involved interests and only after having balanced such interests affirms the necessity to tribute greater importance to the individual's right not to be exposed to the death penalty. On the judgment *See* B.P. VERMEULEN, *How Should the Courts Decide in Conflicts between Human Rights Treaties and Conflicting Provisions of Other Treaties and International Norms?*, *NCJM-Bulletin,* 1990, pp. 429 443. Death penalty concerns are dealt within the *NATO Sofa* and the additional protocol to the *PfP Sofa*, respectively in the form of a prohibition for the authorities of the sending State to carry out a death penalty in the receiving State's territory if death penalty isn't established in the laws of the said State (which may determine the previous removal of the individual…) and in the forma of a prohibition, for the authorities of the receiving State to apply death penalty to members of the sending State covered by the *Sofa*, if death penalty isn't established in the legislation of the sending State. The last mentioned provision represents a specific application of the *dual criminal liability* (*dual death penalty requirement*). Unfortunately not all *PfP* States have ratified the protocol.

[31] On the *fair trial* requirements set by the *European Human Rights Court's* jurisprudence in respect of the *UK* and Belgian Court Martial Proceedings and their eventual impact on *Sofa*, *see* P. ROWE, *Historical Developments Influencing the Present Law of Visiting Forces*, in D. FLECK (edited by) *The Handbook of the Law of Visiting Forces*, New York, 2001, p. 30, footnote n. 130. In *Findlay v. the UK,* 21 January 1997, § 77, the Court stated that "*the*

be mentioned that the *European Human Rights Court* was several times confronted with the issue of alleged violations of article 5[32] in circumstances in which military service member had been imprisoned pursuant to an order of the concerned organ of the *Sending State* whilst they

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power to give a binding decision which may not be altered by a non-judicial authority is inherent in the very notion of "tribunal" and can also be seen as a component of the "independence" required". Same considerations are expressed in *Coyne v. The UK,* 24 September 1997, § 54. In *Grieves v. the UK,* while analyzing the differences between the *Court Martial procedure* in the *Air force* and in the *Navy*, the Court observed that "*even if the naval Judge Advocate appointed to the applicant's court-martial could be considered to have been independent despite the reporting matters highlighted in the preceding paragraph, the position of naval Judge Advocates his position as "serving officer" ... cannot be considered to constitute a strong guarantee of the independence of a naval court-martial*. Accordingly (§ 89), the lack of a civilian in the pivotal role of Judge Advocate deprives a naval court-martial of one of the most significant guarantees of independence enjoyed by other services' courts-martial (army and air-force court-martial systems). In *Cooper v. the UK* the Court held that the *ad hoc* appointment of the military non legal trained members of a Court Martial, while not sufficient of themselves to undermine their independence, creates the need for particularly convincing safeguards against outside pressure being brought to bear on those officers. The Court also held that the role of the *Reviewing Authority* did not undermine the independence of the court-martial because the final decision in the proceedings would lie with a judicial body (the *Court Martial Appellate Court* which is a criminal division of the Court of Appeal). On the presence of a military judge in the Turkish courts vested with jurisdiction in respect of civilians, *see ex plurimis, Yurtdas and Iaci v. Turkey*, *Isik v. Turkey*, *Atlay v. Turkey*, *Mehdizana v. Turkey*, *Incal and others v. Turkey*.

32 In reference to the detention the removed individual would suffer abroad, *Chahal v. the UK*, 15 November 1996. The *Human Rights Chamber for Bosnia and Herzegovina,* in the *Boudellaa and others case*, in *H.R. Law Jr.*, 2002, p. 406ff, affirmed that *in the present case, the obligation implies that before handing over the applicants to the custody of the authorities of another State, the respondent Parties were obliged to obtain and examine information as to the legal basis of that custody, as reflected in the quoted provisions relating to extradition proceedings …* and that (paragraph 233) *… the hand-over of the applicants to the custody of US forces without seeking and receiving any information as to the basis of the detention constitutes a breach of the respondent Parties obligations to protect the applicants against arbitrary detention by foreign forces*. The last mentioned reference is nevertheless to "territorial detention" under foreign forces control.

were present in the territory of another contracting State[33] under the *NATO Sofa* and descending *Supplementary Agreements*, and alleged violations of article 6 in respect of Court Martial proceeding held, at least in their first instance, in the territory of another contracting State.[34] In all the said cases claims were brought exclusively against the sending State.[35]

Another question we can imagine could be raised pertains to the lack of the dual criminal liability requirement. The *dual criminal liability principle* has a particular attitude in respect of *Sofa* and works as a jurisdiction sharing rule. On the other side, reliance on the principle would most probably endanger the discipline within the visiting force.

Whilst conducts punished only under the receiving State law may still raise legal problems in respect of the "extraterritorial handover" of service members (*infra*) of the visiting forces (over relatives the sending State military authorities may lack detaining power in order to ensure the enforce the hand over), but fundamentally represent territorial conducts exclusively punishable under the territorial law,[36] the legal implications of the opposite

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[33] *Pauwels v. Belgium*, decision of the 27 April 1988, concerned an officer of the Belgian Army arrested and detained whilst in Germany in accordance with an order of the *Board of Inquiry* of *Field Court Martial 1*, and the complaint concerned the lack of impartiality of the *Special Auditor* presiding the said *Board*. The complaints brought in *Hood v. the UK*, judgment of 18th February 1999, concerned in part also strict arrest suffered by the applicant whilst in Germany.

[34] *Coyne v. The UK*, *cit*., concerned the case of a lance Sergeant trailed whilst deployed in Germany. The compliant concerned partly the composition of the Court Martial and the procedures followed during the first instance proceeding.

[35] Which represents by itself a "double bladed" arguments as, it doesn't exclude, in the absence of adequate and corresponding protection by the sending State (for example when such a State isn't a member State of the *European human rights convention*) a receiving State liability, if not for the handling directly, for having undertaken agreements.

[36] The United States extend the range of conducts punishable under their military laws under the UCMJ punitive articles 92 and 134, to include violations of local laws. Even if the said extension is formally interpreted as not including "foreign laws", practice shows that the said provision may be used to allege that a violation of the receiving State laws, not otherwise punishable may be sanctioned *per relationem*. This reduces *de facto* situations of exclusive receiving State jurisdiction to situations of concurrent jurisdiction to be settled in accordance with the rules on priority in the exercise of jurisdiction. Such an use of sending State criminal law is defined as "*vindication of concurrent jurisdiction*" by R. BIRKE, *Strafverfolgung nach dem NATO – Truppenstatut, cit*., p. 106.

situation are far more reaching.

At this regard, scholars has suggested the establishment of an *ordre public* limit, paralleling a more general ancient proposal to replace the *dual criminal liability* requirement with such a clause,[37] and negotiating *ad hoc agreements.*[38] Obviously the issue of judicial cooperation in lacking the *dual criminal liability* of the individual isn't strictly symmetrical in the receiving and in the sending State's perspective. Where judicial cooperation in the handover of the individual becomes highly questionable is in respect of conducts in no way punishable under the receiving State criminal law. At this purpose we may recall several conducts punishable under the *U.S. Uniform code of military justice*, which shows to include through a so called "*catch all*" provision, specific conducts, listed in the *Manual for Courts Martial United States,*[39] like *Adultery*, *Wrongful cohabitation*, *Dishonorable failure to pay debts*, *Fraternization*, and also *Pandering or prostitution*.

In such cases, where cooperation in the form of handing over the individual is to be provided, it is also highly questionable to what extent the authorities of the receiving State may restrict the freedom of the individual sought and what the legal base for such a restriction is if no punitive provision exists in the laws of the State providing judicial assistance. The question is strictly tied up with the very role of such assistance under the receiving State laws[40] and the relevance of the dual criminal liability rule under such laws.[41] Furthermore the judicial cooperation in the investigation

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37 So R. BIRKE, *Strafverfolgung nach dem NATO – Truppenstatut, cit*. p. 333ff., referrring to the proposal of H.H. JESCHECK, *Die internationale Rechtshilfe in Strafsachen in Europa*, *Zetitschrift für die Gesamte Strafrechtswissenschaft*, 1954, p. 532.

38 Specific agreements are negotiated by some State, like Turkey, in order to address the peculiarities of the status of Islamic militaries deployed in Islamic States.

39 Edition 2005, IV, Section 62.

40 At this purpose we would remind the different reconstructions suggested for the very nature of the exercise of jurisdiction underlying the granting of extradition.

41 Under a strict criminal law perspective, the dual criminal liability requirement pertains, as we have mentioned in respect to extradition, to the *nulla poena sine lege* core principle. At the opposite, under an international law oriented perspective, the requirement is a specific expression of the reciprocity principle. In the last mentioned perspective, once the lack of *dual criminal liability* works as jurisdictional criteria (exclusive jurisdiction is conferred to the State exclusively prohibiting a specific conduct), reciprocity is granted.

of the offence may, in such cases interfere with fundamental rights of citizens of the receiving State. The usual alternative obligation to the extradition – the *aut dedere aut judicare* principle – would in such case conflict with the *nulla poena sine lege* principle.[42]

Another traditional bar to extradition renounced in respect of the handover of individual according to *Sofa* is the so called "political offense clause" (offenses against the security of sending/receiving State are mostly suitable to be labeled as a political offense).

The handover of nationals remains a critical issue on the side of the receiving and sending States try to avoid deploying with visiting force nationals of the receiving State because such a situations would probably fall eventually under constitutional prohibition to extradite nationals.[43] Handover of own nationals is the normal case when members of the visiting force are handed over to the receiving State.[44]

The irrelevance of the *dual criminal liability* requirement and the absences of bars to the handover for a *political offense* and *death penalty* reflect in the lack of provisions related to the *specialty rule*. A recovery of the relevance of such requirements and/or bars through the appreciation of conflicting conventional human rights obligations and/or constitutional requirements would determine the need to rethink the specialty rule and undergo *ad hoc* negotiations. Curiously the practice of surrender of captured individuals to the *host State* during military operations shows the tendency to adopt (not mandatory) rules modeled on the *specialty principle*.

An early example of judicial review in respect of a fugitive to be handed over to the authorities of a sending State is curiously represented by the decision of the *US Supreme Court* in the *Tucker v. Alexandroff* case,[45]

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[42] The establishment of punitive provisions *per relationem* through the "mobile reference" to foreign law (reference to foreign law "as is" and not to the established text as was when the reference was made) would not comply with the constitutional requirement of several States.

[43] Even if within the European Union such prohibitions are losing relevance, there may be a problem as to the need of a convention in order to allow the extradition (*Sofas* may be regarded as not fulfilling such a requirement and there may be the need to re human rights obligations qualify the cooperation as extradition).

[44] In this case, the applicability of constitutional provisions is firstly a question of accountability of the handover to the sending State authorities and secondly a matter of extensive interpretation of the constitutional provisions.

[45] 183 U.S. 424 (1902). In that case the petitioner was detained upon a commissioner's warrant, issued upon the *affidavit* of the Captain of the Russian cruiser *Variag*, to the effect that he was a duly engaged seaman whose term of

which is usually quoted as a *leading case* excluding supervisory jurisdictions over visiting forces[46]. In the practice, only in one case, whose

service had not expired, and that he had deserted from said vessel without any intention of returning thereto. There was no statement that an examination had been had before the commissioner, and the warrant did not commit him for examination, but subject to the order of the Russian vice-consul at Philadelphia or of the master of the cruiser *Variag,* or until he shall be discharged "by the due course of law". The petitioner applied for a *writ of habeas corpus* to the *district court* and was discharged from custody. An appeal was brought against this order to the *circuit court of appeals* which upheld the order of the *district court*. Where upon *Tucker*, vice-consul of Russia applied for and was granted a *writ of certiorari* from *Supreme Court*. Most of the reasoning of the decision related to the fact that the *Variag* was not, at the time the petitioner left the service, a Russian warship, but an "unfinished vessel" intended for a Russian cruiser. The commissioner in issuing the warrant acted in pursuance of *Rev. Stat. 5280* which reads: "*on application of a consul or vice-consul of any foreign government having a treaty with the United States stipulating for the restoration of seamen deserting, made in writing, stating that the person therein named has deserted from a vessel of any such government, while in any port of the United States, and on proof by the exhibition of the register of the vessel, ship's roll, or other official document, that the person named belonged, at the time of desertion, to the crew of such vessel, it shall be the duty of any court, judge, commissioner of any circuit court, justice or other magistrate, having competent power, to issue warrants to cause such person to be arrested for examination"*. Legal base for the warrant was initially sought in the December 1832 treaty with Russia. The *US Supreme Court* observed that "*while desertion is not a crime provided for by any of our numerous extradition treaties with foreign nations, the arrest and return to their ships of deserting seamen is no novelty either in treaties, legislation, or general international jurisprudence"*, nevertheless the statutory provision under which the commissioner was bound to proceed, limits his jurisdiction to applications by a consul or vice- consul of a foreign government "having a treaty with the United States" for that purpose nor in the absence of a treaty, the surrender of deserting seamen could be granted by the authorities of the United States.

[46] G.P. BARTON, *Foreign Armed Forces: immunity from supervisory jurisdiction,* in *Br. Yb. of Intern. Law*, 1949, p. 391., In a relevant passage of its reasoning the *US Supreme Court's* affirmed, recalling the *Schooner "Excange v. Mc Faddon",* 116, 3 U.S. 287 (1812), that "*... we have no doubt that ... [a] foreign officer may exercise his accustomed authority for the maintenance of discipline, and perhaps arrest a deserter* dum fervet opus*, and to that extent this country waives its jurisdiction over the foreign crew or command"*. The proposition was although intended to justify the absence of *US* court's jurisdiction in the enforcement of foreign laws and orders. This becomes clear from the reading of

decision is unpublished and reported by publicists[47], a receiving State tried to prevent the departure of a uniformed service member held in custody by its national authorities.[48]

A *forum* for the in which the individual could raise his concerns against its handover may be represented by the eventual judicial *close out* procedure aimed normally at the termination of the proceeding once the priority in the exercise of the receiving State's jurisdiction has been waived.[49]

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the second part of the above proposition in which it is affirmed that «*yet if a member of that crew actually escapes from the custody of his officers, he commits no crime against the local government, and it is a grave question whether the local courts can be called upon to enforce what is in reality the law of a foreign sovereign*» and also that "*the principle of comity may imply the surrender of jurisdiction over a foreign force within our territory, but it does not necessarily imply the assumption by our courts of a new jurisdiction, invoked by a foreign power, for the arrest of persons who have committed no offence against our laws, and are perhaps seeking to become citizens of our country"*. Question at issue was properly the ambit of the assistance to be provided to the foreign armed force.

47 G.P. BARTON, *Foreign Armed Forces: immunity from supervisory jurisdiction,* in *Br. Yb. of Intern. Law*, 1949, p. 391. The case and allegedly relevant in the subject matter of *supervisory jurisdiction* over foreign forces is related to the order issued during the First World War, by the *Bow Street magistrate* upon an appeal granted by the *High Court* in the *Dryver v. Aughet* case. In his order the *magistrate* ruled that *Dryver* – a Belgian officer held in custody by Belgian authorities in England with the purpose to bring him before a Belgian court martial in *Calais* whilst a private prosecution was brought against him for the same fact in England – should not be removed out of England. The Belgian authorities complained on the grounds that they had, according to an agreement in force, exclusive jurisdiction and accordingly the magistrate should be prevented from making the order. The British Government deemed the agreement as not being applicable as *Dryver* and also *Aughet* were not members of the Belgian army. The case was later dismissed by the *Divisional Court*.

48 The situation in which a service member of the sending State is being returned to its Country to face trial for capital charges is listed, by R. BIRKE, *Strafverfolgung nach dem NATO – Truppenstatut, cit*., p. 315, who raises the question if the mere tollerance of the transportation of the individual from the sending State's premises to the sending State's territory doesn' represent *per se*…. The Author considers the handling of the sending State not to be imputed to the receiving State, and affirms that it is furthermore a question if and to what extent the receiving State is allowed to interfere with a such a handling.

49 So for example article 1 paragraph 6 of the Italian Decree adopted the 2

What we defined previously, in the receiving State's perspective, as the "active handover" of an individual is at the same time the "passive handover" from the sending State's authorities to the authorities of the receiving State.

Insisting briefly on the receiving State's perspective, we can observe that the request to the sending State authorities to hand over an individual pose the same problems posed by "active extradition requests" in respect of eventual human rights violations connected with the activities carried out by the requested party in order to grant the request.[50]

It should also be mentioned that even the custody of the individual, pending trial, may led, under supplementary agreements to the NATO Sofa, to a temporary transfer of the individual to the sending State authorities and *vice versa.*[51]

December 1956, n. 1666.

[50] A wider notion of the "effects principle" has been developed in advance and some years before the *Soering doctrine* by the German *Bundesverfassungsgericht* which dealt twice with individual applications under the German Constitution in reference to request for extradition of individuals (*BVerfG*, 25th March 1981, in *BverfGE*, 57, 9; *BVerfG*, 7th April 1988, not published). In both cases the deprivation the requested individual's freedom for extradition purposes was deemed as a consequence of an independent acting of the relevant State which should not be evaluated with the constitutional parameters. Nevertheless the *Bundesverfassungsgericht* stated that competent authorities aren't exempted, when requesting the arrest for extradition purposes to verify if the conditions of the detentions comply with internationally recognized minimum human rights standards and with the core of the German constitutional principles. At this purpose, See D. ZIEGENHAHN, *Der Schutz der Menschenrechte bei der grenzüberschreitenden Zusammenarbeit in Strafsachen*, Berlin, 2002, p. 257. On the insufficiency of the "imputation criteria" developped by the *Bundesverfassungsgerichtn* for the so called *Auslandsfolgen*, moving from the concept of the "decisive influence" on the activity of foreign State organs, *see* M. BALDUS, *Transnationales Polizeirecht*, Baden Baden, 2001, p. 165.

[51] Under the *NATO Sofa*, art. VII, paragraph 5c, "*the custody of an accused member of a force or civilian component over whom the receiving State is to exercise jurisdiction shall, if he is in the hand of the sending State, remain with that State until he is charged by the receiving State".* Custody represents, in this case a temporarily restricted alternative to the handover. As emerges from the preparatory works, the receiving State isn't obliged to ensure custody over individuals over whom the sending State is to exercise jurisdiction. In the Committed it was stated that *if the sending State wishes to exercise its right of jurisdiction, it should be normally be responsible for the custody of the*

A different question is posed by the "military return" of an individual belonging to a visiting force to the sending State to face there a trial. Empowerment of the executive and the mainly administrative character of the restriction/return order may determine "*arbitrary detention*" questions.

The rendition of non military defeating seaman goes beyond the military side of judicial cooperation based on *Sofa* and represent a, once usual, form of assistance aimed ad ensure the safety of maritime navigation rather than the prosecution of the fugitive, which continue to be established in bilateral treaties (mostly on consular functions) and needs to be measured against the *non refoulment* principle.

3.2 The extraterritorial portion of the handover in accordance with *Sofa's*: from the sending to the receiving State

In the sending State's perspective, the request for the handling over of an individual is mainly to be dealt as an "extraterritorial surrender", as the individual is mostly within military premises on the territory of the receiving State. We will not deal with the problematic question posed by the eventual limits of the receiving State's powers to police such premises[52] and the related issue of the eventual need, for the receiving State's authorities to rely on the sending State's assistance in the apprehension of the individual. We will move from the assumption that such assistance is mostly required, irrespective if for legal consideration or based only on "international comity". The question nevertheless remains relevant as such assistance may assume the form of a mere authorization (or removal of a legal obstacle) to the apprehension of the individual – based on the "*just open the door*" model – or at the opposite, may led to a material apprehension and surrender of the individual by sending State authorities.

Handover of an individual from the sending State authorities to the authorities of the receiving State may have dual fold implication where such a handover represent a follow up of the sending State's renounce to its

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offender. In the discipline set by the *Supplementary Agreement of 3 August 1959* between Germany and six *NATO* Member States, where jurisdiction is to be exercised by the sending State authorities, the custody remains with them, except for offenses solely against the security of the FRG. The authorities of the sending State may transfer the custody to the authorities of the receiving State.

[52] On the issue, *see* R. BIRKE, *Strafverfolgung nach dem NATO – Truppenstatut,* cit. p. 119ff. In respect of the preparatory works of the *NATO Sofa*, *see* S. LAZAREFF, *Status of Military Forces under current international law*, Leyden, 1971, p. 153.

priority in the exercise of the jurisdiction or such a priority is controversial and the Sending State availed himself of the settlement procedures established by the *Sofa*, adhering to the Receiving State's views and withdrawing previous jurisdictional priority claims. Waiver of jurisdiction may, as a measure of general judicial cooperation, assume various forms, from the mere request to prosecute (e.g. the "transfer of denunciation" which may be relevant under the receiving party's laws as a typical jurisdictional requisite) to more articulated procedures (e.g. the transfer of criminal proceedings) aimed at the preservation, to a certain extent, of substantive effects of the proceeding being transferred (we can imagine bars to statutes of limitation and interruption of lapse of time) and even procedural effects. Such procedures are variously implemented by States and show sometimes a distinction between the different activities aimed at the ordering of transfer of the proceeding, which may be in the hand of the executive, and the "*jurisdictional close out*", aimed at terminating the proceeding being transferred.

The waiver of the priority in the exercise of the sending State's jurisdiction, as well as the settlement of contentious jurisdictional questions under the *Sofa*, both activities foregoing the transfer of the individual, is rarely the topic of a detailed implementation. Some States, like the United States, have progressively heightened, through presidential orders, the level of the authorization. Accordingly the power to waive primary jurisdiction over *on duty conducts* is currently with the president. In the implementation of the *NATO Sofa*, other States, like Italy, omitted to deal with and to establish a procedure for the waiver of their priority in the exercise of jurisdiction over service members and persons subject to the jurisdiction of military authorities.[53] The issue of the waiver of the sending State's priority in the exercise of its jurisdiction following a settlement procedure with the receiving State's authorities was the focal point of the *Wilson v. Girard*

[53] Italy implemented the article VII provisions related to the renounce to the priority in the exercise of its jurisdiction as receiving State, the request to the sending State to waive its priority and the descending provision on cooperation with the sending State. If it is acknowledged that implementing choices may exhaust faculties and choices established in a Convention, in our view, where this Convention calls up signatory parties to sympathetic take into consideration the request for a waiver of its priority in the exercise of the jurisdiction, such an omission is contrary to the spirit of the Convention and the implementation is only partial. In any case, Italian authorities use to call up counterparts to "sympathetic" grant waiver of their primary jurisdiction over service members.

case.[54]

Regulations recently adopted in the *U.S. Military Extraterritorial Jurisdiction Act,* 2000 (*MEJA*), in order to establish federal (obviously not military) jurisdiction over civilian employees and contractors of the Department of Defense and federal agencies supporting the said department (but also uniformed service members in respect of offences committed jointly with the former ones), provide a more formal discipline for the handover of individuals to the receiving State authorities.[55] Whilst the

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[54] U.S. Supreme Court 1L ed 2d, 1957. The respondent was a US army specialist determined by the Secretary of defense to be delivered for trial on criminal charges in Japanese Court. The service member previously had sought, whilst "administratively restricted" at *Camp Whittington* (Japan) a *writ of habeas corpus* from the District Court for the District of Columbia. The writ was denied, but a declaratory relief in the form of an injunction against his delivery to the Japanese authorities was granted. Pending appeal before the Court of appeal for the District of Columbia, the Secretary of defense invoked the Supreme Court joined by the respondent who filled a cross petition for the review of the denial of the *writ of habeas corpus*. The Court synthesized the question as follows: "*whether ... the Constitution or legislation subsequent to the Security Treaty prohibited the carrying out of [the] provision authorized by the treaty for the waiver of the qualified jurisdiction granted by Japan*". The finding was that no Constitutional or statutory provision barrier to the provision on the waiver and that "*in the absence of such encroachments, the wisdom of the arrangement is exclusively for the determination of the executive and legislative branch".* In the case, the issue of the handover to the receiving State authorities, even if the subject of the prohibition contained in the injunction of the District Court which was reversed, remained on the background of the decision.

[55] 18 USC 3263 reads as follows: *"(*a*) Any person designated and authorized under section 3262(*a*) may deliver a person described in section 3261(*a*) to the appropriate authorities of a foreign country in which such person is alleged to have violated section 3261(*a*) if: (1) appropriate authorities of that country request the delivery of the person to such country for trial for such conduct as an offence under the laws of that country; and (2) the delivery of such person to that country is authorized by a treaty or other international agreement to which the United States is a party. (*b*) The Secretary of Defence, in consultation with the Secretary of State, shall determine which officials of a foreign country constitute appropriate authorities for purposes of this section*. On the provision *see the Department of Defense Instructions* n. 5525.11 date 3 March 2005. On the *MEJA see* also J.R. PERLAK, *The Military Extraterritorial Jurisdiction Act of 2000: Implications for contractor personnel,* in *Militare Law Review,* 2001, p. 105ff., which stresses the discretionality of the U.S. decision and the

MEJA, (2000) is aimed at covering situations in which an offense is committed under the most wide variety of *Sofa's* (and the most various regulations as to the host State's policing powers) the wording suggests the existence of a wide discretion in decision as to whether the individual is to be handed over or not.

Surrender from the sending State was the specific topic of a later decision of the U.S. Court of appeal for the District of Columbia in the case *Holmes v. Laird.*[56] Obviously the possibility of the executive to order the "military return" of military service members from their Country or a third

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requirement for specific "handover agreement" not being extradition agreement sufficient for the purpose of § 3261.

[56] 148 U.S. App. D.C. 187; 459 F.2d 1211 (1972). On a similar issue, *see* also *Stone v. Robinson*, 431 F.2d 548 (3d Cir. 1970). The case referred to a situation in which the receiving State had priority in the exercise of jurisdiction. The appellants were U.S. service members and attempted to thwart their hand over to the German authorities alleging they weren't afforded with the Constitutional fair trial guarantees in the foreign trial. They were held in U.S. custody pending the German trial and prior the pronouncement of the German appellate decision; they left the receiving State without authorization and initiated litigation in the U.S. District Court. One of the arguments raised by the appellants in *Holmes v. Laird* was that "*as persons no longer in [the receiving State] they are no longer members of a force to which NATO Sofa applies"* and this argument was strictly tied up with a second one according to which *"the appellants are surrenderable only pursuant to the terms of an extradition treaty"*. In the Court of appeal's view, once German jurisdiction was attached *neither it nor the [U.S] obligation to surrender [is] affected by the appellant's subsequent unauthorized departure for the United States*, this implied also the rejection of the second argument which was nevertheless dealt specifically on its own, based on the consideration that the *NATO Sofa* provided a proper legal base and surrender wouldn't represent an unlawful extradition. Similar considerations have been expressed in respect of an inadvertent transfer of the military service member imputable to the military administration. At the opposite discharge or release of the military service member, disrupt the service relationship and impose the extradition of the individual. In the individual's perspective, as has been pointed out in the legal literature, if the surrender may be labeled as extradition, there is the need for a specific empowerment of the executive and the need to hold a *probable cause* hearing. On the issue, *see* P.J. CONDERMAN, *Extradition and Return of Military personnel*, *Jurisdiction,* in D. FLECK (edited by) *The Handbook of the Law of Visiting Forces*, cit., p. 120. On the *Sofa's* scheme in order to empower the executive to surrender individuals, *see* W.J. NORTON, *United States obligations under Status of Forces Agreements: a new method of Extradition?,* in *Georgia Journal of international and Comparative Law,* 1975, V, p. 1fff.

State to the original receiving State, and correspondingly bypass the guarantees of the individual under the extradition procedure, is strictly linked with the constitutional position of the military in the U.S. legal system. This implies that surrender of individuals to the State in which they committed a crime whilst present as a *visiting force* component, but whose territory they left, should in other systems mostly be labeled and treated as "extradition".

In most European States, the military authority doesn't enjoy the same powers the US authority does and, whilst constitutional provision dealing with extradition still need to be exploited in respect of the topic of *Sofa's*, even the handover of individuals belonging to the own visiting force while abroad in the receiving State pose critical legal problems: military authorities may, under on the European human rights convention (applicable without restrictions to the exercise of organic jurisdiction abroad), be authorized to restrict the individual's freedom for handover purposes, only in accordance with the procedures established by the law and pursuant to a judicial order.

Finally, the *Sofa's* may, as the *NATO Sofa*, provide for the enforcement of sentences pronounced by the sending State's military authorities in the receiving State's prison facilities. The aim of the provision is to allow the enforcement in situations in which the sending State hasn't its own prison facilities. The enforcement isn't linked, as the handover of the individual, to any of the traditional requirements for the enforcement of sentences and covers, in theory, even enforcement in the absence of the *dual criminal liability requirement.*[57]

The handover for enforcement purposes isn't linked, in the sending State's perspective, to any verification of standards of detention in the receiving State.

In the receiving State's perspective the enforcement of the foreign sentence isn't linked to any verification mechanism of the compatibility of the decision with international standards on fair trial.[58]

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[57] Recently on the critical issue of the "two speeds" of the judicial cooperation according to the *European arrest Warrant* (unbound from the verification of the *dual criminal liability requirement*) and the cooperation in the enforcement of a foreign judgment (still bound to the requirement), which represents accordingly a only partially working alternative to the surrender of the person, *see* the decision of the German *Bundesverfassungsgericht* of the 18th July 2005 concerning the *Europäisches Haftbefehlsgesetz* o *EuHbG* of the 21 July 2004.

[58] On the obligations under the *European Human Rights Convention*, of a State enforcing a foreign sentence see, *Drozd and Janousek v. France and Spain*, 27

4. Surrender in modern police cooperation: cross-border apprehension, "neutralized" spaces and *on the spot transfer of authority*

Whilst *Sofa's* are the expression of the consented coexistence, within one State's territory, of two different sovereignties, one of them – the territorial one – plain and unlimited, whilst the other is limited *ratione personae* and in its purposes (maintain discipline within the visiting force), in the phenomena of the surrender of individuals in the State's border close areas or neutralized areas, a certain part of the territory of another State is regarded as being, for certain extents only, as an area over which extend own activities.

The purpose of the tolerance of the activities of foreign State agents, even if partially mitigated by the application of the receiving State's law, is the need to recoup some efficient functions the sending State was unable to exercise due to a deconstruction of borders.

"Modern forms of police cooperation", as they are defined currently, and specifically "*cross border hot pursuit*" dates back to the 19th Century (1852) and to international agreements adopted, at that purpose, mainly between German States and their neighbors.[59] *Cross border hot pursuit* was intended as a measure supporting extradition but in some cases the "rendition" of the fugitive could be carried out directly by the pursuing

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May 1992. In the said cases, the critical issues raised by the applicant moved ten judges to deliver their dissenting or partially dissenting opinion. In particular, judge *Cremona* observed that he couldn't accept that "*France, on whose territory the applicants were in fact detained … can be justified in not exercising the minimum degree of control reasonable in the circumstances in respect of the ... conviction's compatibility with the Convention for the purposes of the lawfulness of the detention itself*". Judge *Frowein* stated in his dissenting opinion that every State has the duty and the positive obligation to ensure that persons detained on its territory are treated in a way which is not discriminatory. In their joint dissenting opinion the judges *Mac Donald*, *Bernhardt*, *Pekkanen* and *Wildhaber* observed that "*there must be some effective control that the foreign court has respected those guarantees which must be considered fundamental under the European Convention* and also that *the independence of the judiciary and of the judges belong to these fundamental guarantees"*. Such a control is accordingly "*of special importance when prison sentences deprive a person of his freedom for long periods – up to fourteen years in the present case"* and *Iribarne Pérez v. France,* 29 September 1995.

[59] For an early reference to the practice of cross border hot pursuit, *see* F. MEILI, *Lehrbuch des Internationalen Strafrechts & Strafprozessrecht*, Zürich, 1910, p. 352.

officer.[60] This faculty was mostly excluded in situations in which the individual was a national of the receiving State, because the tolerance of the rendition of nationals would be regarded as an infringement of the prohibition to extradite nationals. The mentioned examples of early police cooperation went beyond the corresponding cooperation currently established in the *Convention implementing the Schengen Agreement* – (*CISA*). Besides, an early agreement between Prussia and Austria (1864) allowed the respective police officers to cross the border to investigate about fugitive individuals and individuals suspected of representing a threat to the security. This cooperation shows already *in nuce* the trend to extend police cooperation from the judicial dimension to the "security and preventive dimension". By the way, the United States used to resort to *cross border hot pursuit* in respect of "*Indian bandits*" used to refuge beyond the Mexican border. This particular application of the *hot pursuit* had a properly "military dimension" and was later used as a justification of military measures against terrorists.[61]

In the "soft version" of *hot pursuit*, as disciplined in the *CISA*[62] – which presupposes that the person is previously caught in the commission of a crime included in a specific list or otherwise extraditable[63] and pursued.

The pursuing officer not only is forbidden to transfer the apprehended person back to the State he fled, but furthermore he hasn't the right to apprehend the person unless the local authorities are unable to intervene quickly enough. In the said case, the person may be apprehended until the authorities of the receiving State are able to establish the identity of the person and eventually to arrest the person. Depending on the declarations submitted by the concerned State in respect of the *CISA*, *hot pursuit* may be

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60 References in M. BALDUS, *Transnationales Polizeirecht*, p. 39.

61 For a historical U.S. perspective on international police cooperation, *see* M. DEFLEM in the *Encyclopedia of Criminology*, edited by R.A. WRIGHT – J. MITCHELL MILLER, New York, 2005.

62 Provisions on *hot pursuit* are replicated in the *Naples II* Convention on mutual administrative assistance and cooperation between custom authorities, done the 18th December 1997 (art. 20). In the "*Schengen* and *Naples II* inspired" bilateral Convention between Germany and Switzerland done the 27th April 1999, *hot pursuit* is also admissible, with geographical limits (30 km) if a person subtract themselves to a frontier control or to a police control.

63 The *CISA* doesn't provide itself a definition of an extradable offence and the said character must be established based on the *European extradition convention* to whose Member States of the *CISA* are parties and eventually, in the bilateral relations amongst the sending and the receiving States by the protocol additional to the said convention.

geographically limited to an area more or less close to the border. Furtherance of the pursuit on the territory of a third State not confining with the one in which pursuit started, also if eventually compliant with geographical or temporal restrictions, remains a critical issue.[64] One of the "general conditions" to which *hot pursuit* is subject (art. 41 paragraph 5 letter *b*) reads, "*Pursuit shall be solely over land borders*".[65] During the pursuit, police officers must comply with the receiving State's laws and regulations and must be easily identifiable.[66] Pursuing officers are obliged to present themselves to the local authorities and give account of their mission. At the request of the receiving State they must remain at their disposal unless the circumstances of the pursuance have been adequately elucidated; this even if the person hasn't been apprehended. The person, arrested by the local authorities may be held for questioning irrespective of his nationality,[67] in accordance with national rules which shall "apply by analogy".[68] If the arrested person hasn't the nationality of the State on whose territory the person has been apprehended and arrested, the said person must be released within 6 hours from his arrest,[69] if no request for provisional arrest for the purpose of extradition has been received. The distinction between apprehension and arrest of "nationals" (aimed at the

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[64] A proposal on the abolition of the limitations to the *hot pursuit* has been forwarded by the *European Commission* since 2005.

[65] This shows that evolution of police cooperation isn't really linear and crossing of aerial and maritime borders remains still a *tabu*. By the way, *hot pursuit* in the neighbor's territorial waters is the matter of ongoing bilateral negotiations within several *EU* member States.

[66] They must also be able to proof they are acting in their official capacity and also that the authorization ha been granted (unless the above circumstances are given). Arms may be carried but used only for self defense. Entry into private homes and domiciles not accessible to the public is forbidden. The apprehended person, for the sole purpose of bringing him/her before the local authorities may subject to a "security search" and handcuffed.

[67] Questioning in accordance with art. 41 *CISA* should be limited to circumstances related to the apprehension of the person.

[68] This may imply, for example, that the person has to be treated as if he/she was apprehended while committing/participating in he commission of a crime "in the same territory" and apprehension by foreign pursuing police officer and subsequent arrest by local police authorities must be regarded in respect of the application of procedural provisions, as arrest "in flagrancy".

[69] Hours between midnight and a.m. 9.00 in the morning are "neutralized" at this purpose and not accounted.

further prosecution in the State of apprehension)[70] and "non nationals" (aimed at the following extradition of the person) reflects the prohibition to extradite own national established in some member States. The mentioned rule has been, in principle,[71] been "outdated" within the European Union by the regime established by the implementing legislations of the *Framework decision on the European Arrest Warrant.*[72]

Hot pursuit with following rendition carried out directly by the pursuing officer – as established in some bilateral agreement – represent an "outreach" of the apprehension and arrest powers of the authorities of the State the individual is fleeing from, and formally no surrender or handover takes place (unless receiving State authorities support the pursuit and apprehend the individual). At the opposite, in the *hot pursuit* as established in the *CISA*, the apprehended individual is handed over from the pursuing to the receiving State authorities for an *extraditional follow up* (in respect of non nationals) or a prosecution by the receiving State authorities (in respect of nationals); the later eventually based on other conventional instruments like the *European Convention on judicial assistance* (art. 21). The handover following the apprehension of the individual terminates a temporary limited phase in which the pursuing officers have "control" over the individual, but "police cars aren't extraterritorial" and the "control" exercised is necessarily inchoate[73] and may not led to issues related to the

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[70] K. WÜRZ, *Das Schengener Durchfürungsabkommen*, Stuttgart, 1997, p. 90, recalls, at this purpose, the need to inform promptly the *Sendin State's Prosecution office*, in order to enable it to forward a "request for prosecution" as established, for example, in art. 21 of the *European Convention on Mutual Assistance in Criminal Matters,* done in Strasbourg the 20th April 1959.

[71] Some State's still doesn't permit extradition of own nationals for the execution of the sentence and subordinate extradition in order to ensure attendance to the proceeding, to the return of the person for the execution of the following sentence.

[72] After the re-qualification and incorporation of the relevant provisions of the *CISA* into the so called third pillar of the European Union, as a form of reinforced cooperation, a re-alignment of the provisions on police cooperation with the ones on judicial cooperation is, in our view, urgently needed.

[73] Critical legal questions are nevertheless posed by the *cross-border pursuit* and the following apprehensions and arrest of "non national" of the State on whose territory the individual is arrested: moving from the implications of art. 5 of the *European Human Rights Convention,* in the cross-border dimension of the operation what would have led initially to an arrest for purposes of "criminal prosecution", becomes finally an arrest for "extraditional purposes". The proper legal review of the circumstances inherent the apprehension of the person in the

"protection" of the individual in respect of the territorial State even if an accountability for subsequent human rights violations based on the determining effect of the apprehension may not be excluded.

In any case, legal literature shows that the pursuing officer isn't deemed exercising powers of the receiving State and no "State organ's lease" in favor of the receiving State takes place. A reductive reconstruction tends to reduce the power exercised by the pursuing officer to power attributed to any "citizen".[74]

International Railroads moved States to establish special police regimes for International Railroad stations. These Stations represent, according to the provisions on police activities, a space in which, apart from the territorial location, police activities are carried out by the authorities of both the concerned States.[75]

Specific rules cover the surrender and detention of individual under the *Eurotunnel* (the *Channel tunnel*) regime,[76] which represents a *unique*

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commission of the crime, which are fundamentally in the evaluation of the legitimacy of the arrest seems to gets temporarily lost in the "formal evaluation", in the State where the person is detained, of the subsequent extradition request or *European Arrest Warrant*. An *ex officio* judicial review of the apprehension of the person (ultimately arrested by police officers of the *receiving State*) which covers the initial phases, when the person is apprehended in the commission or participation in the commission of a crime, isn't mostly practicable for formal reasons in the *sending State* (we can imagine lack of territorial competence, *foreign* character of the arrest, absence of a request by the *prosecutor* non served with an arrest record). Specifically on art. 5 of the *European human rights convention*, *see* E. UNFRIED, *Die Freiheits und Sicherheitsrechte nach art. 5 EMRK,* Berlin, 2006. A specific example in respect of a "search" is referred by B. HECKER, *Europäisches Strafrecht*, Berlin, 2005, p. 207.

74 At this purpose it should be mentioned that "citizen arrest" when carried out by foreign State agents acting within its duties always pose harsh legal questions in respect of the underlying transfer of sovereignty or at least the tolerance of the direct interference of the handling with individual rights.

75 *See*, for example the *Convention between Switzerland and Italy in respect of the police service in the international station of Domodossola*, adopted the 18th January 1906 and the similar Conventions adopted in respect of Luino and Chiasso.

76 The regime of *Eurotunnel* is governed by the Treaty between the United Kingdom and France concerning the *construction and operation by private concessionaires of a Channel Fixed Link* with Exchange of Notes Canterbury 12th February, 1986 and the *Protocol between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the*

situation for border controls and offenses committed "on board" of the shuttles within the *fixed link.*[77] In the said regime, there are established *control zoned* which are part of the territory of the host State and within which, the officers of the adjoining State are empowered to effect controls.[78] The *UK* and France agreed to establish national control offices in the terminal installations situated at either end of the tunnel which implied that French frontier controls are carried out in the *UK*, and *vice versa* (*Frontier controls in the State of departure*) but supplementary frontier controls may be carried out in the *fixed link* by officers of the State of arrival on its own territory. The "control zones" include the area in each terminal in which controls are conducted on passengers and on freight.[79] At terminal control are carried out in specific control points.[80] Each State may nevertheless carry out its frontier controls during the journey. The control zone at the terminal control point in the host State may be used only for maintaining arrests and carrying out administrative functions.[81] Within the

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French Republic concerning frontier controls and policing, cooperation in criminal justice, public safety and mutual assistance relating to the Channel Fixed Link made at Sangatte 25th November 1991. Other relevant instruments are the *Tripartite Agreement* and *Protocol* between the UK, Belgium and France concerning rail traffic between Belgium and the UK using the Channel Tunnel signed at Brussels on 15th December, 1993 which came into force on the 1st December 1997 and the Franco-British *arrangement for the implementation of the Sangatte Protocol concerning frontier controls and policing, cooperation in criminal justice, public safety and mutual assistance with respect to frontier controls on through trains using the Channel Tunnel* which is implemented through written technical arrangements held locally at each frontier control point. On the "tunnel cooperation, *see* F. GALLANGHER, *Cross-border Police Cooperation: The Kent Experience*, *Reg. Fed. Studies*, 2002, p. 112ff.

77 The *Fixed Link* is the twin bored railway tunnel with an associated service tunnel under the English Channel between Cheriton in Kent and Coquelles in France, including terminal areas and any freight and road link which may be agreed to form part of the Fixed Link.

78 Further we will skip the question of the controls in the case of non-stop trains to and from Belgium.

79 The two governments may agree to an extension of the control zones for through trains as far as London and Paris respectively (*Sangatte Protocol* Article 7.2) for example, in the event of breakdowns.

80 The control zone comprehend the part of the track on which the train is standing, the parts of the track and the adjacent platforms on either side of the stationary train, the accommodation for officers and the direct lines of communication, stairways and passages between the platforms and track.

81 1993 Memorandum, page 4.

fixed link, each government permits officers of the other State to carry out their frontier control powers and they can circulate freely in the whole of the *fixed link* for official purposes. With regard to *through trains*, the train itself will generally be a control zone so that officers will be able to exercise their frontier control powers while on the train. The focal point of the unique regime applicable to the control zone lies in the fact that officers of the "*adjoining State*" are permitted to exercise any power of arrest conferred by a frontier control statutes and shall be permitted to detain or arrest persons sought by the authorities of their own State or wanted on warrant and "conduct such persons to the territory of their State".[82] The host State grants the same protection under criminal law and assistance to officers of the *adjoining State* in the exercise of their functions as they grant to their own officers. Officers of the *adjoining State* aren't subject, for official acts committed within the control zones in the *fixed link*, to the jurisdiction of the host State.[83] This regulation diverges significantly from the perspective adopted within the *CISA* which implies the subjection of the pursuing officer for official conducts within the border area within which hot pursuit is allowed, to the receiving State's jurisdiction. Specific regulations deal with offences committed in the *fixed link*. Substantial law issue and descending jurisdictional issue are resolved based on the territoriality principle having regard to the frontiers with the exception of offences falling under the substantial law of both the *UK* and the French laws because they are either undetermined in respect of the *locus commissi delicti*, connected with an offence committed in the other territory or continuing through the territory of both States. In the said circumstance, the jurisdiction is to be exercised, unless specifically waived by the State first receiving the person.[84]

If following the waiver of the said State, the other State decide not to exercise jurisdiction, the State first receiving the person must exercise its jurisdiction. The said rule avoids negative jurisdictional conflicts. Decision is to be made by the "*custody officer*". When an arrest has been made for an offence in respect of which a State has jurisdiction, that arrest shall not be affected by the fact that it continues in the territory of the other State (*continuing arrest*: the person has been arrested immediately after the

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[82] *Sangatte Protocol*, art. 10.1*; Tripartite Protocol*, art. 3.1.

[83] Officers of the *adjoining State* may not be prosecuted by the authorities of the host State for any acts performed in the control zone or within the *fixed link* whilst in the exercise of their functions. In such a case they come under the jurisdiction of the *adjoining State* as if the act had been committed in that State.

[84] *Sangatte Protocol*, art. 38.2 lett. *b.*

departure from one terminal and arrest is maintained after the crossing of the border). Detention following arrest, when maintained pending an assessment on the jurisdiction, determines the application to the person of the rights established under the laws of the State on whose territory the person is detained, even if detention is under the control of the adjoining State's officer. Exercise of such rights isn't meant at delaying the handover of the person to the adjoining State, if such State is to exercise jurisdiction. When arrest is carried out by officers of the receiving State, the person is to be taken to a police office. If decision is made that jurisdiction is to be exercised by the other State, the person must be transferred within 48 hours, most likely by handling her over to officers of the other State in the *control zone*. Expiration of the said term determines the need to resort to an extradition proceeding. Return of persons detained by officers of the adjoining State remains entirely under the responsibility of that State. Slightly different procedures apply in respect of crimes committed on through trains (not in the fixed link) and arrest and following detention.

The above cooperation in the apprehension, arrest and handover of the person diverge from the cooperation developped under the *CISA* because it takes place between States initially willing to preserve their border control powers without decontructiong their fronteers. The descending complex and advanced regulation, allows the host and the adjoining State to exercise both their powers within the *fixed link*. Besides, the said regulation is the only one facing the problem of the validity of executive jurisdiction in a mobile *medium* connecting different States.

The paradigm of the "*lease of executive of jurisdiction*" is the undelying concept of surrender of individuals in situations in which a State is authorized to intervene, for the repression of offenses related to the illicit traffiking in drugs and narcotics at Sea by the flag State. Reference is in this case to the *Agreement on Illicit Traffic by Sea implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, done at Vienna the 31st January 1995. The aim of the said agreement was to create a legal framework for the intervention at Sea by States parties other than the flag State. The agreement was preceded by some bilateral attempts to implement article 17 of the *U.N. Convention*, in which the "intervening State" was regarded as an "agent of the flag State", which represent an example of *organ's lease* under international law.[85] The agreements oblige each party to establish its

[85] At this purpose *see* the *Treaty between the Italian Republic and the Reign of Spain on the repression of traffic at Sea*, implementing article 17 of the *U.N. Convention*, done at Madrid the 23 March 1990. The above treaty establishes

jurisdiction over the same range of offences when committed on board a vessel of another party or on board a stateless vessel and establish basically what is defined *jurisdiction to prescribe*. Before a State can take any action towards a vessel of another State party he needs an authorization of the said State (*flag State*) is needed. In the convention the term *authorization* was adopted, rather than *consent*; this was done in order to make clear that the intervening State wasn't obliged to act and that the sole source of powers for an action should have been, by virtue of an agreement, the authorization given by the flag State.[86]

Once authorization is granted, the intervening State may adopt the enforcement measures establihed under its law (*law governing the action*).[87] The said State is in any case obliged to notify the flag State without delay about arrest of persons and detention of the vessel. Upon agreement the vessel may be escorted to the territory of a third State. The

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the priority of the flag State in the repression of offences committed outside the territorial waters of both the intervening and the flag State. The intervening State may seek a waiver of the priority by the flag State. The elements the flag State takes into consideration in order to waive its priority include the possibility to collect evidence. If the intervening State's request isn't expressively answered, waiver will be established by silence after 60 days. The Italian law authorizing the ratification (law of 24th of July 1993 n. 304) doesn't contain, as usual when waiver of jurisdiction is contemplated, any implementing disposition. For a legal assessment on the nature of the intervening State's powers, *see Agreement on Illicit Traffic by Sea implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, *Explanatory Report*, *ETS n. 156*, § 14.

86 At the opposite, the term *consent* would have suggested implicit powers and the mere need of "consent" just in order to remove an obstacle to the exercise of such powers (*consent as the condition/removal of an obstacle to the exercise of powers otherwise established and pertaining to the intervening State*). The theorization of the source of the power is solely functional to the examination of the aspects related to the handover of individuals from the intervening to the flag State and we will not deal with the certainly interesting, aspects related to the relationship of the agreement with the established "*law of the sea*".

87 The officials of the intervening State may not be prosecuted in the flag State for offences committed, acting under their laws, in the execution of an authorized action; which represent a significant departure from the principles established for hot pursuit and apprehension of individuals under the *CISA*. The officials of the intervening State may invoke any defense under the *law governing the action* but also conditions established in the authorization of the flag State, which may pose interesting accountability questions under human rights laws.

jurisdiction sharing rules over the offenses committed on board the vessel are the following: the flag State has "*preferential jurisdiction*" and has to notify the intervening State the exercise of its jurisdiction within the 14 day following the receipt of the summary of evidence (art. 13 and 14). During the said period of time the the suspect is afforded, in the intervening State, with the guarantees established by article 5, paragraph 3 of the *European Human Rights Convention*, even if the criminal jurisdiction of the said State remains suspended (art. 15, paragraph 4).[88] The notification by the flag State may determine the surrender of persons to the last mentioned State and a "transfer of the proceeding" in kind.[89] The notification may also lead to a request for the mandatory release of the arrested persons. The request for the surrender of a person has to be supported by a certified arrest warrant or another order having the same effect, issued by a judicial authority of the flag State. Article 15 states that parties "*shall use their best endeavors to expedite the surrender of persons…"*. The term "extradition" isn't used even in respect of the traditional bar related to the capital punishment under the law of the flag State (art. 16). The usual *modus procedendi* of an authorized intervention is described in the *Explanatory Report*[90] which affirms that "*in practice the crew are nearly always removed from the vessel and taken into the port on board the intervening vessel* and that … *a* sui generis *system based on surrender of persons and seized property, was widely favored to specifically cover the unique situation dealt with the agreement"* whilst *"resorting to some kind of extradition system would jeopardize the concept of preferential jurisdiction"*. The legal argument used to "discourage" the resort to extradition was that "enforcement jurisdiction" was "loaned" to the intervening State and is thus "*fragile and totally depending on whether the flag State exercises its preferential jurisdiction*" and surrender would determine a *restitutio in integrum* of the flag State's jurisdiction. How the "loan of jurisdiction" reflects on the individual's rights is questionable and the *Explanatory Report* shows full awareness of the fact that under the intervening State's laws the arrested person "*may wish to seize the courts*" and that the "*ability to surrender may be constrained circumstances beyond*

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[88] Following the exercise of the flag State's preferential jurisdiction the a determination in respect of the lawfulness of the detention may be sought before the courts of the flag State.

[89] Article 14, paragraph 5, states that: "*measures taken by the intervening State against … persons on board may be deemed to have been taken as a part of the procedure of the flag State"*.

[90] *ETS n. 156*, *cit*. § 69.

the control of the competent authorities, for example where a suspect person has recourse to the courts of the intervening State to challenge the lawfulness of his detention". The attitudes of States in respect of the implementation of the Convention induces to consider that the "surrender" the drafters had in mind represented something like a wishful thinking and that in most situations the notification for the exercise of preferential jurisdiction would conduce to an extradition proceeding (or to an *European Arrest Warrant* amongst States belonging to the *European Union*). The surrender theorized in the Convention may still be workable in respect of an "*on the spot*" notification of preferential jurisdiction with transfer of operational control to the flag State's units. By the way, such a *modus procedendi* has been recently theorized in respect of *Maritime interdiction operation* of a military character (*Al Qaeda and Taliban leadership interdiction operations*) and military operations against maritime piracy. The question if surrender remains practicable once the crew has been removed from the vessel but not taken into the port should in our view be answered in the negative because, despite the theorization of a loan of executive jurisdiction, the individuals have been brought within the control of the intervening State's authorities; at least as long as arrest is maintained.[91]

5. Handover of individuals from diplomatic and consular premises and other State's outposts

Extraterritorial handover of individuals may take place also in situation not representing a codified mean of judicial cooperation. At this purpose we can imagine the granting of authorization to host State's police authorities to arrest individuals claiming refugee status or asylum in diplomatic

[91] If the release of the individual may be used as an expedient to remove the person from the intervening State's vessel as an administrative measure, remains questionable. Even if in such a situation the need for an extradition proceeding may not be claimed, it seems to us that the issue should be dealt in accordance with the criteria developed under the *European Human Rights Convention* in respect of protection individuals seeking extraterritorial asylum are to be afforded. At this purpose, *see WM v. Denmark,* Appl. N. 17392/90, 14 October 1992, in which the extraterritorial application of the *Soering rule* is established, and recently, under the *UK Human Rights Act(1998)*, *R (O and Others) v. Secretary of State for Foreign and Commonwealth Office [2004]EWCA Civ 1344, 18th October 2004.*

premises or on warships and even the waiver of diplomatic and consular immunity. Both traditionally afforded with the guarantee of extraterritoriality in respect of the executive jurisdiction of the receiving/port State.

In the case of diplomatic and consular premises, the handover of individuals is inspired by the *just open the door* paradigm, because arrest, detention and following surrender *manu militari* by sending State officers pose harsh legal questions; even if in supporting the Host State's criminal jurisdiction.[92]

The hand over of fugitives from State's outposts like embassies or even warships towards the host or costal State has never been considered as an extradition or an expulsion as both of them have a territorial purpose.[93]

In the case of *WM v. Denmark*, dealt by the former *European Human Rights Commission,*[94] the applicant claimed the respondent State's omission to protect him in the embassy of Denmark whilst the Danish ambassador, after initial negotiations, allowed the former *DDR's* police to enter and arrest him. Jurisdiction under article 1 of the Convention was affirmed, in that case,[95] but the claim was rejected in reference to the alleged right to reseed in the respondent State's territory because of the jurisdiction *ratione materiae* … as embassies are not part of the territory of the sending State and return couldn't therefore be regarded as an expulsion. In recent

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[92] Besides, the exercise of the sending State's criminal jurisdiction in respect of its diplomatic and technical personnel would most probably pose problems in respect of the transit from the premise to the sending State's borders or next airport and the host State's cooperation in such a kind of transit is mainly not codified and pose problems of accountability in respect of the deprivation of liberty in the host State and even problems in respect of the alleged territorial reach of detention order in the sending State. Rendition of fugitive diplomatic and consular personnel sought by the sending State is a matter of extradition procedure and the vanishing of the *jus ad presentiam* under immigration need to be metered with the principle of *non refoulement*.

[93] As mentioned previously, some statutes deal with some kind of extraterritorial, but not international extradition; so for example U.S. Code 18 § 3183 in respect of fugitives from State, territory, or possession into extraterritorial jurisdiction of the United States.

[94] *WM v. Denmark, cit*..

[95] The Commission observed that the Commission that *authorised agents of a State, including diplomatic or consular agents, bring other persons or property within the jurisdiction of that State to the extent that they exercise authority over such persons or property*.

judgment, *B and others v. Secretary of State,*[96] the *UK Court of appeal* dealt with the situation of individuals of Afghan origin escaped from the *Woomera Detention Centre for immigrates in Australia* and entered in the British consulate in *Melbourne* seeking protection and alleging threat of being subjected to inhuman and degrading treatment risk of "indefinite and arbitrary detention which would amount to a flagrant breach of their rights under article 5 of the Convention". Under the *UN Refugees Convention* there were no grounds to consider an asylum request other than in the country of first asylum which was Australia and the said Convention doesn't deal with extraterritorial asylum. The *Court of appeal* noted that "*in contrast to the facts in WM v Denmark, no one at the Melbourne Consulate entered into any negotiations in relation to the applicants with the State authorities*".[97] Notwithstanding the fact that the said observation seemed to underline the constitutive effect of initial negotiations in respect of the obligation to protect, the *Court of appeal* found the jurisdictional link in the circumstance that "*the applicants were told that while they were in the Consulate they would be kept safe ... and that they were given some protection by being brought from the reception area into the office area"*. As to the State's obligation to protect the individual, the *Court of appeal*, after having recalled the *International Court of Justice*'s decision in the *Asylum Case,*[98] observes that … "*if the Soering approach is to be applied to*

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[96] *R (O and Others) v. Secretary of State for Foreign and Commonwealth Office [2004], cit.*

[97] *R (O and Others) v. Secretary of State,* paragraph 66.

[98] *Asylum Case (Columbia v Peru)* (1950) ICJ Rep. 206. Outcomes of the decision was that Colombia wasn't entitled to qualify unilaterally the political nature of the offence for which the asylum seeker was charged, that Peru was not obliged to grant a safe – conduct for the said individual in order to allow him to leave the Colombian embassy and the Peruvian territory and that the charges brought against the individual were not o a common nature but furthermore of a military one (*military rebellion*) and finally that the asylum had to cease. Colombia later brought a second application in order to obtain a decision on the manner in which the judgment of the Court should be executed by the applicant and furthermore to declare that she was not bound to surrender the individual. The outcomes of the Court's second judgment adopted the 13th of June 1951 were that it was not with the Court to make a choice as to the different ways in which the asylum may be brought to an end (which were essentially the surrender of the individual by the State granting asylum and the granting of a safe – conduct by the territorial State …), that Colombia was under no obligation to surrender the individual and newly that the asylum had to cease (…). At this purpose it should be observed that the *1928 Havana*

diplomatic asylum, the duty to provide refuge can only arise under the Convention where this is compatible with public international law".[99] The criteria for an international law compatible interpretation of the *Soering* rules are set by the *court of appeal* in reference to situations where a "*fugitive is facing the risk of death or injury as the result of lawless disorder"*. Where, however, the receiving State requests that the fugitive be handed over the situation is very different. According to the Court of appeal, the basic principle is that the authorities of the receiving State can require surrender of a fugitive in respect of whom they wish to exercise the authority that arises from their territorial jurisdiction. Nevertheless, should it be clear, however, that the receiving State intends to subject the fugitive "*to treatment so harsh as to constitute a crime against humanity, international law must surely permit the officials of the sending state to do all that is reasonably possible, including allowing the fugitive to take refuge in the diplomatic premises, in order to protect him against such treatment … in such circumstances the Convention may well impose a duty on a Contracting State to afford diplomatic asylum*".

Under the *United Nations Convention on the Law of the Sea* (*UNCLOS*), done at *Montego Bay* the 10th of December 1982, the master of a ship passing through the territorial sea (and the diplomatic agents of the flag State), may request assistance from the coastal State in the arrest of an individual (art. 27, paragraph 1, lett. *c*), in a situation in which the coastal State's authorities could otherwise (due to the absence of the other jurisdictional links listed in the provision) be prevented from the execution of such an arrest. The master's powers are *latu sensu* of a constabulary nature (*private vested with certain public functions*). The request may well be compelled by the events, but the link with the territorial jurisdiction of the coastal State is established "by the request" and the jurisdiction of the last mentioned State isn't immanent but prevented in adjudicating by functional immunity or immunity *ratione personae* like in respect of acts performed by diplomatic personnel. Under article 8 of the *Convention for the suppression of unlawful acts against the safety of maritime navigation,* concluded at Rome on 10th of March 1988, the master of ship may deliver to any State party (receiving State) any person suspect of having committed a crime under the Convention. The *ratio* of both the *UNCLOS* and the

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Convention on Asylum established, once asylum had been regularly initiated that common offenders should be surrendered and political offenders, at the request of the territorial State which aims that they leave the country, granted with a safe – conduct.

[99] *R (O and Others) v. Secretary of State,* paragraph 86.

Rome Convention is to allow the master to get rid of an individual representing a continuing danger to the safety of the navigation by triggering a Coast State police operation. The handover still remains a judicial cooperation measure in the sense that, after the handover the receiving State is obliged to proceed under the Rome Convention and prosecute. The mentioned Convention takes into account also the interest of the receiving State and requires a previous notification. The "distress fair" of the mentioned provisions seems lo leave a reduced room for *human rights considerations* and the protection of the individual to be handed over.

A similar provision can be found in article 7 paragraph 1 letter *c*) of the *Convention on Offences and certain other acts committed on board aircraft,* signed at Tokyo on 14th September 1963. The said Convention imposes to the State parties the empowerment of the aircraft commander with the faculty to impose "reasonable measures" including "restraint" over persons on board.[100] The decision to disembark the person and terminate the *on board restraint* may be governed by legal considerations.[101] In general terms, the situation dealt by the Tokyo Convention seems, due to the peculiarities of aerial navigation, to afford commanders, supposing that the individual is under safe restraint, with a wider choice as to the member State in which disembark the individual.

Finally, we can move to the phenomena of transfer of individuals captured and brought under the control of military authorities participating to a military mission to the host State authorities, mainly for custody but often with prosecutorial follow ups.

The situation must be preliminarily distinguished from the transfer of persons held in custody in sites over which the State of custody exercises "complete jurisdiction and control" like the United States does over *Guantanamo Bay.*[102] Whilst the first trend in the "global war against terrorism" was represented by the rendition of individuals from different

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[100] At this regards *see* the *Guide fro the Legislative Incorporation and Implementation of the Universal Anti-Terrorism Instruments*, issued by the *United Nations Office Drugs and Crime* (*UNODC*), Vienna, 2006, p. 76.

[101] According to article 7, paragraph 2, the measure may not be continued beyond the landing unless the landing point is in the territory of a non State party and the authorities refuse to receive the person or the landing was forced and the aircraft commander is "unable to deliver that person to the authorities". The person may also agree to onward carriage under restraint.

[102] The United States exercise "complete jurisdiction and control" over the *Guantanamo Bay* Naval Base, and may continue to exercise such control permanently if it so chooses according to the 1903 Lease Agreement, Art. III and also the 1934 Treaty, Art. III.

countries and unlimited detention without trial over them in what was initially thought as a "*jurisdictional limbo*" out of the territorial reach of constitutional and statutory relief,[103] followed by the establishment of *Combatant status review Tribunals* and a selection of individuals to be trialed by military commissions, the current deterrence strategy seems to include the transfer of former *Guantanamo detainees* to States, including the State of origin, in which they fear threats to life and freedom on the ground of political opinion. This attempt originated the latest wave of in court litigations.[104] Return is in the hands of the military and dealt as a quasi illegal immigration matter. We mentioned the above situation with the purpose to distinguish it from other situation in which the transfer of the individual is really extraterritorial and the transferring State hasn't "complete jurisdiction and control" over an area; this because we consider that, despite the jurisdictional loopholes and shortfalls, the transfer of individuals from *Guantanamo* should be metered with the *refoulement* prohibition under international law.

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[103] *See* on the topic S. BORELLI, *Casting light on the legal black hole: international law and detention abroad in the "war on terror"*, in *International Review of the Red Cross*, n. 857, 2005, p. 43, note 16. In more general terms, S. FITZPATRICK, *Rendition and Transfer in the War Against Terrorism: Guantanamo and Beyond*, in *Loy.L.A.Int. and Comp.L.Rv.,* 2003, p. 460.

[104] Federal jurisdiction *habeas* jurisdiction over *Guantanamo* detainees, stripped out by the *Detainees Treatment Act* (2005) and the *Military Commissions Act* (2006) and confined to the review of *Combatant status review tribunal* determinations, has been partially re-established by the U.S. Supreme Court with its decision in the *Boumediene v. Bush* decision n. 06/1195, because the above mentioned statutes violated the constitutional *habeas* suspension clause. *Habeas* jurisdiction has although been established as the said jurisdiction was embraced by the mentioned suspension clause. In what looks like a "traditionalist" approach, the absolute minimum of protection granted by the *habeas* relief under the suspension clause, coincides with the extent of the said relief as of 1789. The 10th of August 2007 the Supreme Court denied the *certiorari* in the case of *Belbecha v. Bush* concerning the transfer of a *Guantanamo* detainee to Algeria. The applicant has later sought an emergency stay of his transfer under the *All writs Act* 28 U.S.C. §1651(*a*) and applied to the Courts of Appeals for the District of Columbia. The 9th of October a federal judge of the District Court for the District of Columbia ordered the stay of the transfer of *M.A. Rahman* to Tunisia and demonstrating the willingness jurisdiction over such claims and considering them within the reach of the U.S. Supreme Court *Boumediene* decision. Detainees ordered for deportation which have exhausted their remedies before the above decision are currently relying on U.S. Congress petitions.

At the opposite, the said principle – as it governs the rights of "territorial" asylum seekers – doesn't seem us to fit a certain portion of "extraterritorial asylum" situations, in which there is no choice, for the concerned party, as to the State to which return the individual. In the last mentioned portion it seems us that the pattern of conduct set by the *refoulement* principle should be replaced by the specific duty to protect the individual within the State of capture's jurisdiction from specific inhumane of degrading treatments, enforcement of death penalty and arbitrary detention and such duties should be assessed having in mind conflicting obligations towards the host State the under international law.

Two Civil liberties association have recently filed an application to the Canadian Federal Court for an injunction to prevent the Canadian military from transferring Afghan detainees to Afghan police custody.[105] The application relies on *international human rights law*, *international humanitarian law* and the *Canadian Charter of Rights and Freedoms*. One of the arguments raised by the applicants is that the "*Canada-Afghanistan Detainee Agreement*" – which replicates the wording – but not the substance – of some extradition clauses[106] – did not do enough to ensure

[105] Court file T-324-07, Application for Judicial Review, filled the 21st of February 2007. Application was filled by *Amnesty International* and the *British Columbia Civil Liberties Association.*

[106] One of the main concerns of the Canadian and also the UK Parliament, besides the ones mentioned in the text, was that, detainees turned over to Afghan authorities would could be later "picked- up" in Afghan prisons and transferred to U.S. prison facilities in Afghanistan but also in other Countries in accordance with the current U.S. "overseas detention policy". Opinion was expressed that any removal of turned over detainees should follow a "regular extradition proceeding". Several Countries signed *Detainee Agreement*s with Afghan authorities. These agreements largely relied on the International Committee of the Red Cross's own competencies under the 1949 Conventions for the inspection of Afghan detention areas and treatment of prisoners. Besides, not all agreements had the same content. The agreement signed by the Netherlands tries to address the concern by subjecting the surrender/extradition of the individual to the authorities to another State, to the previous notification to the State which previously turned over the individual. This clause, inspired by the "re-extradition" clauses didn't replicate the same guarantees represented by the necessary authorization of the State which previously extradited the person, and the "notification" isn't linked up with any prerogative of the last mentioned State. Surveillance over the detention of the individual, which involves the *International Committee of the Red Cross* replicate the *Committee*s' attributions within relevant instruments of international humanitarian law, but can, at the

detainees would not be tortured by Afghan Forces. They argue that the Canadian military should build a prisoner-of-war camp in Afghanistan to hold "battlefield detainees" rather than turn them over to Afghan secret police. According to the Canadian authorities, the transfer of "insurgents" from the Canadian custody to the Afghan authorities was an expression of the Canadian mission in Afghanistan which was "fully supportive of efforts to strengthen Afghan capacity and good governance".[107]

In the case of the handover of *Saddam Hussein* from the military authorities of the coalition to the Iraqi authorities for what was defined a "show trial" (…), the *European Human Rights Court* declared the claim inadmissible because the issue of the respondent State's responsibility wasn't addressed in respect of any division of responsibility (territorial, functional or reflected by the command structure) between them and the *US* authorities.[108] The reasoning underlying the declaration of inadmissibility seemed to support the assumption that the Court would be willing to hear further cases, if a sharing of responsibility would have substantiated. The later outcome of the *Saramati* case contradicts clearly the assumption based

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same time, remind the "international execution of sentences"; Obviously, also in this case, with no prerogatives. On the Agreement *see* F. NAERT, *Detention in Peace Operations: The Legal Framework and Main Categories of Detainees*, Leuven, 2006, p. 19. In the same environment detachment, of troops by several European countries to the U.S. lead mission *Enduring Freedom*, determined surrender of individual to U.S. detention facilities in Afghanistan (from which in several cases the individual was transferred to other U.S. "overseas detention" facilities). In some case European troops avoided to take custody over apprehended individuals, subsequently take into custody "on the spot" by U.S. military. This approach allowed not to label formally as "surrender" the handing over of the apprehended individual to U.S. responsibility.

[107] Canadian House of Commons, Standing Committee on National Defense, Evidence, Monday, December 11, 2006, p. 1530 (Mr. *Swords*, Assistant Deputy Minister, International Security Branch and Political Director, Department of Foreign Affairs and International Trade). The application for injunctory relief was finally rejected by the Canadian Federal Court, judge Mactavish, the 7th of February 2008, because the applicants have failed to shown an irreparable harm would result without the injunction, as Canada has in the meantime (starting 5th November 2007) suspended the transfer of detainees to Afghan authorities. The Court refused also to issue an order imposing an obligation on Canadina Forces to notify the eventual resumption of Transfers.

[108] *Saddam Hussein v. Albania, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, The Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Turkey, Ukraine and the UK,* decision of the 14th March 2006.

on the consideration that even handover to local authorities may fall under the "any means" clause usually included in the wording of *United Nations Security Council Resolutions* and therefore determine a lack of jurisdiction *ratione personae* under the Convention. By the way, in that case, detention was upheld despite the first release of the individual by local authorities and pending the trial by a local court, which regarded itself as without jurisdiction over the *status detentionis*. Obviously it is not our intention to assert that the usual wording "any means" should justify detention (for example in the Afghan situation) by a troop contributing State despite the obligation to respect the host State's jurisdictional prerogatives. More simplistic, the European human rights Court has theorized that Security Council Resolutions represent a "box of tools" for which State's aren't accountable.

Several States are on a daily base transferring "battlefield detainees", to local authorities in situations in which the building up of an efficient judicial system is in being and the detainees are exposed at the treat of being treated inhumanely. *Sofa's* or *Military technical agreements* taking place of *Sofa's* may not address the issue of immunity of installations and the keeping individuals under custody and control by a State contributing with troops to the mission may well be based on *de facto* power relationships. On the other side such situations may arise out of the policy to refuse to deal with "prisoners" and *a fortiori* prisoners of war

6. Conclusions

Handover and surrender of individuals not linked with a formal extradition proceeding is a relatively diffuse legal phenomena.

The handover of individuals according to *Status of forces agreements* is variously disciplinated by the different implementing legislation. In the mainstream, represented by the departure of narrow interpreted extraditional guarantees it is possible to indentify real attempts to pervene to a simplification of the procedure, but also missing provisions in which omissions and neglected aspects are tactically construed in order to avoid legal stalls. On the other side, imputation criteria developped under regional human rights instruments are increasingly challenging the original jurisdictional settlements of *Status of forces agreements*.

Handover under police cooperation – a modern re-discovery rather than a primer – are still a phenomena waiting for a defintive legal qualification. Criteria and theories on the development, delegation of sovereign powers

diverge in respect of the different forms of cooperation considered, which suggests that principles are sometimes developped *a posteriori*, rather than assisting the development of the single form of cooperation.

As mentioned, several States are on a daily base transferring "battlefield detainees" to local authorities in situations in which the building up of an efficient judicial system is in being and the detainees are exposed at the treat of being treated inhumanely. That in court claims arose in Canada is just a consequence of the deeper overview of the civilian society over military operations abroad and a specific attitude of the judicial power in respect of interdicting illegal activities of the executive.

Not all legal systems are equally qualified and effective in this respect,[109] and *common law* provides to some extent for overview of the

[109] Despite the wide interest shown by the Italian legal literature in respect of the reach of the U.S. Constitution and the *Guantanamo legal limb*, the issue of extraterritorial detention and handover in military operations, must unfortunately be qualified as a "*lesson not learned*". A synthetic assessment of the effectiveness of legal remedies established shows that the eventual extraterritorial reach of certain constitutional provisions (reference is to articles 13, 24 and 111) is mainly unexploited, with the only exception of arrest carried out in the exercise of organic jurisdiction over own troops abroad (art. 9, paragraphs 5 and 6 of the legislative decree of the 1st December 2001 n. 421, as converted by the law of the 31st of January 2002). Apprehension, temporary detention and handover of individuals carrying out acts of hostilities - despite the (legally weak) "criminalization" of the conduct – aren't formalized and subject to legal review in the form of mandatory validation procedure (article 391 and its "extradition correspondent", article 716 of the criminal procedure code). Legal review of temporary detention awaiting surrender isn't formally established, and the seeking of a review by the individual in the form of an appeal (articles 309, 311 and their "extradition correspondent" article 719 of the criminal procedure code) would fail due to the absence of a judicial order restricting the freedom of the individual and problems related to empowerment of the detained person's representatives, and problems of territorial jurisdictional competence. Civilian remedies would fail – supposing that the problem of the empowerment could be resolved – due to the jurisprudence of the Supreme Court (Joint civilian sections, 16th March 2002) preventing the judiciary from adjudicating on handling allegedly pertaining to the core of a State's attribution. Remedies sought applying to the administrative judicial circuit, based on the administrative character of the temporary detention and transfer would most probably fail – supposing that the problem of the empowerment could be resolved – based the above jurisprudence of the Supreme Court, the absence of a detention and transfer order, absence of territorial jurisdictional competence if such an act exists and eventually lack of

activities of the military abroad.[110]

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jurisdiction if the detention order is issued by the foreign Command of the military mission. The only remedy apparently available is a "secondary judicial review" in the form of an assessment of criminal responsibility in respect of the prohibition of "illegal transfer" of persons under article 185-*bis* of the wartime military penal code, even if the poorly drafted provision was adopted in order to punish transfer of protected person from the their territory, and not handover of individual to local authorities or to a foreign power non respecting the third Geneva Convention.

[110] A leading case is represented by *Mostyn v. Fabrigas*, 1774, 98 Eng. Rep., 1021. The case concerned the illegal detention of a native minorcan by the British military Governor of Minorca. The resistant failed to prove that detention was justified under local law and the challenge to the King's Bench's jurisdiction was rejected because such a challenge need to show that there is another competent Court.
In *Ex parte Anderson*, 1861, 30 Eng. Rep., 129, a fugitive slave was imprisoned by Canadian Officers whilst his extradition proceeding to the U.S. was pending.

A claim was brought in front of the Queen's Bench Division by British abolitionists. The *Queens Bench Division* granted the writ of *habeas corpus* and rejected two arguments against review of "overseas detention": existence of Canadian courts (with final review in front of the Privy Council) and enforceability of the writ. A subsequent legislative evolution established the principle of deferral to local courts. Finally, in *Rex v. Earl of Creeve*, 1910, 2 Enf. Rep., 576, the *King's Bench* was called up to decide on the detention abroad in Bechuanaland. Detention was upheld but jurisdiction affirmed. Other cases concerned the detention of African Tribal Leaders.

Les Criminologues Dans Les Prisons Militaires

par
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A. Les perceptions dominantes

Dans la mesure où les dispositions concernant les "infractions militaires" sont souvent intégrées dans des chapitres de la partie spéciale du Code Pénal[1] et leur contenu est directement influencé par les évolutions intervenues dans la partie générale,[2] on pourrait imaginer que la même chose se passerait avec le droit pénitentiaire militaire.

Les tentatives de modernisation du Code Pénitentiaire Militaire[3] n'ont cependant pas été accompagnées des mouvements de réforme en matière de statut des établissements de détention et, par conséquent, la peine de travaux forcés (art. 10A CPM) est encore en vigueur (bien qu'elle soit tombée en désuétude) ou même les prisons communes (!) et les prisons militaires sont utilisées comme un espace d'exécution des peines (art. 7 - 8).

Les prisons militaires du 19ème siècle de l'Acronauplie (où étaient détenus les condamnés à des peines excédant deux ans), les prisons pour prévenus (qui fonctionnaient auprès de chaque tribunal militaire pour les prévenus et les condamnés à un emprisonnement d'une durée d'au moins deux ans) et les prisons militaires des quartiers généraux ou des unités de

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1 En ce qui concerne la Grèce v.: A. NIKOPOULOU, Code pénal militaire, Athènes 1988, p. 19 – K. VOUGIOUKA, le droit pénal des lois spéciales, volume A', 1986, p. 34 – A. PAPADAMAKI, Crimes contre le service militaire, Thessalonique, 1990, p. 20, note 2.

2 V. entre autres: IGOR ANDREJEW, Le droit pénal comparé des pays socialistes, éd. A. Pedone, Paris, 1981, p. 10, 80, A.A. PIONTKOVSKY-V.M. TCHKHIKVADZE, Le système pénal soviétique, L.G.D.J., Paris, 1975, p. 13.

3 A. NIKOPOULOU, *op.cit*., p.19.

l'armée (où étaient exécutées des peines d'emprisonnement ou de détention jusqu'à 3 mois) dominent toujours les orientations des autorités militaires .

On constate que le besoin d'affronter le "désordre des militaires"[4] au lieu de créer un "cadre socialement juste"[5] (dans lequel le citoyen en uniforme ou le militaire ne seraient pas privés de leurs droits élémentaires), a abouti à un simple remplacement de l'internement dans une forteresse[6] par l'internement (incarcération) dans une cellule disciplinaire.[7]

Il n'y a alors aucun changement conceptuel, mais simplement le fait que les prisons militaires soient considérées comme partie de l'organisation militaire[8] en relation avec le fait que le "service militaire" soit un bien juridique indépendamment protégé[9] (alors que la discipline constitue un rapport fonctionnel,)[10] justifie le rôle de la destination spéciale des prisons militaires. C'est un rôle qui consiste à ce que les détenus continuent à mener "une vie militaire" et à obéir à "leurs supérieurs hiérarchiques".[11] Ce qui est alors important, c'est l'adaptation des détenus à l'armée et non pas leur (ré-) intégration dans la société.

Bien que les sanctions pénales visent à la protection des biens juridiques, tandis que les sanctions disciplinaires ont comme rôle principal le bon fonctionnement de l'administration,[12] il est évident que l'application des peines (militaires) a un caractère dualiste: punir (pour) le crime et en même temps initier à la discipline (militaire).[13]

La question majeure à laquelle doit répondre le criminologue est la suivante: jusqu'à quel point ce caractère dualiste est compatible avec le respect des droits et de la dignité mais aussi avec la formation d'une conscience sociale (pour que la récidive soit évitée).

La criminologie clinique et la vision du changement de l'homme peuvent être liées du point de vue historique à la discipline militaire de la répression, influencées par la discipline militarisée dans les établissements

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4 E. ANANIADOU, *op.cit*., p. 27.

5 Cf.: Exposé des motifs du projet de loi "Recrutement des Grecs" (1987) dans le A. NIKOPOULOU, Code pénal militaire, Annexe-I, La loi nouvelle de recrutement, Athènes 1988, p.6.

6 E. ANANIADOU, *op.cit*., p. 26.

7 Art. 44 § 2 e' Décret Présidentiel 297/75.

8 N. ALEVIZATOU, les statuts constitutionnels de l'armée, Athènes 1987, p. 21, 22.

9 A. PAPADAMAKI, *op.cit*., p. 32, 56.

10 *Ib.id.* p. 33.

11 E. ANANIADOU, *op.cit*., p. 38.

12 V. entre autres: *Ar. Charalambakis*, manuel de droit pénal, éd. 1993, p. 29.

13 D. SPIRAKOS parle du "Triomphe de la discipline militaire" dans "La discipline militaire dans les prisons", 1991, p. 39.

militaires.[14] Cependant, il ne faudrait pas limiter l'action du criminologue au simple enregistrement des problèmes institutionnels.[15] Il est nécessaire, en effet, que le criminologue "intervienne", même si le cadre n'est pas le plus approprié.

B. Le rôle du criminologue

Si on accepte de façon axiomatique que "la justice ne s'arrête pas à la porte de la prison"[16], alors le juge de l'exécution des peines[17] incarne le gardien de la légitimité, l'assistant représente le lien avec le milieu social (familial, professionnel) et le criminologue est le garant du maintien du contenu essentiel du "traitement" et de la "réintégration sociale"[18] avec le respect simultané des droits de l'homme.

L'intervention en faveur des droits de l'homme-criminel au sein des structures et des centres décisionnels en ce qui concerne son destin, est aussi importante que l'analyse des facteurs criminogènes[19].

De nos jours, la politique criminelle ne s'identifie pas à la criminologie appliquée car la fonction préventive de la société[20] y intervient.

D'ailleurs, la politique pénitentiaire ne se limite pas à des déclarations humanistes et à des pratiques anachroniques.[21]

La gestion des problèmes des détenus a remplacé l'ambition (utopique) de leur socialisation[22] et pour cette raison, le directeur de la prison ne peut plus être l'instrument exclusivement compétent pour la régulation du statut des détenus.[23]

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14 D. SZABO, Tendances et complications de la Criminologie moderne, Revue Grecque de Criminologie, 1988, vol. 2, p. 21-22.

15 V. art. 112 Loi 1851/89, "Tâches du criminologue".

16 V. Cour Européenne des Droits de l'homme, Campbell et Fell, Arrêt 28 Juin 1984, série A, No 80, § 69, p. 68.

17 V.:art. 86 Loi 2776/99 "Code Penitentiaire".

18 V. aussi: *St. Alexiadis*, La protection des droits de l'homme pendant l'exécution de la peine, dans le "Droits Humains-Répression Légale", Thessalonique 1990, p. 142.

19 N. KOURAKIS, les tendances actuelles de la criminologie, Armenopoulos, vol. 11, 1985, p. 925.

20 M. CUSSON, Le virage stratégique en criminologie appliquée, RIC-P.T., vol. XLVI, no 3, 1993, p. 296.

21 V. entre autres: Y. PANOUSSIS, La réforme pénitentiaire en Grèce, 1989, passim.

22 M. CUSSON, *op.cit*., p. 298.

23 Art. 10 Loi 2776/99 sur le "Conseil de la Prison".

Le détenu-criminel n'est pas un "jouet"[24] aux mains de l'Etat. La microcriminologie n'est pas présentée comme l'alibi de la macrocriminologie.

Comme il semble difficile (ou même dangereux) de vouloir changer l'homme-criminel, il serait peut-être préférable d'intervenir afin de changer les situations criminogènes en donnant des réponses concrètes à des questions concrètes.

Le système pénitentiaire et la politique pénitentiaire sont des éléments de la crise de la politique criminelle.

Il existe une différence entre l'idéal moderne et la pratique moderne[25] dans les prisons.

Le criminologue sert d'intermédiaire entre la gestion des détenus et l'ordre, c'est-à-dire d'intermédiaire entre les chefs des détenus et les chefs des prisons, il tente d'entreprendre des actions pour transformer le condamné en *acteur social.*[26]

Cette utopie d'un système libéral où la privation de la liberté vise à l'amélioration de l'homme,[27] peut se pérenniser seulement si les criminologues se chargent de l'*iter* de socialisation.

Le criminologue n'est ni l'initiateur tout puissant d'une super-discipline ni le thérapeute des âmes.[28] Son rôle consiste à "s'entretenir" avec les criminels et le public, illuminer les problèmes et intervenir sans considérer le contrôle pratique de la criminalité comme panacée et oublier les causes génératrices[29] de l'acte et sans que la criminologie empirique ne domine la criminologie théorique.[30]

Le criminologue ne doit pas considérer le criminel comme l'"autre" (qui s'est différencié par son action) mais comme le "pareil" (qui a vécu une

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[24] "Utilitarian Puppet" d'après les criminologues radicaux v. entre autres I. TZORTZIS, Radical Criminology-A critique, Athènes, 1991, p. 50.

[25] M. IGNATIEFF, Historiographie critique du système pénitentiaire, in "La prison, le bagne et l'histoire", Genève, 1984, p. 15.

[26] S. SNACKEN, Le détenu "acteur social", in "Acteur social et délinquance", Hommage à Christian Debuyst, Bruxelles, 1990, p. 332.

[27] P. YOUNG, The importance of Utopias in Criminological thinking, British Journal of Criminology, vol. 32, no 4, 1992, p. 435.

[28] M. CUSSON, Les régulateurs de la criminalité, RIC-P.T., vol. XLVII, n-2, 1994, p. 142.

[29] V. KARIDIS, Criminalité et contrôle social en URSS, (1917-1988), Athènes, p. 30, 91.

[30] K. SPINELLI, Criminologie, tendances d'aujourd'hui et du passé, Athènes 1985, p. 20.

situation d'une façon différente)[31] et doit tenter de pénétrer ce "cadre de référence au criminel" pour découvrir sa signification réelle.[32] Par conséquent, il ne doit pas gérer un problème de moralité, d'affection humaine ou de désordre social, mais manipuler la situation (et non pas les idées) des détenus.

La criminologie ne dispose pas d'un "paradigme" clair et unique,[33] puisque son action est limitée dans une zone triangulaire (*science-droit-liberté humaine)* où il ne suffit pas seulement d'observer et de comparer, mais il faut comprendre les inhibitions et pratiques sociales.[34]

Même si le criminologue n'arrive pas à décrire "ce qui se passe", il est le seul capable de certifier "ce qui ne se passe pas".[35]

Le criminologue, sensible à des sujets de contrôle social, peut fonder des canaux de communication entre l'état, la justice et la société en améliorant la prison, pour qu'elle reflète mieux notre civilisation.[36]

Ce n'est pas à nous de choisir entre l'approche structurelle ou subjective de l'étude du crime (et du criminel).[37] On doit cependant reconnaître, que vivre un sentiment singulier de victimisation constitue l'expérience la plus traumatisante de ceux qui ont été privés de leur liberté. Cette expérience devient encore plus intense quand on ajoute aux paramètres sociaux, psychologiques et économiques le comportement violent du personnel de garde.[38] tandis qu'elle "se double" quand on ajoute à la qualité du "prisonnier" la qualité du "militaire" (en n'oubliant pas les limitations innées).

Le criminologue doit gérer cette situation grave (qui est analysée et

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[31] Peut-être "la peur" cessera être de cette façon le sentiment prépondérant des prisonniers v.: L. BEZE, De la psychologie du détenu, Annales 1, 1991, p. 63.

[32] E. DE GREEFF, L'homme chez le criminel, RDPet Cr, 1928, p. 7.

[33] D. SZABO, Les perspectives actuelles de la recherche criminologique en Europe, Annales Internationales de Criminologie, vol. 30, nos 1-2, 1992, p. 44.

[34] ST. ALEXIADIS, Recherches dans le domaine de la criminogénèse, Tiré à part du "Consacré à Constantin Vavouskos", vol. IV, éd. Sakkoula, Thessalonique, 1991, p. 17.

[35] R. GASSIN, La Criminologie et les tendences modernes de la politique repressive, RSC 1981, p. 278.

[36] JAN J. M. VAN DIJK, Penal sanctions and the process of civilisation, in Annales Internationales de Criminologie, Année 1989, vol. 27, nos 1-3, p. 201.

[37] W. BYRON GROVES-MICHAEL J. LYNCH, Reconciling structural and subjective approaches to the study of crime, Journal of Research in Crime and Delinquency, Sage, vol. 27, no 4, 1990, p. 348.

[38] V. plus des détails dans LEE H. BOWKER, Prison victimization, New York 1980, p. 58, 71, 87.

vécue pendant de nombreux moments cruciaux)[39] dans les prisons militaires, en s'occupant en même temps du maintien du statut et des rapports[40] entre les prisonniers.

Le conflit entre le droit (militaire) et les exigences humanistes[41] peut être détendu par des techniques,[42], des méthodes d'application[43] et des approches[44] différentes de celles qui dominent.

Certes, les questions sont nombreuses et importantes:

Est-ce que le criminologue, en qualité d'intervenant, maintient sa neutralité (modèle consensuel) ou est-ce qu'il prend position (modèle conflictuel)?[45] Est-ce qu'il exerce de la morale ou de la politique?[46] A-t-il un objectif?[47] Est-il garant des droits ou intermédiaire de rééducation et de resocialisation,[48], faisant partie de l'assistance sociale envers les détenus?[49]

Ou bien, incarne-t-il la régulation sociale du crime (et du criminel) à l'intérieur et à l'extérieur de l'établissement pénitentiaire,[50] en gérant le *Know How*[51] juridique, criminologique et sociologique, en facilitant le

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39 M. CUSSON, La criminologie a-t-elle un avenir? RIC-PT, vol. XLI, no 4, 1988, p. 433.

40 D. SZABO, Criminologie ou sociologie criminelle? La contribution du professeur Martin Killias aux grands débats actuels, RIC-PT, vol. XLV, no 1, 1992, p. 89.

41 Cf.: LODE WALGRAVE, A la recherche de la Criminologie, RIC-PT, vol. XLVI, no 1, 1993, p. 20.

42 Cf.: JACQUES VERCHAEGEN, Une Criminologie révolutionnaire, RIC-PT, vol. XLIII, no 1, 1990, p. 97.

43 Cf.: FRANÇOISE DIGNEFFE, La criminologie et son histoire, Réflexions à propos de quelques questions d'objet(s) et de méthode(s), RIC-PT, vol. XLIV, no 3, 1991, p. 301.

44 *Ib.id*, p. 307.

45 Cf.: Y. PANOUSSIS, Introduction à la Criminologie, Athènes 1983, p. 54.

46 V. KARIDIS, Les buts de la peine, Sujets Contemporains, vol. 41-42, 1990, p. 17-18.

47 En ce qui concerne le *goal model* d'organisations et d'organismes v.: EFI LAMBROPOULOU, Le système pénitentiaire de Big house jusqu'à nos jours, Sujets Contemporains, *ib.id*., p. 26.

48 *Ib.id*., p. 41.

49 Cf.: Entretien avec DIMITRI KALOGEROPOULOS (mené par KARINE LALIEUX), Ecole de Sc. Crim. Léon Cornil, "L'aide sociale aux justiciables", Bruxelles 1991, p. 310.

50 Cf.: D. KALOGEROPOULOS, *Le phénomène criminel au point de rencontre de la sociologie de Droit, la sociologie criminelle et la criminologie,* Revue Grecque de Criminologie, 1988, vol. 1, p. 75.

51 *Ib.id*., p. 79.

prisonnier à découvrir sa compétence sociale et son rôle social, sans qu'il perde "son identité ou ses droits" ?

La pratique est la seule qui peut donner une réponse à ces questions.

Les criminologues ne peuvent pas changer la société à travers leur action scientifique. Ils contribuent, cependant, à changer les perceptions sociales envers le crime et le criminel, en éloignant la stigmatisation et en décourageant le retour des condamnés anonymes qui porteront seulement un code (enregistré cette fois dans un ordinateur).[52]

De plus, ils peuvent donner au rôle du *médiateur*[53] des prisons un contenu de prévention spéciale, entendue par les mesures prises pour éviter les crimes qui découlent de la "situation" dans laquelle se trouve le détenu.[54]

C. Les nouveautés du décret présidentiel 427/ 94

Générales

Les règles contenues dans le nouveau règlement des prisons militaires régissent les conditions d'emprisonnement et d'execution des peines, qui sont imposées d'après la Constitution, le code pénal militaire ou le code pénal.

Le traitement des détenus est réalisé lui aussi d'après la Constitution, les traités internationaux ratifiés, les lois et les actes réglementaires issus après l'autorisation provenant de ces lois.

On arrive à penser qu'un réseau de dispositions, qui garantit la légalité et l'égalité de traitement, est constitué sur la base des principes selon lesquels: *a*) toute discrimination raciale, d'origine sociale, sur la base de convictions idéologiques (sauf celles excusées par la situation légale ou réelle des détenus et puisqu'elles sont faites à leur profit) est interdite et *b*) la protection légale est explicitement prévue.

L'emprisonnement des détenus dans les prisons militaires n'empêche pas le développement libre de leur personnalité et l'exercice de leur droits compatibles, et leurs obligations ne sont que celles prévues par le

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[52] Cf.: G.P. HOEFNAGELS, The future of Criminology, in "Criminology in the 21st century", Leuven 1990, p. 79.

[53] G. KELLENS, Entre théories et pratique: La Criminologie appliquée constitue-t-elle une discipline susceptible de professionnalisation? dans la "Profession Criminologue", éd. Erès, Toulouse, 1994, p. 19.

[54] ANNE-MARIE FAVARD, Quelle place pour le criminologue dans la nouvelle politique de la ville? *ib.id*, p. 119.

règlement.

En adoptant le modèle de justice, la loi permet que les détenus soient non seulement dotés de droits, mais aussi que leur réintègration sociale puisse être facilitée.

Spéciales

1. Le contrôle des prisons est confiée au Procureur du Tribunal Militaire.
2. Des sections différentes sont créées pour le classement des détenus (condamnés, inculpés, officiers, sous-officiers, femmes, etc...).
3. Les compétences du personnel d'administration, ainsi que des autres personnes compétentes (médecins, assistants sociaux, etc...) sont déterminées de façon à ce que la bureaucratie soit évoquée.
4. L'assistance sanitaire et médicale est organisée alors que les "expériences" sur les soldats sont interdites. De plus, l'information des détenus sur le SIDA, les drogues (etc..) devient plus formelle.
5. L'autoéducation est encouragée et les congés éducatifs sont réglementés pour la première fois.
6. Une attention particulière est porté au travail et à l'emploi, et sont recommandés la création et l'équipement de laboratoires et l'augmentation des places de travail en considèrant que leur contribution sera positive.
7. Les visites aux détenus sont facilitées.
8. Les procédures de congés pénitentiaires sont mieux réglementées et une nouvelle commission plus indépendante est créee.
9. Les délits disciplinaires sont radicalement réduits et les sanctions disciplinaires qui sont considérées comme tortures sont interdites.
10. Les rapports entre personnel et prisonniers sont réglementés.

L'objectif

Le règlement ne vise pas à renverser les hiérarchies dans l'armée ni à changer le sentiment de discipline et de responsabilité. Cependant, il a l' ambition de moderniser les institutions, d'éclaircir certaines dispositions, de produire un climat différent dans les prisons militaires; un climat humain, caractèrisé par la légalité, le respect des droits et la dignité du détenu.

De cette manière la privation de liberté ne détruira pas le détenu de manière irréversible, mais elle lui procurera une nouvelle opportunité de retourner à la société et de s'y réintègrer avec le moins possible de problèmes.

D. De nouvelles possibilités d'intervention pour le criminologue?

En dépit de la pathologie toute reconnue du système pénitentiaire des prisons militaires[55] et en dépit de la méconnaissance du rôle des criminologues dans les institutions jusqu'à nos jours,[56] le nouveau règlement tente un élargissement substantiel.

Bien sur, l'intégration du criminologue au "personnel de l'établissement" ne sera pas facile.

La perspective du travail du criminologue sera différente si par exemple son rôle est celui de l'assistant pénitentiaire (v. art. 46 § Règles minima ONU, 1957), éventuellement responsable de l'éducation pénitentiaire (v. art. 131 AN grecque 125/67) où il agira –à travers sa compétence (et mentalité) de fonctionnaire (v. art 46 § 3 R73 du Conseil d'Europe, 1973) – comme un instrument étatique (v. art. 54 § R87 du Conseil d'Europe, 1987).[57] Cela lui donnera une perspective différente et il s'agira d'autre chose si il fonctionne en dehors de pyramides hiérarchiques sur la base de son expérience, de ses connaissances et de sa conscience.

Les compétences (et, bien sur, pas les pouvoirs) du criminologue ne sont pas décrites de manière précise dans le règlement[58] mais elles résultent de la *ratio* ou, de plus, du contenu des articles secondaires.

Le traitement des prisonniers (art. 22 § 1) en accord avec l'objectif de l'exécution da la peine (art. 1 § 1), procurent le cadre dans lequel doit travailler le criminologue.

La "philosophie de conseiller" du criminologue ne doit pas être confondue avec le *counselling*[59] du pédagogue ou du psychologue, ni être réduit au role de rédacteur de rapports destinés aux autorités compétentes.

Pour agir, le criminologue a besoin de démocratie et de liberté.[60] Et

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55 V. entre autres: ADAM PAPADAMAKIS, Justice Militaire, l'heure de la réforme, dans l'œuvre collectif Politique Criminelle (avec le soin de N. KOURAKIS) PENAUX-42, 1994, p. 319.

56 La loi 1851/89 (article 112) prévoit un rôle dualiste (elle juge de la politique et elle collecte des éléments statistiques) qui ne lui avait été cependant jamais confiée. C'était seulement au début de 2000 que le premier criminologue a été embauché dans les prisons grecques les plus grandes.

57 V. aussi les articles 49 § Règles Minima, 132 § 2 AN 125/67, 49 § 1 R-73, 57 § 1 R-87 dans ST. ALEXIADIS – Y.PANOUSSIS, Règles fondamentales pour le traitement des prisonniers, 1990, p. 365-V. aussi l'article 20E du Décret Présidentiel 287/88 "Organisation de Ministère de la Justice".

58 Cf. des vues rélatives dans les Annales-2, DUTh, 1991, p. 22-23.

59 V. entre autres: Y. PANOUSSIS, La réforme pénitentiaire en Grèce, *op cit*., p. 144.

60 V.: G. KELLENS, *ib. id*., p. 27.

qu'elle que soit l'aide donnée par le cadre institutionnel, la mentalité et la tradition militaires peuvent annuler toutes les initiatives. La législation et la jurisprudence[61] militaires doivent se rendre compte le plus vite possible que le soldat – qu'il soit criminel ou pas – ne soit pas un objet à mille morceaux,[62] mais un homme-citoyen qui dispose de droits. Seul le criminologue peut atteindre cette combinaison: *la criminologie de traitement* avec *l'individualisation de la sanction*, qui vise à la réalisation de la demande humaniste de toute société démocratique pour plus de "liberté", d'égalité et de solidarité.

Sans une telle vision, la loi restera une "lettre morte", le législateur cherchera de nouvelles responsabilités ou des conditions plus appropriées et le criminologue aura perdu encore une opportunité (historique) de prouver en pratique l'unicité de sa spécialisation et de son rôle.

A la suite de son action préventive dans la société locale,[63] son intervention dans les structures d'un système doublement isolé, comme les prisons militaires, augmente l'espace de responsabilité du criminologue qui trouve enfin son "royaume".[64]

Mais afin que une telle chose soit réalisée, il est nécessaire, d'une part qu'un Conseil de Stratégie Préventive du Crime soit fondé auprès du Ministère de Défense Nationale, et d'autre part qu'il soit adaptée la nécessité de recrutement de criminologues en tant que scientifiques spéciaux dans chaque prison militaire.

La réforme du code pénal militaire et les réformes institutionnelles dans les prisons militaires n'auront qu'une valeur théorique ou idéologique s'ils ne sont pas accompagnés d'une nouvelle politique pénitentiaire, dont les criminologues grecs garantissent la réussite.

E. Epilogue

Alors que dans la correspondance administrative militaire, l'usage du terme "pénitentiaire" est évité, mais on se réfère au "Règlement des prisons

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61 V. entre autres Cour Militaire 286/1986 (ordre militaire, 464/1986 (désobéissance), Ordonnance du Conseil de Thessalonique 253/1988 (Sens de "service") dans ADAM PAPADAMAKIS, Analecta Pénales, Thessalonique 1994, p. 103, 147, 343.

62 Cf.: LUGIA NEGRIER-DORMONT, La Criminologue dans la Cité, éd. Erasme, 1990, p. 1973.

63 Y. PANOUSSIS, Crime et société locale, Criminologiques-1, 1993, passim.

64 En paraphrasant la phrase bien connue de Thorsten Sellin.

militaires", et malgré les questions si les institutions fermées peuvent conduire à "l'action pénitentiaire",[65] je pense que dans l'article 1 ("L'exécution de la peine vise à… la réintégration des prisonniers dans la société") l'intention du législateur est déjà évidente.[66]

Si les dispositions restent et fonctionnent comme cela, l'espace d'intervention du criminologue est de cette manière élargi.

Cet article ne visait pas bien sûr, à proposer des solutions en ce qui concerne le changement du système des peines ou de l'organisation des établissements d'emprisonnement ou d'incarcération;[67] ni a-t-on voulu remarquer le caractère raisonnable ou irraisonnable de la prison.[68]

Etant donné que nous ne formulons pas des "vérités absolues" en aucune version criminologique ou pénitentiaire, on prétend simplement que le rôle du criminologue dans les prisons pénitentiaires (communes ou militaires)[69] est d'une importance majeure[70] dans la mesure où l'Etat s'est

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65 V. Annales-2, *ib.id*., p. 26.

66 L'article correspondant 24 du Décret Présidentiel 297/75 a été placé dans le milieu de l'acte législatif (après les dispositions concernant la garde, le prêtre, e.t.c.) sans se référer à la "réintégration" (en se contentant à l'"adaptation").

67 V. entre autres les commentaires de N. KOURAKIS, Observations préliminaires aux art. 50-78, dans l'"exégèse systématique du C.P.", Athènes, 1993, p. 104.

68 Cf.: M. CUSSON, La pensée stratégique appliquée au crime, dans le "Quelques aspects des sciences criminelles", Cujas, Poitiers 1990, p. 55, 66.

69 D'après AD. PAPADAMAKIS, Justice Militaire, *op.cit*., p. 320 elles sont "hors de loi".

70 JEAN-PAUL LABORDE, Les besoins en Criminologie de l'administration pénitentiaire, dans le "Profession: Criminologue", *op.cit*., p. 125.

rendu compte que son obligation est de "gagner et non pas de perdre" des individus, de comprendre et de pardonner et non pas de se borner à condamner et ensuite de refuser de porter un regarde sur les conséquences de ses décisions de condamnations.[71]

[71] En ce qui concerne les caractéristiques des détenus dans les prisons d'Avlona (données socioéconomiques, carrière criminelle, e.t.c.) v.: Thèse d'ANDREAS KANAVARIS, Prisons militaires d'Aulona, Mai 1994.

IN MEMORIAM

A Salute to Gerhard W.O. Mueller

by
EDUARDO VETERE

One year has passed since Gerhard died, but I still remember that Saturday afternoon of one year ago when Irene Melup phoned me from New York to give me the sad news. She was able to reach me on my portable while I was strolling in the Vienna's woods, enjoying the perfumes of the Austrian spring in the luxuriant green of the newly blossoming trees around me. She was crying and was mad at me because all her previous attempts to call me at home had failed. I also remember that suddenly the nature around me started to change, that everything became first gray and after dark, while I continued to walk for hours, lost in the memories of my long friendship with Gerhard and his wife Freda.

In fact, not only had I known Gerhard for almost forty years, but I had been closely working with him for decades, with our friendship becoming every day stronger. In this context, how to forget that it was Gerhard who – through our common friend Franco Ferracuti and when I was working in Rome University – gave me the opportunity in 1968 of being involved for the first time in a major comparative research project, when he was the Director of the Comparative Law Project at New York University? It was Gerhard again who first exposed me to the international arena, by asking me to service an intersessional working group charged with drafting the United Nations Declaration against Torture, during the Fifth U N Congress in Geneva in 1975. It was also Gerhard who recruited me to work with him in the glorious Crime Prevention and Criminal Justice Branch of the United Nations Secretariat in New York, a few months later. Furthermore, Gerhard encouraged me to apply in succeeding him as Head of the UN Crime Programme in 1987, after the retirement of Shikita-san. Last but not least, Gerhard with Freda continued to remain among my best friends and advisors, always ready with their enormous generosity to provide moral support, guidance and affection.

As Gerhard's endeavours have spanned different professions and covered various decades, it would not be easy to highlight the variety of his activities and the extent of his merits without running the risk of doing injustice either to his glorious academic career or to his prestigious public life. In my view, however, there are three distinctive features that should be particularly underlined: Gerhard as a Professor and Teacher, as a Scientist and Legal Scholar; and as a Citizen of the World.

As a Professor and Teacher, Gerhard held positions of great prestige both in the United States and Europe. In addition to his "distinguished" position at Rutgers University School of Criminal Justice, which he contributed to establish and where he thought for more than two decades, Gerhard was previously a member of the faculties of the universities of Washington, West Virginia, New York and of the National Judicial College, further to his studies in Germany and Switzerland, as well as the Chicago and Columbia Law Schools. He also had visiting appointments and lectureships at universities in Latin America, Western and Eastern Europe, Africa, Asia and Australia. His students loved him, impressed by his encyclopaedic knowledge, admired by his powerful standing and yet astonished by his easy way of getting things through, pleased with his great sense of humour and literally overtaken by his innate charm and unobjectionable class.

As a Scientist and Legal Scholar, Gerhard authored or edited some fifty books and about three hundred scholarly articles. In addition, he contributed to pioneering not only the concept but also the practice of International Criminal Law, as well as that of the "marriage" between Criminal Law and Criminology (it was not by chance that he married Dr Freda Adler, a most distinguished Criminologist of the Philadelphia School of Thorsten Sellin and Marvin Wolfgang, and that their marriage was one of the happiest one I have ever seen!).

Of his early works, a special mention should be made of his seminal "International Criminal Law" and "Criminal Law and Procedure", both published in 1965, as well as "Crime, the Law and the Scholars", published in 1969. In his introduction to the latter, Sir Leon Radzinowicz wrote: "T*his book will be extensively used wherever criminal law and criminology are being taught, and wherever the impact of developments in the criminal law and criminology of the United States is being felt. And it is being felt in many parts of the world*".

Among his latest publications, "Criminology" and "Criminal Justice" are two major textbooks co-authored with Freda and one of the late disciples of Marvin, Professor William Laufer, which are extensively used in many US universities and have been translated into many different

languages. In addition to several "windows of the world" covering specific United Nations and other international initiatives, the authors included two chapters devoted to "Comparative Criminology" and to "International and Comparative Criminal Justice", respectively. The following passages, showing the inmate gift of Gerhard and the other two co-authors to explain global issues from a comparative perspective while being attentive to their historical context, deserve particular attention: *"In view of the globalization of the world – brought about by recent technological advances and the enormous increase in international commerce, both legal and illegal – comparative studies in criminology have become a necessity. …….There are a number of requirements for successful comparative research: studying foreign law, understanding foreign criminal justice systems, learning about a foreign culture, collecting reliable data, engaging in comparative research, and, when needed, doing cross-cultural empirical research. The accomplishments of criminologists who have engaged in comparative studies form the foundation for further research. The tools of comparative criminology should prove useful in helping both individual nations and the United Nations solve some of their common crime problems. The United Nations and its agencies continue to do very practical work to help nations to deal with crime on a worldwide basis"……. "U.N. activities in crime prevention and criminal justice are broad-ranging. Many aim at assisting individual countries in their own crime prevention and criminal justice efforts. Some are designed to provide technical assistance by improving the capacity of governments to deal with their domestic crime problems in a humane manner; others are directed at dealing with international and transnational crime. Of particular significance are the norms, guidelines, principles, standards and models pertaining to a wide range of criminal justice issues……Considering that only forty years ago there was no agreement among the governments of the world as to what constitutes humane criminal justice procedures, the world has come a long way in a short period of time. The countries of the world have agreed on a basic set of standards for the humane administration of criminal justice. These standards extend to all areas of criminal justice, from crime prevention to policing to prosecution and adjudication to corrections. Some countries have taken the standards very seriously, by enacting them into law or by adjusting their laws accordingly, and by using them in the training of officials. Some have ignored them. And some are undergoing change."*

Of great historical significance are also, in my view, the more than 40 books and monographs Gerhard edited as Director of the CLEAR Center, in

particular “The American Series of Foreign Penal Codes” and other studies related to Comparative Criminal Law and Criminal Science, which for the first time exposed the American public and academic community to important legislative and scientific developments taking place in other countries. For these achievements, as well as other reasons, Gerhard was awarded the Dr. Jur. Honoris Causa by the Royal Swedish University of Uppsala in 1971 and the prestigious Beccaria Golden Medal by the Deutsche Kriminologische Gesellschaft in 1979. He was also President of the American Society of Criminology (1967-1968), President of the American Section of the International Association of Penal Law (1959-1964), Vice-President of the International Association of Penal Law since 1964, Vice-President of the International Society of Social Defence since 1977, and Member of the Executive Board of ISPAC since 1991, including for a number of years Acting President (after the sudden death of its President Adolfo Beria di Argentine) and Long-Standing Rapporteur.

His reports submitted to the annual conferences of ISPAC remain there to testify not only the many different initiatives launched by ISPAC, but also his special skills of presenting complex and difficult issues in the easiest and most humorous way. For example, he started his general report of the Conference on “Migration and Crime” by addressing the audience as follows:

“My dear Fellow Migrants”

You may be astonished at this address as were the Dames of the American Revolution – a rather conservative association of ladies of great heritage – when President Franklin Delano Roosevelt addressed these ladies as

“My dear Fellow Immigrants”

Now you will appreciate the term “dear fellow migrants”, as a term of honour. With the possible exception of Dr. Isam E. Abugideri, Director of UNAFRI, at Kampala, Uganda, and the Honourable Joseph Etima, the Commissioner of Prisons, Uganda, we are all migrants, or the descendants of migrants. Even you, dear Chief Adedokun Adeyemi, for you live in West Africa, to which your ancestors migrated from the cradle of Homo sapiens, which was in East Africa, either 100.000 or 180.000 years ago. But, if we want to go to the Holy Book, than even our East African friends are migrants, cast out of the Garden of Eden as punishment for having committed a rather serious felony.

Homo sapiens has been migrating ever since.”

And, being himself a genuine "International Fellow Migrant" in addition to a truly professional "Sailor" (his dream was to come to Vienna from New York with his 'Contessa Maria', navigating the old Danube), the impact of his work extended far beyond the United States or his native Germany: he left a mark which was acknowledged and broadly recognized worldwide: a truly "Global Law Scholar", as the New York Times stated in its obituary of 30 April 2006.

Finally, as a Citizen of the World, Gerhard has always professed his faith for – and strongly encouraged – new and challenging avenues of international cooperation in crime prevention and criminal justice. We all remember him as the "Chief" of the Crime Prevention Programme of the United Nations Secretariat, serving from 1974 to 1982 and covering not only the very important position of Executive Secretary of the Fifth and Sixth UN Congresses, held respectively in Geneva and Caracas (1980), but also that of Officer-in-Charge of the Social Development Division, for a number of years. He was the one who, soon after having successfully completed his second congress in Caracas, was faced wit the difficult task of affecting the transfer of the Branch from New York to Vienna. He did manage to re-establish the Programme at the Vienna International Centre smoothly and effectively, creating and reinforcing professional contacts with the relevant authorities of the Austrian Government and with many European institutions. In this connection, I would like to recall some of the maxims of the congresses, which we put together in a paper written a few years ago, such as:

- *"The maxim that nothing in this world is perfect contradicts the official policy of the Crime Prevention and Criminal Justice Branch".*
- *"The normal working day of the United Nations Congress has 24 hours. If these are not adequate to accomplish the work, the night will have to be used. Any additional allotment of hours to the work day will require a decision of the Steering Committee".*
- *"Every problem has a solution. If something has no solution, it is not a problem".*

"It is the responsibility of each staff member who relieves the Executive Secretary of a worry to supply him with a new one within 24 hours". (G.O.W. Mueller and Eduardo Vetere, "The UN's Global Gatherings on Crime Prevention and Criminal Justice: Some Basic Maxims", Heuni Newsletter, Special Supplement, January 2000).

And, commenting about his experience at the UN, Gerhard with Freda wrote: *"There is human drama and comedy in the United Nations, there are*

human triumphs and defeats, jealousies and ambitions, life and death. Yet the international civil service is not permitted to indulge in human emotions, or even the mention of names……Many colleagues have come and gone. There is, and was, not one among them who was not totally devoted to the ideals of the United Nations. All worked harder than colleagues in most other departments of the UN, often burning the midnight oil……Looking back at the accomplishments in the UN's crime prevention and criminal justice efforts during the past half century, what are the main achievements? During the first third of this era, the UN created a sense of solidarity among the world community, which is the cornerstone of all international efforts to deal with the global crime problem, whether or not associated with socio-economic development. During the second third of this era, the UN created the scientific bases for all crime prevention and criminal justice efforts, including the statistical infrastructure in the world surveys of crime and criminal justice. In the final third of the ear, the UN excelled in the production of norms, guidelines, standards (and here I would add – in the most recent years – treaties and conventions). *These instruments contain what the world regards as minimum requirements with respect to all crime prevention efforts, regardless of divergences in culture. The standards they set out apply to all cultures because all of these efforts deal with human beings, who are equally protected by the Universal Declaration of Human Rights*." (Gerhard Muller and Freda Adler, "A very personal and family history of the United Nations Crime Prevention and Criminal Justice Branch", in "The Contributions of Specialized Institutes and Non-governmental Organizations to the United Nations Criminal Justice Program", written in honour of Adolfo Beria di Argentine and edited by M. Cherif Bassiouni, Martinus Nijohoff Publishers, 1995).

The importance and value of Gerhard's contribution as Head of the UN Programme and as Executive Secretary of the congresses were also recently acknowledged in the report of the Secretary-General of the Eleventh Congress entitled: "Fifty years of United Nations Congresses on Crime Prevention and Criminal Justice: past accomplishments and future prospects", which states that: *"Another example of a concept developed through the congresses finding its way into the treaty sphere appears in the title of the United Nations Convention against Transnational Organized Crime. In his famous Storrs Lecture delivered at Yale University in 1956, Philip Jessup proposed the term "transnational" "to include all law which regulates actions or events that transcend national frontiers". The Executive Secretary of the Fifth Congress used the term "transnational crime" to describe crime that crossed frontiers, using it as "criminological rather than a juridical term". Now, with the coming into force of the*

Organized Crime Convention, "transnational organized crime" has become a juridical term of art". (A/CONF.203/15, para. 53).

Even if Gerhard left the United Nations Secretariat over twenty years ago, in keeping with the *"established tradition that one cannot really ever retire from the United Nations, just as priests cant stop believing in God after retirement"*, he continued to inspire, stimulate and participate in many United Nations initiatives and activities. Although he was so humble and modest never to take any credit for it, it was Gerhard who drafted a special consultancy-paper commissioned by the newly elected Secretary-General Kofi Anan for the major UN reform he carried out in 1997, which led the same year to the upgrading of the Crime Prevention and Criminal Justice Division to the Centre for International Crime Prevention – to work together with the United Nations Drug Abuse Control Programme in a newly redesigned Vienna Office.

But, above all, Gerhard and Freda managed to remain very close to their former colleagues and friends, both in Vienna and around the world, genuinely interested about their work and their career, as well as sincerely concerned about their health and family life. I will always remember our annual meetings with Gerhard and Freda's students during the General Assembly sessions of the United Nations, when they used to come to Headquarters to attend the Third Committee's sessions and, as a follow-up to such debates, to have in-depth discussions related to both the substantive issues on the table with their political implications and the procedural hurdles involved. All this ended with sumptuous dinners at their Penthouse in Waterside Plaza, to which other former colleagues and UN friends were invited, with drinking, chatting and laughing till exhaustion (such dinners became almost as famous as their receptions on the occasion of the annual conferences of the American Society of Criminology!…..).

Gerhard has left an inestimable heritage, in terms of magisterial lessons, innovative writings, dedicated activism, intellectual leadership and joie de vivre. Entire generations of students have learned a lot from him, and not only academically or professionally. With his vibrant life-style, caring human touch and absolute devotion to the UN ideals, he has also left an indelible mark among all his friends and colleagues, including those still optimist and undeceived dreamers who firmly believe that they have to follow his example in further advancing the cause of more effective, fair and humane crime prevention and criminal justice policies, nationally and internationally, for maintaining the supremacy of the rule of law and for ensuring the universal protection of basic human rights. I am convinced that both his heritage and mark will continue to be increasingly cherished

in the years to come, not only by the entire United Nations family but also by the wider scientific and academic community.

As our good fiend Cherif Bassiouni so eloquently put it, Gerhard *"was a charismatic teacher and a charismatic leader, who had authority, competence, and an extraordinary way with people…… He was an exceptional blend of a superb classroom teacher, an extraordinary researcher, a good writer, a warm human being, a leader, and a man of courage and convictions… His towering personality will live in the minds of the many who appreciated him and cared for him. That, in the final analysis, is the best legacy that any one can leave behind. To say that he will be missed by his family and friends all over the world would be an understatement"*. (M. Cherif Bassiouni, "In Memoriam: Gerhard O.W. Muller, March 15 1926 – April 23 2006, in Revue Internationale de Droit Penal (Vol.77), 2006).

Vienna, 23 April 2007

Une fleur pour Nicola

"È morto a Sydney, in un incidente stradale, il figlio del procuratore aggiunto di Milano ed ex presidente dell'Associazione Nazionale Magistrati, Edmondo Bruti Liberati, Nicola Bruti Liberati, 31 anni, unico figlio del magistrato. Laureato in Economia e Commercio all'Università Bocconi di Milano, ricercatore alla University of Technology di Sydney, il giovane risiedeva da alcuni anni in Australia dove si era trasferito per proseguire i suoi studi" (La Repubblica, 29.08.2007).

A travers ces quelques lignes, les *Cahiers* désirent offrir une fleur à la mémoire de Nicola, fils du Secrétaire Général de notre Société, Edmondo Bruti Liberati, et lui exprimer toute notre affectueuse sympathie.

OBSERVATOIRE INTERNATIONAL

ISPAC International Conference: The Evolving Challenge of Identity-Related Crime: Addressing Fraud and the Criminal Misuse and Falsification of Identity

at the initiative of
International Scientific and Professional Advisory Council of the United Nations Crime Prevention and Criminal Justice Programme/ ISPAC
Centro Nazionale di Prevenzione e Difesa Sociale/ CNPDS
Courmayeur Foundation
in cooperation with
United Nations Office on Drugs and Crime/ UNODC, Vienna
Courmayeur Mont Blanc, Italy, 30 November - 2 December 2007

The proliferation of crimes of fraud, abuse and falsification of identity at the national and transnational levels is becoming increasingly serious both in developed and developing countries; it also results from the globalization of trade and the use of modern computer and communication technologies (*criminal opportunity factors*). In fact, research in this area highlights a rapid increase in cases of such fraud throughout the whole world. "Global society" is demonstrably extremely vulnerable, as much to the criminal misuse of identity as to other frauds and related offences (economic crime, crimes associated with the phenomena of migration, terrorism, money laundering, *cybercrimes*, etc.). Despite its enormity, the problem has been greatly underestimated, indeed sometimes altogether ignored, by the politics and governments of many States.

The Annual Conference of ISPAC, therefore, has been dedicated to finding the best ways and means for effectively combating identity-related crime. It had a twofold objective: to formulate an updated version of the study published early in 2007 by the co-organizer of the Conference, UNODC – the United Nations Office on Drugs and Crime, entitled "Fraud, and the criminal misuse and falsification of identity", whilst also drawing

upon the papers presented at the Conference; also to set out guidelines for the development of suitable procedures and available instructional materials to be used for prevention and for studies and judicial procedures relative to identity – related fraud.

The Conference has benefited from the widespread participation of international organizations, representatives from the public sector, from the judiciary, from police forces, from independent authorities in civil society, from the academic world and from the private sector, so providing an unprecedented opportunity for the exchange of opinions on the routes to be followed to achieve efficient synergies and international collaboration in the fight against identity-related crime.

The proceedings commenced with a presentation of the results of the above-mentioned UNODC study on *fraud and the criminal misuse and falsification of identity.* In short, whilst distancing itself from the traditional view of criminality and criminal acts involving the use of false identities, this study considers identity-related fraud as distinct from fraud in its narrower sense (whereby fraud is an economic crime, whilst falsification of identity is not necessarily an economic crime). Consequently, it was shown, in particular, that the prevention of fraud can be based on a number of elements:

- education of the potential victims;
- *training* police forces in the special field of anti-fraud controls;
- the protection of information, communications and commercial systems;
- co-operation between the public and private sectors (private resources, *expertise*, access to data);
- international co-operation (*best practices*, exchanges of information);
- the prevention of identity-related crimes, in turn, may be obtained through:
- measures concentrating on physical identification documents
- protection of *identity infrastructures;*
- use of various indentifying elements (PINs codes, keys, cards, documents, photographs).

On the basis of UNODC's own recommendations at the XVIth Meeting in April 2007 in Vienna, ECOSOC – Economic and Social Council of the United Nations – considered the results of the study and invited Member States to profit from the guidelines for developing effective strategies against the threats posed by identity-related crime, whilst also encouraging the promotion of reciprocal information and co-operation between public

and private bodies. In this connection, UNODOC aims to create a *consultative platform* on identity-related crime in which leading representatives of the public sector, business leaders in the *market*, international and regional organizations and other *stakeholders* would work together in sharing their experiences, developing strategies and promoting research in this field.

The three days of the Conference were split into a number of sessions, each devoted to a specific aspect of the fight against identity-related crime: the challenge and counter-measures in economic crime; systems of identification; the links between identity-related and other forms of crime; national and international criminal procedures; victims of identity-related crime and prevention. The wealth of content in the various sessions precludes a detailed presentation of each of the contributions. However, it is possible, in the light of the objectives defined by the Conference organizers, to mention what might be the most important items both on the concept of *fraud* and on possible ways of combating it.

In the first session, dealing with the challenge and counter-measures for economic crime, the transnational dimension and the involvement of organized crime were highlighted, followed by an analysis of protection against identity-related crime in the balance between the exigencies of effectiveness and personal liberty. The ever increasing use of advanced technology in the so-called information society and the Net creates, on the one hand, new development opportunities in the economic and financial markets associated with the new media, and on the other, new virtual scenarios in which terrorist and organized criminal groups operate with still greater ease to enhance their illicit profits and ensure greater impunity for themselves.

In relation to Italy, it was recorded that the Law of 23rd December 1993 No.547 laid down the requirement, for certain crimes, of an official indictment and not a simple complaint on the part of the interested parties, and also provided that certain penal norms may be invoked by managers of data-banks only if they had adopted certain security measures. Consequently, no protection is available to such managers unable to prove the secure handling and retention of their data.

One must also recognize that when one speaks of fraud in its broad sense and identity-related fraud in particular, the problems are not only tied to the quantity of information to be protected but also to the problems inherent in identifying the interested parties. For instance, recent EU moves envisage the introduction of digital photographs in documents or biometric measures, whilst not devoting sufficient attention to verifying the *physical identity* of the person. Symbolic is the case of requests for photocopies of

identity documents by telephonic executives, resulting in the release of telephonic data-sheets unlawfully bearing the names of people wholly unaware of the practice. One thinks also of the problem of controlling the behaviour of private companies who engage in *outsourcing* activities which can no longer be controlled by those engaged in the *core* business.

Apart from the criminal aspect, one should be concerned about the *short circuit,* which as been created for reasons of security after 9/11, whereby private individuals are required to have more information (e.g. the PNR – *Passenger Name Record*). In the face of this problem, one should both reflect on the modes of use of PINs – *Personal Identification Numbers* and take careful note of the contributions emanating from the information sector for the correct use of such information. Finally, in order that the fight against fraud may take due note of the available information technologies, one can also see very clearly the approach in the Outline Programme of the European Commission, concerned with the study of new *privacy enhancing technologies*, i.e. information measures enabling the greater prevention of fraudulent identity violations.

The following session, on the systems for identifying identity-related crime, focused on information, communication and commercial technologies from a twofold point of view: as an instrument for protecting identity and as a means of perpetrating identity fraud. In the face of the undeniable advantages linked to the vast use of the new technologies, there came to light new forms of crime operated in cyberspace, capable of striking at the weaknesses in legislative systems and traditional modes of investigation. Given that the theft of identity is a criminal act aimed at exploiting the identifying data of a subject without his knowledge (tax details, credit card numbers, registered personal data) in order to commit a fraud to the detriment either of third parties or the legitimate holder of the data, it is shown that identity thieves aim unlawfully to acquire names, addresses, dates of birth, banking codes, *Internet passwords* and PIN numbers belonging to others. In order to attack or defraud services on the Net, so as to gain access to such information, use is usually made of the *Trojan* virus, or cloning credit cards, or *hacking*, or *spamming*, or *phishing* (fraud aiming for illegal purposes to obtain confidential data through the sending of e-mails).

The advantages in using biometry in the fight against fraud were then examined. In fact, with biometry the unique physical characteristics of an individual are used for authentication, e.g. for verifying his genuineness (finger-printing is currently the most employed for of biometric technology) and whilst the everyday instruments for memorizing *passwords*

or PIN codes have the great drawback of being lost or falling into hostile hands, biometric elements can be neither forgotten nor passed on to another individual, nor can they be lost or stolen by another person. Today biometric systems are widely and successfully employed, through a great number of installations. One thinks of the electronic passport, which possesses special printed features that cannot be counterfeited and of a microprocessor which permits the registration of electronically certified data regarding the holder of the document and the authority that has issued it. Moreover, it has been stated that, although biometry is a significant instrument for effectively preventing identity fraud, it is not, of itself, a panacea, since its efficient contribution depends not only of technological progress but also on the integrity of the document-issuing system.

A study of the current situation and future developments of identity-related crime in various countries of the world has shown, in particular, that the falsification of identity is a serious problem in U.S.A., the United Kingdom, Australia and India, giving rise to notably high financial and social costs (for instance in Australia it is estimated that it accounts for a third of all the costs of crime in this field). Identity-related crime through the *Internet* is now very widely spread: in the last two years *phishers* have attacked a growing number of financial entities in Europe, whilst the United States (where *phishing* attacks have doubled since 2005) and China play host to the high number of *phishing* web-sites. An accurate analysis of the current situation and trends in identity-related crime, however, is still not possible, since apart from U.S.A. no other countries possess systematic data banks. For this reason, also, international collaboration is unanimously agreed to be an indispensable weapon for fighting such crime.

With regard for the subject of the third session, identity-related crime and links with other forms of crime, it was recorded, first and foremost, that money-laundering is an illegal activity underpinning the very existence and functioning of organized crime and terrorists, by now acting on a global scale. Next, as a direct result of such fraud, terrorism and trafficking in drugs and human beings are financed. Moreover, the rapid and major developments achieved by innovation in the *Information Technology* sector have determined the emergence of a wide range of electronic payment systems. The number of intermediaries, other than traditional operators in the banking and financial sectors, has grown at the same pace. This panorama offers a range of complex financial solutions, which can permit the construction of sophisticated money-laundering schemes and financing of terrorism, which are exploited by criminals and criminal organizations with growing dexterity. The question was asked whether it is possible to control such forms of crime. Studies in the United States have indicated

possibilities through specific market regulation measures and *ad hoc* legislative policies, such as guaranteeing the transparency of operations between practitioners and clients, the use of deterrents and preventative for combating abuses, the blocking of finance for terrorist groups, the monitoring of "militants", the protection of consumers. From this point, the discussion focused on the opportunities available for adopting similar security measures to prevent the illegal and clandestine activities of terrorist groups and organized crime. Business and the public sector also need to defend themselves by adopting suitable control systems and ensuring that they are implemented faithfully.

In the next session, on identity-related crime and criminal justice, the main emphasis was on jurisdictional aspects: some countries have begun to address the growing spread of identity-related crime, considering identity abuses (the assumption, copying or creation of identity) as new and distinct forms of crime within the general heading of fraudulent crime. The main advantage of this approach – which is also the one adopted in the UNODC study, as already mentioned – lies in the fact that the appointed authorities are able to intervene on a broader scale especially with regard to prevention of crimes and protection of victims. This last point is a particularly sensitive one: the victimization of individuals whose identity has been stolen or misused can, in fact, easily continue in time, unlike the position with traditional fraud, from the moment that the victim usually suffers a series of problems in the reacquisition of his own identity and possibly to restore his own credit-rating (which is the indirect cost for consumers).

The common view was that the fight against identity-related crime should proceed in step with the evolution and implementation of legislation and that to address these changes it is necessary above all to have conceptual clarity of the process and appropriate preventive measures, both at the national and supranational levels. On this last point, illustrations were given, first, of the existing legal framework (UN Convention on transnational organized crime, signed in 2001 and coming into force in 2004; the Council of Europe 2003 Convention on computer-crime which came into force in 2006; Communication of the EU Commission *Towards a general policy in the fight against cybercrime*, in 2007) and then the operational aspects (Europol, Interpol). Here in particular it was confirmed how preventive and repressive activity against crimes committed through the Net is seriously impeded by the difficulty of identifying the originators/users and of pinpointing the Web-sites and data. Consequently, an effective counter-strategy against this criminal phenomenon should follow an agreed course towards attaining the following objectives: harmonization at an international level of the legislative provisions in this

field; establishment of police bodies specializing in computer-crime; encouragement of close collaboration between the organs responsible for the security of computer systems and the police working in this field, as well as between the judiciary and the police; setting up national and international organs dedicated to the promotion of security policies in order to develop a homogenous protective system.

In the last session, the preventive strategies against identity-related crime in various countries were outlined. The strongly held view was that counter-strategies against the new forms of crime under study at the Conference are so detailed and pervasive that it is essential to adopt new approaches, both in terms of investigation/repression and in terms of adequate preventive measures: it appears ever more necessary to have an investigative response on a vast scale on the part of the police, specialized and coordinated on an international plane. Similarly, in the area of prevention, it seems indispensable to have a widespread and continuous awareness among users of computer services of the new forms of computer-security culture. Relative to this particular objective, a feature common to the various experiences of Holland, India and China – where the phenomenon of identity-related crime is spreading rapidly – is the promotion of co-operation between the public and private sectors through four principal lines of intervention: participation, education, prevention and legislation. In India, for example, NASSCOM – the National Association of Software and Service Companies – a non-profit organization with more than 1100 members from companies operating in the *Information Technology* field and in electronic trade, collaborates actively both with the government to formulate *ad hoc* norms and with *stakeholders* to promote the entry of IT firms into the global market.

One final piece of evidence, on the anti-fraud battle in Spain, confirmed the importance of developing technologies to prevent the fraudulent duplication and modification of documents (passports, medical certificates, insurance policies, cheques, etc.)

What is the interest to be protected in the fight against identity-related crime? Is it a private interest or an interest of the nation at large? What conduct is to be considered as criminal? What data are to be considered confidential? These are the main questions to which those speaking at the Conference endeavoured to give a response, sharing a twofold conviction: that *prevention*, more than control and reaction to the commission of the crime, is the indispensable means of making identity-related crime more difficult, and that blocking or reducing the phenomenon should be the responsibility of public as well as private bodies. In order for prevention to be considered effective, however, more information and data on identity-

related crime and crimes linked with it across the whole world is needed. In the last analysis, this is the common objective in the near term.

United Nations General Assembly resolution 62/149 - Moratorium on the use of the death penalty

The General Assembly,

Guided by the purposes and principles contained in the Charter of the United Nations, *Recalling* the Universal Declaration of Human Rights,[1] the International Covenant on Civil and Political Rights[2] and the Convention on the Rights of the Child.[3]

Recalling also the resolutions on the question of the death penalty adopted over the past decade by the Commission on Human Rights in all consecutive sessions, the last being its resolution 2005/59,[4] in which the Commission called upon States that still maintain the death penalty to abolish it completely and, in the meantime, to establish a moratorium on executions.

Recalling further the important results accomplished by the former Commission on Human Rights on the question of the death penalty, and envisaging that the Human Rights Council could continue to work on this issue.

Considering that the use of the death penalty undermines human dignity, and convinced that a moratorium on the use of the death penalty contributes to the enhancement and progressive development of human rights, that there is no conclusive evidence of the death penalty's deterrent value and that any miscarriage or failure of justice in the death penalty's implementation is irreversible and irreparable.

Welcoming the decisions taken by an increasing number of States to apply a moratorium on executions, followed in many cases by the abolition of the death penalty:

1. *Expresses its deep concern* about the continued application of the death penalty;
2. *Calls upon* all States that still maintain the death penalty to:
   a) Respect international standards that provide safeguards

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1 Resolution 217 A (III).
2 See resolution 2200 A (XXI), annex
3 United Nations, Treaty Series, vol. 1577, No. 27531
4 See Official Records of the Economic and Social Council, 2005, Supplement No. 3 and corrigenda (E/2005/23 and Corr.1 and 2), chap. II, sect. A.

guaranteeing the protection of the rights of those facing the death penalty, in particular the minimum standards, as set out in the annex to Economic and Social Council resolution 1984/50 of 25 May 1984;

b) Provide the Secretary-General with information relating to the use of capital punishment and the observance of the safeguards guaranteeing the protection of the rights of those facing the death penalty;

c) Progressively restrict the use of the death penalty and reduce the number of offences for which it may be imposed;

d) Establish a moratorium on executions with a view to abolishing the death penalty;

3. *Calls upon* States which have abolished the death penalty not to reintroduce it;

Requests the Secretary-General to report to the General Assembly at its sixty-third session on the implementation of the present resolution;

4. *Decides* to continue consideration of the matter at its sixty-third session under the same agenda item.

INSTITUT DE DROIT INTERNATIONAL

Résolution adoptée à la Session de Santiago
20–28 octobre 2007

Present problems of the use of Armed Forces in International Law: *A.* Self-Defence – *B.* Human Action

The Institute,

Mindful of the problems raised by the use of force in international relations;

Convinced that the system of collective security established by the United Nations Charter strengthens international peace and security;

Acknowledging the fundamental importance of individual and collective self-defence as a response of States to the unlawful use of force;

Mindful that the problems of self-defence of States facing armed attacks by non-State actors, as well as those of the relationship between self-defence and international organizations, require further study by the Institute;

Adopts the following resolution:

1. Article 51 of the United Nations Charter as supplemented by customary international law adequately governs the exercise of the right of individual and collective self-defence.

2. Necessity and proportionality are essential components of the normative framework of self-defence.

3. The right of self-defence arises for the target State in case of an actual or manifestly imminent armed attack. It may be exercised only when there is no lawful alternative in practice in order to forestall, stop or repel the armed attack, until the Security Council takes effective measures necessary to maintain or restore international peace and security.

4. The target State is under the obligation immediately to report to the Security Council actions taken in self-defence.

5. An armed attack triggering the right of self-defence must be of a certain degree of gravity. Acts involving the use of force of lesser intensity

may give rise to countermeasures in conformity with international law. In case of an attack of lesser intensity the target State may also take strictly necessary police measures to repel the attack. It is understood that the Security Council may take measures referred to in paragraph 3.

6. There is no basis in international law for the doctrines of "preventive" self-defence (in the absence of an actual or manifestly imminent armed attack.

7. In case of threat of an armed attack against a State, only the Security Council is entitled to decide or authorizethe use of force.

8. Collective self-defence may be exercised only at the request of the target State.

9. When the Security Council decides, within the framework of collective security, on measures required for the maintenance or restoration of international peace and security, it may determine the conditions under which the target State is entitled to continue to use armed force.

10. In the event of an armed attack against a State by non-State actors, Article 51 of the Charter as supplemented by customary international law applies as a matter of principle.

A number of situations of armed attack by non-State actors have been raised, and some preliminary responses to the complex problems arising out of them may be as follows:

(*i*) If non-State actors launch an armed attack at the instructions, direction or control of a State, the latter can become the object of action in self-defense by the target State.

(*ii*) If an armed attack by non-State actors is launched from an area beyond the jurisdiction of any State, the target State may exercise its right of self-defence in that area against those non-State actors.

The State from which the armed attack by non-State actors is launched has the obligation to cooperate with the target State.

The Institute of International Law

Having considered the subject of Humanitarian Action for the object of putting an end to genocide, large-scale crimes against humanity and large-scale war crimes;

Approves the following Resolution, together with a Declaration of the President, who was asked to issue this Declaration to express the understanding of the Institute in respect of the question of military actions which have not been authorized by the United Nations:

The President's Declaration is as follows:

"The Institute has discussed in detail the question of the lawfulness of military actions which have not been authorized by the United Nations but which purport to have been taken to end genocide, large-scale crimes against humanity or large-scale war crimes.

While a number of members supported the view that such actions might be lawful under certain circumstances and observing certain conditions, a number of other members were of the view that this is not the case under present international law and in particular under the Charter of the United Nations.

In view of these differences of opinion and in consideration of the fact that another subgroup is specifically dealing with the Present Problems of the Use of Armed Force in International Law and the authorization to resort to the use of force by the United Nations, the Institute decided to refer this particular issue to that sub-group for further discussion in a subsequent session.

10B RESOLUTION Reisman/Owada EN jl 2

Accordingly, Article VI of the Resolution explains that its text does not address this issue, and therefore its referral to a different sub-group in no way preempts nor prejudges the continuation of the discussion on this issue in a subsequent session."

The text of the Resolution is as follows:

I. International law embodies the right to the protection of human life and human dignity against genocide, crimes against humanity and war crimes. Every State is under an obligation to prevent or promptly put an end to genocide, crimes against humanity and war crimes, occurring within its jurisdiction or control.

II. Genocide, large-scale crimes against humanity or large-scale war crimes should be considered as a threat to international peace and security pursuant to Article 39 of the Charter of the United Nations.

III. The competent organs of the United Nations should use all statutory powers at their disposal to take prompt action to put an end to genocide, large-scale crimes against humanity or large-scale war crimes which have not been suppressed by the State within whose jurisdiction or control they are occurring.

IV. Actions to put an end to genocide, large-scale crimes against humanity, or large-scale war crimes shall be conducted in accordance with international law.

V. If military action is taken, the sole objective of such action shall be to put an end to genocide, large-scale crimes against humanity, or large-scale war crimes. International humanitarian law shall be strictly observed during

and after the operations, so as to secure in particular maximum protection of the civilian population. This paragraph is without prejudice to any obligation with regard to the repression of international crimes.

VI. This Resolution does not address the question of the lawfulness of military actions which have not been authorized by the United Nations but which purport to have been taken to end genocide, large-scale crimes against humanity, or large-scale war crimes.

INFORMATIONS / *INFORMATION*

Un grand merci à Luciana

Les lecteurs des Cahiers se seront sans doute aperçus que le nom de Luciana Marselli Milner du "Centro nazionale di prevenzione e difesa sociale" n'est plus indiqué à coté de la fonction de trésorier de la SIDS, poste qu'elle tenait depuis 1982.

En effet, Luciana a terminé sa carrière auprès du "Centro" afin de pouvoir consacrer plus de temps à sa famille.

Cependant, notre ex-trésorière laisse un véritable trésor de souvenirs qui ne nous laisserons jamais oublier sa gentillesse, son intelligence et son travail précieux pour le "Centro" et pour notre Société, pour lesquels ne lui serons toujours très reconnaissants.

Heartfelt thanks to Luciana

The readers of the Cahiers will have noticed that the name of Luciana Marselli Milner of the "Centro nazionale di prevenzione e difesa sociale" is no longer mentioned next to the function of ISSD treasurer, a post she had held since 1982.

Luciana, in fact, has concluded her career at the "Centro" in order to dedicate more time to her family.

There can be no doubt, however, that our ex-treasurer leaves behind a great wealth of memories which will keep alive, with feelings of real gratitude, the memory of her kindness, intelligence and precious work both for the "Centro" and for our Société.

Un grande gracias a Luciana

Los lectores de los Cahiers habrán notado que el nombre de Luciana Marselli Milner, del "Centro Nacional de Prevención y Defensa Social", no aparece ya junto a la función de tesorero de la SiDS, cargo que ocupó desde 1982.

Luciana, en efecto, ha dado por finalizada su carrera en el Centro para poder dedicar más tiempo a su familia.

No puede caber duda, sin embargo, de que nuestra ex-tesorera deja tras de si un enorme legado de recuerdos que permanecerá vivo, acompañado de sentimientos de sincera gratitud, de recuerdos de su amabilidad, su inteligencia y su precioso trabajo para el Centro y para nuestra Sociéte.

NOTES BIBLIOGRAPHIQUES
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INTERNATIONAL SOCIETY OF SOCIAL DEFENCE
AND HUMANE CRIMINAL POLICY
(Organization in consultative status with the
Economic and Social Council of the United Nations)

APPLICATION FORM

(to be returned, duly filled out, to the General Secretariat of the Society – c/o Centro Nazionale di Prevenzione e Difesa Sociale – Palazzo Comunale delle Scienze Sociali – 3, Piazza Castello – 20121 Milano – Italy)

I undersigned,

Name and Surname (in block letters)

……..

Profession and Titles (in block letters)

……..

Address (in block letters)

……..

E-mail: ……..

Recommended by: …….

……..

applies for membership to the International Society of Social Defence and Humane Criminal Policy.

date Signature

…… ……..

Applications will be submitted to the Board of the Society. The Secretary-General will notify to you in due time your admission. Thereafter you will be requested to pay the annual fee which entitles to receive the "Cahiers de Défense Sociale".

Deve rimanere Bianca

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Nous espérons avoir choisi une modalité de règlement des cotisations avec des frais réduits, étant donné qu'avec le système de virement traditionnel, la Société encaissait moins de 5 dollars à cause des frais bancaires.

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Prof Dr. D. Luis Arroyo Zapatero.
Instituto de Derecho Penal Europeo e Internacional
Real Casa de la Misericordia c/ Altagracia, 50,
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Elaborazione informatica a cura di Nadia Mazzucco

Finito di stampare nel mese di gennaio 2009
dalla WELT KOPIE S.a.S.
per conto del
Centro nazionale di prevenzione e difesa sociale / CNPDS
Piazza Castello, 3 – 20121 Milano