

National experiences:

ITALIAN JUDICIAL EXPERIENCES ON PEACE SUPPORT OPERATIONS (PSO)

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I. INTRODUCTION

A brief report on Italian judicial experiences as the topic of the Congress needs some preliminary remarks, to get an outlook over the legal background of military interventions abroad, limitedly to penal aspects: crimes, common jurisdiction, military jurisdiction.

The Italian penal system hasn't specific rules for the peace support operations (PSO).

It is composed by the common penal code (in force since 1930) and by the military penal codes, one for peace time and the other one for war time (both in force since 1941). It is lacking in legislative intervention to get rules up to date. As a matter of fact the PSO aren't war operations even if the interventions may exert military force in relationship with the several kinds of measures and the goals to fulfil: peace keeping, peace enforcing, peace making, and peace building operations and so on.

By comparison with the double division peace time – war time the PSO set up a third genus.

In consequence of historical and politic reasons, whose mention it is difficult to explain now, the Italian military penal system, which in 1941 had consistent and all

round capability, was affected by a creepy paralysis. There is another feature to point out. The Constitution, in force since 1948, provides at article 103 iron bounds to the military jurisdiction: military courts in war time have the jurisdiction established by law; in peace time they have jurisdiction only for military crimes committed by members of armed force. As matter of fact the legislative interventions in 1956 had a pulling down purpose of many special provisions with the contemporary extension of common rules. On the other hand, no penal adaptation has followed the ratification of the Geneva Conventions adopted in 1949 and the Added Protocols agreed at 1977 on the military humanitarian rules.

Also the national conformation to article 8 of the Statute of the International Criminal Court is in a standing list of the Italian Government. In spite of all, 65 articles in the military penal code for war time are still the core provisions on offences against war law and international customary rules.

This heritage of the Italian adoption in 1941 to up to date humanitarian law is useful still now, even if it is partly insufficient.

A narrow legislative make up was done after the Twin Towers terroristic crime. In January and February 2002 the bills n.6 e n.15 replaced some parts of the article 165 of military penal code for war time, which have a propedeutical function for all provisions on offences against war law and international customary rules.

Therefore, independently from the declaration of the state of war, the war time military penal law is extended now to all armed conflicts. The term «armed conflict» is meant where at least one of the parties involved makes a military organized and extended use of arms against another one to carry out war operations. Pending the issuing of rules organically regulating the matter, the provisions on offences against war law will also apply to military operations carried out by Italian armed force abroad.

According to some academic exegetical trends, the result of this new provision is that the penal coverage for humanitarian rules does exist in spite of the Parliament's opting for enforcement of military penal code for peace time.

In detail, elements of crimes of this class are regarding:

- violence of military personnel against enemy private citizens or inhabitants of occupied territories;
- other different offences than violent ones against persons protected by international conventions;
- acts having the purpose of looting in towns or other attacked places;
- fire destruction or large damage not being compelled by the necessity by conduct of military operations, applying the same provisions in cases of fire or destruction or serious damage of historic monuments, works of art, scientific works or buildings destined to worship, charity, education, arts or sciences, including those belonging to the enemy State;

- unlawful appropriation of goods and failure to prevent those offences;
- failure to assist sick, wounded and shipwrecked persons;
- use of weapons against ambulances, hospitals, ships and aircrafts utilized for medical evacuation and against the assigned personnel therein;
- maltreatment of sick, wounded or shipwrecked persons;
- violence against medical personnel and religion ministry;
- failure to release members of the medical service or ministers of religion;
- mutilation, outrage and stealing of a corpse;
- despoliation of a corpse or stealing of money or the property.

A provision inside the upon mentioned section of the Italian military penal code for war time provides punishments of persons different than enemy soldiers or legal belligerents for hostile actions against Italian armed forces. This provision is not applied under the enforcement of military penal code for war time after the Twin Towers crime, which was expressly limited to Italian military personnel and only for the «Enduring Freedom» and the «Ancient Babylonia» missions.

Therefore the hostile conducts against Italian military forces by civilian or stranger people were and are actually under common provisions of the Act against the terroristic actions and organizations and under the common jurisdiction.

Procedural rules allot the competence to ordinary courts and to their procurator's office in Rome similarly to assignment of military trials for abroad breaches only to the Rome's military tribunal.

II. THE ITALIAN JUDICIAL EXPERIENCES ARE TO BE CONSIDERED IN THIS LEGAL FRAMEWORK

Italian armed forces have been engaged for many peace support operations in the last 25 years: Lebanon (1982 e 1984), Namibia (1989), Albania (1991 e 1997), Kurdistan (1991), Somaliland (1992, 1994 e 1995), Congo (1999 e 2006), Mozambique (1993), Bosnia (1995), Timor Est (1999), Kosovo (1999), Macedonia (1999), Afghanistan (since, 2001), Iraq (2003-2006), Lebanon (again, 2006).

All those operations have had different structural profiles.

The rules of the military penal code for peace time have been applied for the upon indicated missions, excepting that one in Afghanistan (since 2001 to 2006) and the other one in Iraq (till 2006). «Enduring Freedom» and «Ancient Babylonia» missions have been under the military penal code for war time till 2006. But last year the new political coalition, which supports actual Government decided to give a step of discontinuity, going back to military penal code for peace time: the political signal was preferred rather than the law systemic reasons.

This profile is on a line of coherence with the program «say war never» to avoid polemic subjects in connection with the prohibition of war provided under article 11 of Italian Constitution.

The first remark is relating to some cases inside PSO in Somaliland and in Mozambique.

Complaints for violent actions by soldiers against civil people and sexual intercourses with native girls pointed out the inadequate structure of the military penal code for peace time to ensure the punishment of such conducts. On the other hand the common penal rules did not warrant a good level of real prosecution.

The Parliament's deliberation for the «Enduring Freedom» and the «Ancient Babylonia» missions (till June of the last year) adopted the military penal code for war time.

Two cases are here to report about. The first one is relating the prosecution *versus* an officer and a corporal belonging to Italian

Army for having intentionally directed attacks against a vehicle with personnel using the distinctive emblems of Iraqi medical service, shooting by a machinegun and in this conducts caused the death of four civilians. (Nassiriya, night between 5 and 6 August 2004). In the pre-trial valuation the judge, in accordance with the request of the Prosecutor's office, discharged the defendants for the justification of military necessity. This defence is provided by article 44 of military penal code for peace time and its extension to war time code, which exempts from punishment offences by necessity to prevent mutiny, sedition, pillage, devastation, and other fit acts to endanger the security of military settlements, ships or aircrafts. In that situation in Iraq the operators were distressed by a likely and not effective attack, but law admit justifications even if those exist putatively (i.e. only inside the mind), on condition that there are reasonable circumstances. It is important on the legal valuation the qualification of proportionality between the dangerous attack and the military reaction.

Upon mentioned case happened in the context of the «*bridges battle*» in Nassiriya and was following acts of perfidy: Iraqi terrorists dropped bombs and busted dangerous devices among civilians too, after using improperly symbols of personnel and vehicles protected by humanitarian law.

In that situation, according to some rules of engagement, the standard operation procedures committed to military units allowed to use weapons in order to prevent close explosions and other dangerous attacks. The judge verified the observance of those standard operation procedures and the defendants were acquitted.

Another similar case happened in Nassiriya where a corporal belonging to Italian Army on 7th September 2003 shot a man dead while the civilian was climbing up to the top of a military vehicle and a lot of people were around for a protest against joined forces of the western coalition.

The defendant was acquitted by the Italian military Court of appeal in Rome for the same law justification of upon mentioned case.

The interesting remark concerning the military necessity justification pointed out the difference between such defense and the common necessity justification: the last one is linked to a self protection reason while in the first one the connection is with the security of military settlements, therefore the duty is prevailing on a personal faculty. The proportionality is common qualification to both ones.

On a different level it is to mention the case of an Italian intelligence operator, shot dead by an American soldier at a check point in Baghdad, on 4 March 2005, which is still under judgment before an Italian common court, in Rome (the *Calipari's case*). The death happened during a covert operation, after the release of an Italian presswoman restrained unlawfully by terrorists for many days, and during the transfer to the local airport.

The Procurator's office charges the American soldier *in absentia*, pointing out his responsibility because he had not correctly applied the committed standard operation procedures.

The defending counsel confutes that indictment maintaining the regular conduct of the American soldier.

But the relevant remark of this case is concerning the competence *ratione personae*. The opinions of the Prosecutor's office meet the objection of the defending counsel who challenges as not lawful the Italian jurisdiction. The argument recalls that according to the agreements for the multinational Iraqi mission, only national courts belonging to each State of the coalition are entitled to try own military personnel so that in the *Calipari's case* the competence is assigned to the American military jurisdiction. The next week (27th September) that fundamental issue will be decided by the Italian Court.

