

CRIMINAL JUSTICE LESSONS TO BE LEARNED IN INTERNATIONAL MILITARY INTERVENTIONS: A COMMON LAW PERSPECTIVE

I must first express my thanks to the sponsors of this program. They selected a topic which is timely and controversial and selected a particularly appropriate venue – Toledo – for the Congress. Toledo was the center of *la Convivencia*, a period in Spanish history when Jews, Muslims and Catholics collaborated on intellectual and social projects benefiting the collective community while retaining their individual cultural traditions. Today we lawyers are called upon to reflect upon the legal problems that arise when national military forces operate together. My title emphasizes that there are “lessons to be learned,” because we are just at the beginning of the process. Although the United Nations had undertaken peacekeeping missions for years, they did not establish a lessons learned unit until 1995 and reorganized it in 2001. Surprisingly, there is no literature available which describes the legal lessons that could be learned from multinational interventions in Kosovo, Bosnia, Congo, East Timor, and Afghanistan. In my brief paper I’ll identify some characteristics of our different legal regimes which will affect efforts to arrive at *convivencia*.

First, we need to keep in mind that in 2007 three Common Law countries – Pakistan, India, and Bangladesh-contributed more troops to UN Missions than the total contributed by the remaining seventeen of the top TCC’s, many of which also derived from the Common Law tradition.¹ Among non UN Missions, the U.S. and the U.K. – first and fourth ranking respectively – contributed more troops than the combined contributions of France and Germany.² As you know, Common Law military justice systems, and that of Denmark, differ fundamentally from those of Continental Europe: there is no distinction between disciplinary and penal offenses. I’ll have more to say about the criminal justice implications of this distinction later in my paper but at this point I want to emphasize that this distinction can be a cultural barrier between military lawyers attempting to resolve a legal problem. Common Lawyers tend to believe that Civil Lawyers don’t treat disciplinary offenses seriously enough while, I think, Civil Lawyers tend to believe that Common Law systems punish disciplinary offenses too harshly. Although both systems pay lip service to the notion that the soldier is also a citizen – attributed variously to George Washington and to Napoleon – we Common Lawyers see our unitary system as an acknowledgment that the Profession of Arms, as it has been called by General Sir John Hackett, is a separate legal community. The Common Lawyer tends to think that the Civil Law systems treat the soldier as a species of government employee subject to certain distinctive norms and minor punishments. This civil/military distinction is reflected in an anecdote told to me by a U.S. participant in Operation Deny Flight, the NATO air operations over Bosnia. The campaign was run from AFSOUTH, part of the NATO headquarters in Naples. The U.S. participant noted that members of the Italian armed forces on duty in the command post, had to be replaced at the conclusion of their normal working day, as defined by Italian law, even if planes

¹ Source: Table 5.2 Annual Review of Global Peace Operations 2007 (Boulder, Co., Lynne Reinner, 2007).

² Id. Table 6.1.

were in the air approaching their targets. There were no adverse consequences from this “business as usual” approach but it suggests fundamental differences in attitude. How will commanders operating within different military justice systems punish, for example, soldiers deployed to an impoverished country who, contrary to orders, purchase the service of a prostitute? As a minor disciplinary offense warranting a reprimand? Or as a challenge to the commander’s authority punishable by demotion? Each commander will draw on his own national traditions in making that decision. Major General Indar Jit Rikhye, who served as senior commander of several UN multi national peacekeeping operations told me of the morale problems caused by the varied punishment philosophies – and authority – of his component commanders.

There are other cultural gaps as well. In terminology, for example the U.S. Armed Forces don’t use the same term to describe summary punishment authorized by the Uniform Code of Military Justice. The Army and Air Force refer to it as “Article 15 punishment,” referring to the Code provision. The Navy refers to it as “Captain’s Mast,” and the Marine Corps as “Office Hours.” I discovered similar variations among foreign armies when I undertook a study for the Defense International Institute for Legal Studies. Notions of privacy differ as well. These notions may not be based on the Civil Law/Common Law distinction but on the divide between the EU and the rest of the world, particularly the U.S. Thus, in maritime interdiction operations, the U.S. collects biometric data from the crews of boarded ships. European navies, with the technical ability to do so, refuse because they consider that a violation of their domestic privacy laws and article 82 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The extra territorial application of the convention is a significant legal barrier to military cooperation. Two examples will suffice. After the U.S. constructed Camp Bondsteel, the NATO base in Kosovo, U.S. authorities were approached by other NATO contingent commanders and asked to detain individuals that the commanders had identified as “spoilers” – threats to peace and stability operations within their area of operations. The Europeans could not charge the spoilers with a criminal offense because there was no court system nor could they detain them without trial in violation of Article 5. I understand that U.S. authorities accepted responsibility in some cases. Of course the practice stopped after the Abu Ghraib prison scandal, but the spoiler problem remains. What are European component commanders to do with a criminal who falls into their hands? The question arises during anti piracy patrols. If the U.S. apprehends a pirate crew, they will be turned over to the littoral state for prosecution. If an EU vessel apprehends pirates the captain must decide whether the littoral state’s legal system meets ECHR standards. If it does not, he may not turn them over. Obviously, this can be a legal friction point.

I must emphasize that some of these friction points are based on misconceptions. I was privileged a year ago to observe the training at EUROCORPS Headquarters in Strasbourg of NATO legal advisors, some on their way to ISAF, others to Iraq. That experience confirmed my opinion that the legal regimes of European/Civil Law armed forces are no less efficient and just than the Common Law regimes I am familiar with. These misconceptions may be based on a misunderstanding of the law. The typical military Common Lawyer is not familiar with the role of reservations in European

Human Rights jurisprudence. If, for example, a Common Lawyer reads the Human Rights Court's *Engel* decision he or she will have a warped view of the Court's role in reviewing military justice decisions. Other friction points are based on different national interpretations of domestic law. British law, treating the event like a piece time death, apparently requires a coroner's inquest in friendly fire cases. Returning to the maritime interdiction example, some navies – the U.S. is one – permit captains to recruit informers from amongst a crew which has been topped and inspected. Other governments prohibit captains from doing so because of laws which strictly limit authority to recruit "intelligence agents." Legal friction points may also arise because components of coalition forces may be limited by national caveats which restrict tactics or the use of deadly force. The force commander must interpret those legal restraints and the interpretation may mean that he is not able to comply with an ally's request for assistance. One ISAF legal advisor referred to U.S. forces in Afghanistan as "the lowest common denominator," able to undertake legitimate military missions which mandates forbade their allies from undertaking.

Finally, the size of a component unit and its legal support structure may cause friction. Belgium, for example, has deployed a company in Kabul and smaller units in Kunduz and Maza-i- Sharif, Afghanistan. When I spoke with a Belgian military lawyer a year ago, he said that unit had two military policeman attacked, and that they were expected to conduct criminal investigations. If the event called for investigation by a public prosecutor one would have to be flown in from Brussels. The delay, the prosecutor's lack of familiarity with military operations, and other contingent circumstances could affect cooperation with other contingents. As I revised this talk after the Congress, I learned that Karol Frankowski, a military prosecutor in Poznan had charged six Polish soldiers with murder and violating international law in an attack on the Afghan village of Nangarkhel. As this is written they are held in custody. The Polish military justice system is described briefly in George Nolte's (ed.) *European Military Law Systems* (Berlin: De Gruyter Recht, 2003) and the role of the Public Prosecutor is described in the Eurojustice country report (2004) on line, although there is no specific discussion of military prosecutors. The initial press reports are unanimous in assuming that a war crime had taken place – much as they assumed that U.S. Marines had committed war crimes at Haditha. As someone familiar with the Haditha investigations I can predict certain friction points that will arise when a prosecutor in Poznan attempts to supervise a criminal investigation half a world away. Who will undertake the investigation? Presumably investigators sent from Poland, who will, as in any murder case, want to examine the bodies and collect forensic evidence. In Muslim countries bodies are buried within 24 hours. Family members – if found – may be unwilling to permit exhumation. Local Iraqi authorities may – or may not – be willing to cooperate. And what of the role of the U.S.? I'm told by one Polish official that the unit was embedded with the U.S. 82nd Airborne Division and that he had heard that the Polish unit claimed that it had mounted the operation based on U.S. intelligence reports. Will the U.S. release the intelligence reports to a foreign prosecutor? Must the U.S. supply security guards and translators so that investigators can interview witnesses? How will Polish authorities provide the suspected soldiers the rights to a fair trial guaranteed by Article 6 of the ECHR – particularly the right to examine witnesses against them and to

obtain the attendance of witnesses on their behalf? That will require the cooperation of both U.S. and Iraqi authorities. One wonders whether this contingency is covered in relevant Status of Forces Agreements or Memoranda of Understanding. As the story unfolds we may learn more lessons on cooperation in international military interventions.

In conclusion, I again congratulate those responsible for organizing this Congress and look forward to reading the Proceedings. May I suggest that copies be sent to EUROJUST, an agency which could well serve as a facilitator in the investigation and prosecution of crimes alleged to have occurred outside national borders? Finally, I dedicate my remarks and respect to the "El Sals," the members of the Cuscatlan Battalion, El Salvador's contribution to the Multi National Forces in Iraq. They have proven that the size of a contingent is not as important as the hearts of its members. Viva the men and women who risk their lives in International Interventions to achieve the Rule of Law.