REPORT OF THE INTERNATIONAL CONFERENCE ON MODERN CHALLENGES IN THE MILITARY LEGAL DOMAIN

Hosted by the Auditoria General Ejército de Chile and
the International Society for Military law and the Law of War
Santiago de Chile, 20 to 23 November 2013

CHARITY W. NJUGUNA & NICOLETTE PAVLOVICS[1]

Table of Contents

[1] Charity W. Njuguna is a legal staff officer at Defense Headquarters, Kenya. Nicolette Pavlovics graduated from Tulane University Law School in 2013 and worked as a collaborator with the International Society for Military Law and the Law of War.

I. Introduction

The international conference on “Modern Challenges in the Military Legal Domain” was organized to provide a platform for scholars, career military officers, military legal advisors, security experts and government officials to confer, exchange ideas and generate stimulating discussions on relevant topical issues confronting the military legal sphere. This conference organized as part of a joint initiative between the Auditoria General Ejército de Chile and the International Society for Military Law and the Law of War (ISMLLW) brought together at least 100 delegates from over 30 nationalities thus representing a diverse melting pot of different backgrounds and cultures in what proved to be a very stimulating conference.

The ISMLLW takes an international and comparative law approach to the research, education, and dissemination of military and humanitarian law worldwide. The ISMLLW pursues this objective in part through hosting at least one international conference each year which contributes to the development of ideas for its tri-annual international Congress. This year’s international conference built on previous activities of the ISMLLW such as the “International Law of Peacekeeping” conference graciously hosted by the Academy for Military Science of the Peoples Liberation Army of China; the ISMLLW's “Comparative Law Conference on Military Justice” on the Isle of Rhodes, Greece; and the recent seminar on “Legal Issues in Cyber Warfare” in Tallinn, Estonia. The Chile event was particularly significant in that it was the first of the ISMLLW’s events to be held on the South American continent.

II. 2013 Conference Overview

The 2013 international conference entitled “Modern Challenges in the Military Legal Domain” focused on four key areas, which were explored by legal experts, experienced military officers and members of the academia. The first panel was devoted to “developments in military justice systems” while the second panel focused on “operational law--role of the armed forces in operations other than war.” The third and fourth panels addressed the subjects of “responsibilities in transparency--the armed forces and military procurement” and “hype or threat? legal challenges in cyber warfare” respectively.

1. Wednesday Afternoon, 20 November

The Commander in Chief of the Chilean Army, General Juan Miguel Fuente-Alba Poblete opened the conference by delivering his welcome address and opening speech to the delegates. He welcomed the participants to Chile and promised Chilean hospitality. The President of the ISMLLW, Brigadier General (ret.) Jan Peter Spijk, later gave the official opening speech at the welcoming reception. He expressed sincere gratitude to Gen. Fuente-Alba for his personal support of the conference, to the Chilean military and Gen. Waldo Martínez Caceres for all the preparations made for the success of the conference, to the Auditor General of the Chilean military and all the universities for their material support towards the conference. He also underscored the importance of the conference as an ideal forum for generation of new ideas and initiatives.

2. Thursday Morning, 21 November

Session 1: Developments in Military Justice Systems

Admiral Julio Pacheco Gaige, Vocal Supreme, Military and Police jurisdiction of Peru kicked off the presentations with an outline of the Peruvian military justice system going back to the first Military Penal Code of 1898, the reforms of 1939, 1950, 1963, 1980 and the Peruvian conflict in early 1990s when President Fujimori ascended to power. He pointed out that the aggravated crime of terrorism was not in the jurisdiction of the military justice system since the terrorists were not military personnel and had to be tried by the civil courts. The military justice system also suffered constitutional challenges such as a constitutional declaration in 2006 that lawyers in uniform could not be trial judges or magistrates, which led to the collapse of the system. Subsequently, the reconstitution of a new court with a fresh criterion for new members took two years. Admiral Pacheco reiterated that the prosecution of military offences is to protect the legal rights of the military system as this can have adverse implications on the unit. In this regard, he identified the two parameters of a military crime as the nature of the crime committed (such as be forgery, theft, misappropriation of military materiel, etc.) and secondly, the accused person has to be someone that the military justice system has jurisdiction over.

However, it is imperative that the prosecutors and judges remain independent and autonomous as the military justice framework could not be a judge on its own and had to learn to co-exist with the civilian justice system. In addition, enforcement of military discipline could not be left in the hands of civilians who even though capable may nonetheless not fully appreciate the realities.

Colonel Andres Suarez Aldana, Judge of the Superior Military Court of Colombia then took the podium for his presentation on the Colombian penal military justice system, which he stated evolved in the context of a very complex conflict, where there is now a prospect for peace. He also stated that the system had to generate public trust, recognize the rights of the victims and co-exist alongside the rest of the society as this was not just in the interest of the military institution but it was of fundamental interest to the country as well. Thus, since 1811, the Colombian military had sought to develop the military courts such that over the years, the military codes had advanced from the penal military code of 1824, the penal military code of 1958 decree 250, the penal military code of 1988 decree 2550, the penal military code of 1999 proviso 522 and finally the penal military code of 2010 proviso 1407. Furthermore, this evolution had been informed by article 170 of the Constitution of 1886 which elucidated that the jurisdiction of the military justice system under the military courts was over active military offences committed by active military personnel. Article 221 of the Constitution of 1991 also further affirmed that the military courts' panel comprised either active or retired military personnel and also defined the scope of the military justice framework. Accordingly, the elements were the subjective (personal) element that is; its jurisdiction was over active service personnel not civilians and secondly, the functional objective which--though slightly controversial--espoused that the offence had to be service related or committed during active official duty. However, crimes such as genocide, torture and crimes against humanity were outside the scope of the military justice system. In addition, if there was doubt as to the competence of the military court or if the two elements are not established, the ordinary law and the ordinary courts assumed jurisdiction.

To wind up, Col. Suarez pointed out that the asymmetrical nature of the Colombian conflict in which the military role overlapped with police role in fighting crime such as drug trafficking and counter-terror operations presented a very difficult and complex situation which demanded dedication from military forces but above all, meant that the legitimacy of use of military force had to be understood by the military judges.

Professor Dr. Stanislas Horvat of the Royal Military Academy, Belgium and the Director of the Documentation Centre at ISMLLW presented on the "European Military Law Systems." From the outset he pointed out that due to political and cultural differences, none of the military law systems are similar but that the justice systems of Europe can be grouped together based on similar traits. These included the organizational perspective underscored by specific legislation with a framework for use of force in situations such as wartime operations, law enforcement, peace operations and disaster relief operations; the criminal law framework with specific legislation on offences of a military nature; specific legislation on the military justice framework and finally specific legislation on the core international crimes. Moreover, there are distinct national bodies to coordinate their respective IHL obligations and guarantees of IHL application so as to avoid applications of IHL standards to IHRL contextual situations. He further noted that most European IHL frameworks followed international treaty prescriptions to avoid national law misinterpretations whereas interpretive guidance was provided for in lower level legal instruments such as military manuals on law of armed conflict.

He noted that two surveys undertaken by the ISMLLW in 2001 and 2011 of the respondent European states identified two kinds of systems: namely the Anglo-American system grounded on a court martial system for individual cases and secondly, the European continental system where countries have mainly dispensed with military courts and grounded on standing civilian courts to hear military criminal cases, though the civilian court is either specialized with a military element or lacking the military specialization and hence purely civilian in nature. Thus the range of European military justice systems encompasses courts martial convened for individual cases, standing military courts, standing military courts with recourse procedures in the ordinary courts, specialized civilian courts, general civilian courts in peacetime, and general civilian courts in peacetime and in wartime.

He further identified the overriding international legal framework that informs the European military justice system as the European Convention on Human Rights and Fundamental Freedoms whose jurisprudence indicates that military justice systems have to be independent and fully impartial, and the trend in Europe to change legislation more and more along the lines of several of the 'Principles governing the administration of justice system through military tribunals' devised by the Geneva Centre for the Democratic Control of Armed Forces. Some of the principles include the functional authority of military courts, that trial of serious human rights violations be conducted by ordinary competent courts and not military courts as per UNGA Declaration No. 47/133 on the Protection of all Persons from Enforced Disappearance, trial by a competent, independent and impartial tribunal as elucidated in article 14 of ICCPR, a robust legal framework that provides for the legal right to challenge the military court's decisions and rulings by way of appeal and judicial review in the civilian courts.

Mr. Eugene R. Fidell, the Florence Rogatz visiting lecturer at Yale Law School, USA presented on "Developments in Military Justice Systems." He outlined the developments in four key domains: "comparativism and international information exchange," "the Report of the UN Special Rapporteur (Gabriella Knaul Report) on the Independence of Judges and Lawyers," "illustrative national reform issues," and "the role of national NGOs in military justice reform." Mr. Fidell provided an overview of each domain and stated that the military justice system as part of the national legal system was highly country specific due to influence by domestic politics, jurisprudential heritage, political history and relations with neighboring countries as well as the rest of the world. More importantly, it has become increasingly apparent that trends and developments in other countries owing to factors such as globalism and commerce has proffered an abundance of experience in finding methods for tackling common issues of maintaining good order and discipline in the armed forces. He also mentioned that exchanges such as the subject conference organized by the ISMLLW and the Chilean military, the Global Military Appellate Seminar hosted by Yale Law school two years ago, the Global Seminar on Military Justice Reforms hosted by the same school last month, the ISMLLW's "Military Law and the Law of War Review" and the ISMLLW's website provide crucial international information exchange for effective engagement on pertinent issues in this area.

However, there is still room for improvement as the ISMLLW needs to bring on board those countries that maintain armed forces but are not engaged with the ISMLLW and also maintain an up to date repository of current military justice legislation and regulations and major judicial decisions from the ISMLLW's affiliated national groups.

The speaker further pointed out that the Report of the UN Special Rapporteur on the Independence of Judges and Lawyers of 7 August 2013 which focuses on the independence and impartiality of military tribunals, subject matter and personal jurisdiction of military tribunals and fair trial guarantees among other topical issues deserves serious consideration as it has the potential to spur legislative and judicial activity and thus help instill public confidence in the administration of justice in military courts and tribunals.

Finally, Mr. Fidell outlined the experiences and processes of several countries such as Nepal, Canada, Mexico, Egypt, Colombia, and Australia in achieving reforms in their military justice frameworks. Together these case studies indicate that throughout the world military justice reforms will continue to attract a lot of public attention. However they may also indicate the trend of defense ministries' resistance to becoming involved in the reform process. Consequently, Mr. Fidell stressed the vitally important role that domestic NGOs (such as The National Institute of Military Justice in the US) can play in the reform process by being available to the news media to explain the technical details in a way that will be understandable to the general public.

To crown the morning presentations, Lieutenant Colonel Ricardo Coronado, Legal Adviser at the Joint General Staff of Chile stated that the current code of Chilean military justice based on an inquisitive model that separated prosecution of the charges from investigations dated back to 1925 though the military prosecutors had a dual role of investigation and prosecution. The system also has a scope of crimes that amount to infractions of military discipline. They fall within the military justice system with due regard to due process, impartiality, the right to remain silent and the principle of legality amongst other criminal justice norms. Towards the end of the 1990s, there was change of paradigm with implications for ordinary justice. These reforms were in the domains of competence, the penal scope and the norms about the scope and a new catalogue in 2009 for military crimes that cited international jurisprudence.

This also saw the emergence of a set of three criteria to ensure independence and impartiality. One, judges had to be designated by other authorities to the military court and security of tenure of the judges must be guaranteed; second, military justice is subordinated to a higher hierarchy; and third, functional jurisdiction of military tribunals relates only to service-connected cases, though there could be exceptional circumstances under the theory of connection in particular instances. Lieutenant Colonel Coronado emphasized that Chile takes account of the 'Principles governing the administration of justice system through military tribunals' referred to by Prof. Horvat, and he added that the Chilean reform of military justice could serve as a possible model for other countries' efforts in this field.

3. Thursday Afternoon, 21 November

Session 2: Operational Law – Role of the Armed Forces in Operations Other Than War (OOTW)

The afternoon session kicked off with a brief introduction of the four speakers slated for the afternoon session by the moderator Lieutenant Colonel Juan Guillermo Michelsen.

First, Professor Dr. Wolff Heintschel Von Heinegg of Europa–Universität Viadrina Frankfurt (Oder) Germany presented on "Maritime Security." He made the point that the concept of maritime security operations (MSOs) is devoid of a universal definition and comprises a wide range of objectives in terms of defending national security interests in own seas, high seas, and abroad. The spectrum of the operations include PSOs, counter-terrorism, counter-piracy, counter-drug, military support to civil authorities, non-combatant evacuation operations, etc. but the bottom line is that they all occur outside of war, thus complicating matters because LOAC is inapplicable. He further provided an overview of the legal bases for MSOs and current issues affecting these operations. These issues include the range of measures in territorial waters, excessive maritime claims, military uses of high seas areas, and interference with foreign vessels, though some of the most outstanding challenges are opposing national interests, a variety of actors with different political agendas, and sovereignty of coastal and flag states.

As far as the legal framework is concerned, this entails a mix of relevant international treaties applicable to the field of maritime security such as select counter-terrorism conventions; regional and bilateral agreements and arrangements; LOSC of 1982; SUA as amended by the 2005 protocol; and UNSC resolutions on counter-terrorism, proliferation of WMD, piracy and armed robbery at sea, among others. In conclusion, Prof. Heintschel von Heinegg observed that there is no unitary, monolithic legal regime for MSOs as they are governed by a mix of both international and domestic law regimes.

Second, Colonel James Johnston of the British Army and the Director of the Military Department of the International Institute for Humanitarian Law used his own experiences in the Rule of Law Operation in East Timor (2001-2003) to further drive forward the afternoon agenda. He outlined a brief background of the conflict in East Timor that saw the constitution of UNTAET, the UK Forca de Defensa de Timor Llorosa'e (FDTL) LEGAD role and the issues and challenges that arose from the discharge of the mandate. The new military justice legal framework incorporated UNTAET regulations, administrative instructions that comprised disciplinary procedures and rules of punishment and FDTL guidelines comprising the specimen charges and the punishment guide. Disciplinary charges triable under the military justice system were catalogued such that charges not suitable for trial in the military discipline system were referred to the civilian courts. The FDTL training curriculum covered the standard domains of discipline including procedural rules on investigation of charges, preparation and drafting of charges in the chargesheet, preparation for disciplinary hearings, disciplinary hearings, deciding on findings and sentences, and rules on sentencing. The main challenges in the implementation of the disciplinary system were perceptions of lack of due process and impartiality, concerns that the system was complex compared to the local justice system, problems with record keeping, difficulties in translation, and inconsistency in implementation of the rules and regulations. Colonel Johnston also stated that the FDTL had a limited operational role under UNTAET but was enabled under the regulations to undertake effective joint operations with the UN peacekeepers and with the Timoreste civil police force.

Pursuant to UNTAET Regulation 2001/9, the FDTL's mandate was to provide defense for the Timoreste territory and its people and to provide assistance to the civilian population during natural disasters and other emergencies following request by civilian authorities provided that the FDTL would not be deployed in internal security operations, police issues or social conflicts.

Subsequently, Captain Juan Antonio Lozada, the Chief of Legal Engagement for US Army South, presented on "Global Tendencies and New Paradigms in OOTW." He gave a summary of the recent evolutionary history of war operations of the US Army, the new operational paradigms of S. Lebanon stabilization operations from 2006 to the present, and lessons learned by the military justice system on stabilization operations. The speaker was clear that there was a transformational doctrinal change in OOTW following the events of September 11, 2001. This was mainly in the area of counter-terrorism and counter-insurgency operations precipitated by new threats characterized by non-conventional guerilla capabilities as well as the nature of internal conflicts and peace stabilization operations which tend to generate uncertainty. The evolutionary history of the paradigm shift was seen in four phases: the first Persian Gulf War and the doctrine of Colin Powell, the period from 9/11 to 2007, the emergence of the Gen. Petraeus doctrine, and finally Gen. Casey and the 34-day war of 2006. The shift saw a new type of model of a multi-disciplinary approach for training and educating military lawyers since in such operations the use of the professional services of military legal advisers is vital. Additionally, the armed forces must have military experts who can explain to a judge how things actually happen in the field. The speaker also reiterated that the rules of engagement are a tool of command and control as well as an obligatory factor in operational law to facilitate personal defense and fulfillment of the mission, but time and resources must be devoted to the training of personnel on the relevant rules. He further highlighted that a lack of knowledge of ROE at the soldier level, if not clarified, can be an obstacle to a soldier or personnel member exercising the right of legitimate self defense. This calls for further research and study on the identification of threat. For example some studies already conducted by police forces on how humans naturally identify and respond to threats could be used to improve soldiers' training.

Finally, Major Kevin McCarthy of U.S. Army South briefly provided an outline of the role of the US Army in foreign humanitarian assistance operations. To begin, he examined the range of areas that entail OOTW activities, *to wit*, stability operations; peace keeping operations including peace keeping, peace enforcement, peace-making, conflict resolution and peace building; foreign humanitarian assistance (FHA); and non-combatant evacuation operations. In relation to foreign humanitarian assistance, Major McCarthy remarked that there was a general distaste for military involvement in humanitarian assistance but this was inevitable because NGOs could only do so much. He also provided the case study of the "Operation Unified Response" in Haiti undertaken in 2010 following a devastating earthquake. In addition, FHA operations are confronted by persistent challenges including the application of international human rights law, rules of engagement, detention operations, abuse of charities and national sovereignty concerns.

4. Friday Morning, 22 November

Session 3: Responsibilities in Transparency – The Armed Forces and Military Procurement

Friday morning began with an introduction of the panel by the moderator, Gen. Iván González López who is the Chilean Army General Controller.

Mr. Ramiro Mendoza, the General Controller of Chile, gave a brief outline of the Chilean procurement legal framework. He remarked that mistrust in society was rife owing to dysfunctional structures of governance over public utilities such as communications and water. For the defense sector, countering this problem has required collaboration of the military structures with public services during procurement of military equipment so as to enhance transparency. Mr. Mendoza remarked that Chile is progressing towards strong management of its resources to secure public property, combat corruption (particularly economic) and integrate transparency as a value in the government system in order to promote accountability and order. Specifically, this has included the creation of a council of transparency in 1999, the legislation of public access to information in 2008, and the passage of a powerful purchase law in 2003 which institutionalized a system of bidding and transparency.

He further remarked that reform also requires the installation of controls especially in defense institutions through powerful reviews and internal audits within each service and the armed forces generally, with a link to juridical top–level controls. In this regard, the model of transparency had implications for the military as this necessitated the availability of data to enhance understanding of national security, public interest and defense matters for purposes of purchasing decisions, tendering and bidding. A model of defense transparency must be created that defines the borders of military transparency. For example, in the past referring to information as confidential because of "national security" was a complete bar to any transparency requirements, but today the public expects more explanation. The public is also not knowledgeable on many aspects of military systems and language used within the military community, so it is the military's job to communicate information to the public in a way they can understand. In conclusion, Mr. Mendoza asserted that military or national security is a legally-definable aspect that requires comprehensive defense indicators given that corruption has become very sophisticated in national security matters.

As a practical answer to a question from a member of the audience on the nature and type of indicators that he would consider satisfactory under the resource model as a gauge for defense institution's resource output worldwide, Mr. Mendoza observed that whereas the natural indicator for the sector is war, the challenge lies in measuring this aspect worldwide. Under the management indicators, the more likely and practical possibilities for validation or measurable practice would be enforcement of IHL, participation in peace keeping operations worldwide, and contributions to domestic disaster relief--though these would present their own challenges. He therefore forecast a huge task ahead in devising the measurable indicators for defense performance.

Professor Dr. Clara Szczaranski Cerda, the Dean of the Law School of Universidad Mayor, Chile remarked that while the mechanisms for control and audit had been tackled by the General Controller, she would delve into the area of economic crimes. She stated that economic crimes exist because of banking, financial, and corporate sectors particularly financial markets, whereas for the armed forces the mistrust has been immense, hence better relations with the citizenry are required. Since military officers are public officers, a type of conditioning,

discipline and devotion to the law demands a different kind of conduct. Thus in the military, awareness of the law is crucial as one cannot blindly follow the orders of a superior. In addition, knowledge of the military world and its dynamics are pertinent to help civilians get an enhanced understanding of the mandate of the armed forces. Prof. Szczaranski further remarked that the Chilean constitution had changed the legal status of private companies (in accordance with Anglo–Saxon law) so that the rendering of goods and services is to be undertaken by private companies which are considered legal entities, indicating that Chile is now on the path of embracing the Anglo–Saxon way of doing business which would enhance transparency, accountability and governability. However, a balance is required between--on the one hand--an expanded democratic space, enhanced fundamental freedoms and individual rights, and economic public order and on the other the emerging sophistication of methods for avoiding controls, for example through money laundering and terrorism. Hence, the image of the armed forces has to change with the dawn of a new era of doing things.

Professor Javier Rincon Salcedo of Colombia's Pontifical Xavierian University gave an account of Colombia as a case study on the armed forces and military procurement. He put the discussion in the context of the ongoing Colombian conflict, which dates back over 60 years, such that this has implications for public purchases as well. Today, a large part of the Colombian military budget goes to pay pensions and only 25% is used for the functioning of the armed forces. Prof. Rincon opined that because of the recognition that the defense procurement process could be characterized by corruption, there are two entities meant to guarantee transparency. One is the purely disciplinary entity for compliance and the other is the general controls of the republic that ensure that the public expenditure is appropriate though it is important to note that the latter is retrospective as its work is merely punitive in nature. He explained that the Colombian system functions on the premise that the only way to avoid corruption in defense procurement is to apply control mechanisms that arise from entities outside of the military. The belief is that administrative functions must be removed from the military and given to civilians within the Ministry of Defense in order to ensure transparency. Thus the military is subject to similar procedures to any other national entity.

The result is that procurement and purchasing are undertaken by the civilian component whilst the military is expected to concentrate on its core constitutional duties. He however noted that the situation in Colombia was not a "paradise" as there was collusion at times between defense personnel and the control entities leading to institutional dysfunction; a problem the government was trying to rectify.

The speaker pointed out that the high malleability and unpredictable nature of operational requirements of the Colombian military could sometimes result in situations where the prompt execution of military missions was at risk. Prof. Rincon thus concluded that, for purposes of procurement in Colombia, a distinction needs to be made between the military's operational and its administrative functions. In order to allow the Colombian armed forces to achieve their necessary missions, he believes purchasing for operational military functions must have a new, separate process which recognizes and allows for the unique challenges of supplying military operations.

Mr. Alfons Vanheusden, General Counsel for the Office of the Minister of Defense of Belgium and the Assistant Secretary General of the ISMLLW delivered an overview of the ISMLLW, its objectives of research and dissemination of the law, organizational structure, publications, and other resources. He encouraged the audience to take a look at the ISMLLW's website http://www.ismllw.org/index.htm (available in English, French, and Spanish), LinkedIn, and Facebook for more information. Mr. Vanheusden explained that membership in the ISMLLW can either be on an individual basis through submission of an application or through membership in a national group. He emphasized that the ISMLLW is looking to incorporate more national groups in countries where they do not yet exist and encouraged anyone wishing to register a national groups to contact him. The national groups function independently in each country but are affiliated with the ISMLLW and receive its support for their activities. He also highlighted a number of the ISMLLW's upcoming conferences, seminars, and workshops and urged all to attend.

Mr. James Johnston also gave a short presentation on the Institute for International Humanitarian Law (IIHL) in San Remo, Italy. The IIHL's mission is to promote understanding and application of IHL around the world. Mr. Johnston's brief overview focused on the Institute's training and other activities which have a high degree of relevance to military operations. He described the wide range of practical, military-focused courses and workshops which emphasize participant interaction, discussion, and active real-life learning scenarios. The audience was encouraged to visit the institute's website as well as social media for more information.

5. Friday Afternoon, 22 November

General Rene Leiva of the Armed Forces of Chile moderated the final panel of the conference, captioned "Hype or Threat? Legal Challenges in Cyber Warfare."

The first speaker Colonel Dr. Paul Ducheine, Associate Professor of Cyber Operations at the Netherlands Defense Academy and Auditor of the ISMLLW gave an overview of cyber operations and their roles in the military framework in his presentation entitled "Cyber Operations in Context." He discussed this subject in the context of the environment of cyberspace, threats and countermeasures; military cyber operations; the context for cyber operations of the Dutch armed forces under the constitution, the strategies and cyber roles. Col. Dr. Ducheine explained that cyberspace consists of four layers: the social level (persona and cyber persona), the logical network (internet protocols and applications), the physical network (physical infrastructure and locations), and the geographic layer. Cyber security, a problem which government has been trying to solve, is however threatened by espionage, sabotage, theft and cyber crimes, internal security breaches, and subversion with the extreme scenario being cyber warfare. He also stated that counter measures could be executed through law enforcement, ICT governance, international cooperation, technological, social and finance measures and in extreme cases, military warfare. In this regard, the four paradigmatic approaches that can be used for cyber operations counter measures are ICT protection, law enforcement, intelligence,

and war. The military cyber operations involve employment of cyber capabilities and could be undertaken under either civil or military authority at home or abroad in the nature of passive, reactive, pro-active or active stance.

The speaker then turned to the Netherlands as a case study. Article 97(1) of the Dutch Constitution includes a role for the Dutch military in terms of defense, maintaining and promoting the international legal order and protecting other vital interests of the country. The vital interests fall under the categories of physical, environmental, economic, and territorial security as well socio-political stability. This translates to four cyber roles of the Dutch armed forces in terms of cyber protection, law enforcement, intelligence and conflict with all being embedded in the relevant legal framework. The cyber strategy of the State's military constitutes offensive cyber operations while NATO only handles defensive action and intelligence tasks. The speaker also stated that the Dutch ministry has proposed powers for police to hack into computers, install spyware and destroy data because many cyber security measures are private, thus demonstrating the limited role the military can play in this area. Ducheine also made the point that "soft cyber" operations, like soft military power, can be used to disseminate ideas and win hearts and minds. He concluded that most cyber operations are not cyber warfare as they relate to hacking and espionage. However, the future of cyber operations lies in training and education, exercises in ICT, legal and operational domains.

The final presenter for the session on cyber warfare was Colonel (ret.) Richard B. "Dick" Jackson the Special Assistant to the US Army Judge Advocate General for law of war matters. He focused on "Cyber Activities and the LOAC." The presentation was broken down into *jus ad bellum,* armed conflict triggers, *jus in bello,* precautions in attack, review of weapons, and requirements of a lawyer from technocrats. Col. Jackson stated that the issue was about "cyber activities" (or cyber capabilities as a tool across a broad spectrum of military operations) because the whole range of cyber warfare did not fit the bill. He said that cyber warfare as a concept is a real threat but is hyped and sensationalized as well. He also opined that the Tallinn Manual is a great place to start when trying to locate where cyber activities fit in the legal spectrum given that there is very little state practice in cyber warfare. The legal framework of *jus ad bellum* is the UN Charter article 2(4), while cyber defense as a means of self defense is grounded

in article 51 against the activities of a state that would amount to a cyber attack in terms of its scale and effects related to disruption of economic activities and not necessarily to physical infrastructure. Col. Jackson further reiterated that the US policy was that LOAC applies in any conflict regardless of how the conflict is characterized because of controversies on the triggers of the application of LOAC. In relation to targeting, this would require determination of whether the cyber attack was an "attack" within the meaning of article 49 of API to set in motion the application of the principles of distinction, discrimination, proportionality and precautionary measures.

In terms of weapons review, critical questions would be whether the cyber capability was a "weapon" capable of "attack" and perhaps more peripherally, if there was intent to "deny, degrade, disrupt or destroy as temporary effects." However, the standards for review of weapons in armed conflict remain the same: if the weapon is of a nature to cause unnecessary suffering or superfluous injury, its capability of discrimination, its ability to adhere to the principle of distinction between military objectives and civilian objects, and if the weapon is the subject of a treaty prohibition or restriction. In conclusion, Col. Jackson surmised that technocrats in weapons manufacture must consider the weapons review benchmarks of the intent of design, provide a clear understanding of the pathway to the target and the effects of the weapon, testing data, instructions to the operator and the likely collateral effects. More importantly, subsequent reviews would be mandatory if a material aspect of that capability is altered, as this would have a fundamental change on the weapon's effects.

The keynote speech of the conference was given by the Honorable Pieter De Crem, the Deputy Prime Minister and Minister of Defense of the Kingdom of Belgium. He thanked Chile and the ISMLLW for organizing the conference and the Chilean Armed Forces for being excellent hosts. He also recognized the Chilean armed forces for its consistent efforts in international peacekeeping and the establishment of the joint peacekeeping operations center in Santiago that facilitated integrated training of military, police and civilian personnel in multidimensional settings. The Deputy Prime Minister referred to the continued relevance of a number of principles he had previously articulated in his statement delivered at the ISMLLW's 18th congress in La Marsa, Tunisia.

He emphasized that though the armed forces holds great potential in its core mandate of defense of a country's territorial integrity and sovereignty as well as in conflict resolution and reconstruction in war torn countries, the armed forces could simultaneously be a tool for severe and extraordinary violations of human rights and IHL. In this light, he was full of praise for the forum's contribution to the rule of law in contemporary military operations.

The Deputy Prime Minister focused on the role of the military in the protection of civilians and the responsibility to protect (R2P). In light of contemporary conflicts such as Syria and Libya, he asserted that the enduring duty to protect civilians under the doctrine of R2P required further assessment of how the doctrine could be applied more consistently across a spectrum of situations of conflict so as to safeguard populations from grave violations of fundamental rights. He expressed his optimism and support for R2P, disagreeing with skeptics who say that despite the inclusion of protection of civilians in the mandate of multi-national operations civilians are not any safer. Minister De Crem asserted that through the use of precision weapons and application of the legal norms of IHL "Operation Unified Protector" in Libya was highly successful in protecting civilians and minimized the risk of collateral damage, injuries to civilians and deaths. The Deputy Prime Minister also cited the example of Belgian forces under a UNIFIL mandate in S. Lebanon which had so far demined over 14,000 explosives and the situation in Afghanistan where ISAF had helped improve security on the ground despite enormous and difficult challenges.

In regard to humanitarian activities, the Deputy Prime Minister opined that there was need to forge cooperation between military and humanitarian actors as exemplified by Belgium's B-FAST team which was a mixed civil-military team deployed to the Philippines to contribute to humanitarian responses following the devastation caused by Typhoon Haiyan. In conclusion, the Deputy Prime Minister asserted that accountability for violations of IHL had heightened and he hoped that the conference had offered an outstanding opportunity for the participants to enhance their understanding of the law so that they could be vehicles for the promotion of the rule of law in the armed forces for the sake of a better world.

In his closing speech, Brigadier General (ret.) Jan Peter Spijk, President of the ISMLLW, applauded the great efforts by the Chilean organizing team, headed by Brigadier General Waldo Martínez Caceres, and the ISMLLW's General Secretariat. He summed up the conference by underscoring its objective to serve as a breeding ground for new study and development in the field of military law. He referred to the inapplicability of the adage from Cicero *silent leges inter arma*, ("in the midst of arms the law falls silent"), emphasizing that the work of the conference exemplifies that in fact this should instead be the mantra that "in the midst of arms the laws will rule."

6. Saturday, 23 November

Following the conclusion of the conference, the Chilean hosts graciously organized a cultural excursion where the participants could see the historically significant city of Valparaiso, now preserved as a UNESCO world heritage site. Guests were then invited to the Granaderos Regiment Cavalry School for a lunch of traditional Chilean cuisine and a magnificent show by the Chilean cavalry regiment.

III. Concluding Remarks

The international conference succeeded in its dissection of the current legal issues and challenges under the topical areas of military justice, the role of armed forces in OOTW, the armed forces and military procurement, and the legal challenges presented by cyber warfare. Through the presentations of the panels and interaction with the audience during plenary, it was possible to identify some common denominators of the various military justice systems though on the whole, no system was truly similar to the other owing to political and cultural differences, jurisprudential bias, historical factors, etc. The panels pinpointed persistent legal challenges including inadequate research and data, inadequate enforcement and implementation, inadequate training and education, lack of information in the public domain about military mandates and objectives, lack of impartiality and autonomy of military courts, and perceived lack of due process leading to erosion of public trust and confidence in the military justice system.

The panel on OOTW also highlighted some exacting issues and difficulties such as unregulated aspects in maritime operations, excessive maritime claims, opposing national interests, a variety of actors bearing different political agendas, new and emerging threats in asymmetrical warfare, ROEs that sometimes constrain the mission mandate and the scope of inter-operability of human rights law and IHL in peacekeeping operations.

Furthermore, a deeper problem lies in the military procurement domain where it has become apparent that the armed forces must embrace a new image of financial propriety and discipline in financial management and procurement processes which is informed by resource, management and transparency indicators. However, it is clear that a further challenge exists in identifying what the indicators ought to be with regard to the armed forces and how the scope and content of these transparency indicators should be defined. The more contemporary phenomenon of cyber warfare also received its share of attention particularly with regard to defining direct participation in hostilities by civilians in the development and deployment of cyber capabilities. Although this conference predictably could not offer comprehensive solutions to many of these challenges, the depth and breadth of problems raised for discussion affirms that the conference achieved its pivotal objective of providing a platform for exchange of ideas on contemporary issues to drive the debate--and consequently the development of the law--forward.