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Special Interest Articles

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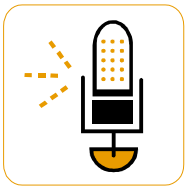
Hail and Farewell



Introduction

Here is the second issue of the NATO Legal Gazette.

It contains articles from NATO legal staff assigned to JFC Naples, NAPMA, ACT/Staff Element Europe, and the Joint Warfare Centre.

If someone of the NATO Legal community is working on a topic that would be of professional interest to all of us, or returned from training , please remember to write a short article and share it with us.
We are also interested in welcoming new colleagues, saying farewell to departing NATO attorneys and hearing about upcoming seminars or other training and education events.

We look forward to your contributions for issue #3 which will be published by the end of February !

REMINDER !!

A reminder to all legal advisors, both those within the NATO system and those working for their national offices:

The NATO School has two courses that provide instruction to Legal Advisors. The first is the "NATO Legal Advisors' Course," Course P5-34. The Course Aim is to provide active duty and civilian NATO and PfP legal advisors with an in-depth introduction to legal aspects of multinational military operations including the plans, policies, operations, and procedures of the Alliance. The course is one week long and will be offered during the week of 4-8 June 2007 and again from 15-19 October 2007.

The second course is a new one: "Advanced NATO Operational Law (OPLAW) Course", Course N5-68. While we are still putting the finishing touches on the curriculum, the aim of this Course is to ensure that Legal Advisors deploying as part of an operational or tactical level operational staff possess a broad understanding of the complex legal issues that arise in the context of modern NATO military operations, are familiar with the operational planning process and creation and execution of operational plans, and possess familiarity with current operational experiences.

While the LEGAD Course (P5-34) is an overview of legal matters within NATO applicable to administrative headquarters as well as operational commands, the Advanced OPLAW Course is focused on current operations and the legal issues arising in those operations. The course will be taught at the NATO Confidential level. The pilot course is scheduled for the week of 9-13 July, 2007.

Further information on obtaining a quota for these courses can be found at the NATO School website: www.natoschool.nato.int, under the pull-down menu "Academics."

Nation's Responsibility for Command Decisions in a Multinational Force with a UN SC Mandate

The European Human Rights Convention applies to all European NATO nations. To ensure compliance the Convention has established the European Court of Human Rights. One of the guarantees provided by the Convention is that of article 5, which protects the right to liberty and security, including the right to due process before being sentenced to a prison term.
As opposed to national courts, an individual may not bring another person before the European Court of Human Rights; a person may only take legal action against a country, which he or she claims is in breach of its obligations under the European Human Rights Convention.

After NATO had taken military control within the Kosovo province, it found itself in dire need to fulfill police tasks as well as conducting the expected military operations. At the time there were no working courts, nor sufficient civilian police. The interpretation of the mandate for KFOR as laid down in (UNSCR) 1244 was that policing was warranted, as it was necessary to ensure "public safety and order until the international civil presence can take responsibility for this task." In addition KFOR was, and still is, mandated "to maintain a safe and secure environment."
The admissibility of a case currently before the European Court of Human Rights has the potential of exploring the balance between the UNSCR mandate, the European Human Rights Convention and that of responsibility of the nations for the orders and actions by the forces and individuals provided to a multinational force.

The case in question before the court is that of an individual from Kosovo of Albanian origin named Saramati claiming he was illegally arrested and held detained after KFOR took control over the province. He places the responsibility with the COMKFOR ordering his detention and authorizing that he be held in detention for a prolonged period of time starting in 2001. During the time he was held in confinement, the COMKFOR was first a Norwegian and later a French General. Since only nations can be taken legal action against before the European Court of Human Rights, the plaintiff[1] decided to take legal action[2] against the two mentioned countries.

The decision by COMKFOR to detain was not based on the need to act as police, but rather in order "to maintain a safe and secure environment." Although COMKFOR derives this authority from a UNSCR, Mr Saramati has still claimed the action to be a breach of his human rights.

The nations in question have all argued that the case cannot be admissible before the European Court of Human Rights on different legal grounds and demand dismissal of the case. Currently the court will rule only on admissibility. What the outcome will be is not clear; a ruling should be expected in about six months from now.
The lawsuit demonstrates that individuals are ready to use legal remedies to contest decisions made by military forces affecting their human rights. And for European nations bound by the convention, an assessment of any policy decision affecting legal rights of individuals needs to be carefully considered before actions are taken. These are factors, which play both at the strategic and operational levels and should effect planning and execution of operations.

For more information on this case as it progresses, check the website of the European court of Human Rights – www.echr.coe.int. The case is labeled Saramati versus France, Norway and Germany.

[1] In the terminology of the European Court of H. R. referred to as the "applicant"
[1] Court terminology is "application"

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NATO Appeals Board Case no 702 (1)

Background

The NATO Civilian Personnel Regulations are open to interpretation in regard to a notice period in case of termination of a contract due to becoming an invalid. International civil personnel are subject to the NATO Civilian Personnel Regulations (NCPR) and under article 9 of the NCPR, NATO is entitled to terminate contracts in case a staff member is incapacitated. Article 10.3 requires a notice period of 90 or 180 days in case of termination of indefinite contracts, or definite contracts with previously seconded staff, depending on the grade. The Head of the NATO body concerned may, due to article 10.5, substitute this notice period by an allowance equal to the emoluments (payment as if the staff member continued work during the notice period).

On the other hand, the Pension Scheme Rules (Annex IV to the NCPR) state in article 17.1 that entitlement to an invalidity pension
shall commence on the first day of the month following the date of the recognition of the invalidity. The rules, as given in articles 45.7.1. and 45.7.3 of the NCPR on extended sick leave seem to come from the understanding that the stage of extended sickness can transfer, after a decision of an Invalidity Board, into invalidity without delay. This continuity gives an indication that there is no notice period required when a contract is terminated due to invalidity.

The Case

A staff member requested payment of a separation allowance for a notice period under article 10.3. The staff member was granted an invalidity pension directly following the end of his employment at NATO (having been on extended sick leave). Because no notice was given, an allowance was requested in lieu of the notice period. The staff member made reference to a supposed policy of the agency concerned, and NATO, on payment of the allowance in case employment ceases due to invalidity. Also it was argued that the principle of equal treatment gives entitlement to the substitute allowance as he pointed to other cases at the agency concerned where a substitute allowance was paid.

Appeals Board Decision

The Appeals Board dismissed the appeal for two reasons. The Appeals Board considers that no specific rule of the NCPR requires payment of a separation allowance (an indemnity) on top of an invalidity pension. On the reference to the principle of equal treatment the Board uses a consideration that was developed in an earlier appeal case (Appeals Board Decision no 366 ((2)).

It states that the appellant cannot invoke to his advantage, the fact that the indemnity may have been wrongly paid to other staff in the same situation.

The Assessment

The decision is important for two reasons. First of all, the Board makes clear that the NCPR do not require payment of a separation allowance on top of an invalidity pension. This is a rational decision as termination for invalidity cannot be foreseen months ahead of the decision of an Invalidity Board.

The second part of the decision may be of more importance in a legal sense, as the Board seems to develop a general rule that a Head of a NATO body is not required to continue a practice that is considered wrong at some point. This gives a basic limitation to the principle of equal treatment under the NCPR. A limitation which is also known in other legal systems: there is no need for the authority to continue to make the same mistake due to the principle of equal treatment.

(1) Appeals Board Decisions are published on the Advisory Panel on Administration on-line information system (available for authorized staff only).
(2) Appeals Board Decision no 366 date 18 November 1997, Lombardi versus SACLANT

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Seminar

Knowledge Management

As part of the effort to create a shared NATO legal office document management system with an interactive search capability, I attended a two day seminar on Knowledge Management (K.M.) in Gosselies, Belgium on 16-17 November 2006.

The three avowed objectives of the training were to define K.M, to explain how to determine a K.M. strategy adapted to the organization we worked for, and to implement it using specific processes.

What is Knowledge Management ? K.M. is the behaviors and processes by which a group of people maintain and increase their personal and collective knowledge to compete, increase performance, and decrease risk. It's important to note that K.M is not just about information technology (IT) or IT solutions, even if you need IT to permit knowledge sharing in the modern workplace. A K.M. initiative will involve *changes to behaviors* and *changes to processes*.

Our seminar leader (Dr. Philippe Valoggia of the consulting firm Tudor in Luxembourg) observed there are three types of knowledge:

1) Capitalized Knowledge (Building a knowledge patrimony, capturing and formalizing knowledge to better protect it and favor dissemination and use. This is achieved by formalizing internal processes).
2) Customized Knowledge (knowledge held by workers. There is a necessity to identify the knowledge holders and insure communication - exchange between partners.)
3) Generated Knowledge (knowledge that doesn't exist yet and has to be produced).

When developing the K.M strategy, it's essential to remember that K.M. is a discipline of facilitating a greater degree of actionable knowledge than would occur naturally in the organization. The initiatives that will unlock the greatest value will vary tremendously with the nature of the firm, its maturity or stage of development, and the implementation of elements of a knowledge strategy.

From what was taught at this seminary, it is clear that for our NATO Legal Community to develop a successful Knowledge Management strategy we will have to change how we work together. This means both procedural changes (how we physically handle information with our available technology) to philosophical changes (shifting from a "*need to know*" outlook to a "*duty to share.*") How fast will effective knowledge sharing come to the NATO community? That question is up to each of us to answer because we all are key.

For more information on K.M, the book "Effective Knowledge Management for Law Firms" by M. Parsons is a good resource. It is available at ACT/SEE.

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They always say that time changes things, but you actually have to change them yourself.

Andy Warhol

"Avoid the distractions of debates on political correctness and focus on the soldiers' mission, one that remains fixed, determined, inviolable. It is to win our wars."

General MacArthur
April 1962

O.R.M (Operational Risk Management)

During the April '06 Bi-SC Legal Conference Dr. Baldwin De Vidts, Legad to the Sec-Gen made four recommendations, which were used to organize the 11 items the conference participants identified as requiring action. One of the recommendations was 'Take a Positivist Approach to the law'.

As a short reminder 'Positivism' in Law is the theory that laws and their operation derive validity from having been enacted by authority or deriving logically from existing decisions rather than from moral considerations. Within that theme of 'Take a Positivist Approach', legal operational risk management (ORM) was identified by the attending NATO legal advisors as an action item.

What is legal ORM? Most of us will have an idea when confronted with this question. And most of us know our Commanders and operators use ORM when analyzing possible courses of action. Their ORM can be defined as "… *a decision making tool used by people at all levels to increase operational effectiveness by anticipating hazards and reducing the potential for loss, thereby increasing the probability of a successful mission*."

Lawyers in the outside world use ORM, which is more widely referred to as Legal Risk Management (LRM). The Department of Justice in Canada e.g. uses this term when they refer to the process as a management tool. They see LRM as one of the principal processes used by the Department of Justice to provide the highest quality legal services to the Government of Canada and its institutions. They define LRM as '*the process of making and carrying out decisions that reduce the frequency and severity of legal problems that prejudice the Government's ability to meet its objectives.*'

We often see that LEGADS use a simple form of ORM, without labeling it as such. In a way, ORM is a method most of us, almost reflexively, have frequently used. This is especially the case during operations.

My goal is to begin the process that helps NATO legal advisors develop skills to consciously address ORM when providing legal support. One of the steps in that process is to come to a NATO definition for Legal ORM.

Because 'ORM' is the term the military operational world is familiar with, I prefer the term "Legal ORM' instead of 'LRM' to include this concept within the common vocabulary used by the Military.

Navies, Armies and Air Forces within the Alliance for more than 10 years now use ORM. I think it will enhance our credibility, when we – the NATO Legal Community – show our clients that we are not only aware that they use ORM, but that we also apply a similar process to our work. Commanders and other operational clients will value our visible effort to get familiar with their world and be on their team in both words and deeds. They will appreciate our contribution to the activity we perform together as they will appreciate us making more explicit the legal role in the holistic implementation of an effects-based approach to operations (EBAO) throughout NATO.

O.R.M. (Operational Risk Management)

Why does the NATO legal community want ORM? What is the problem we are attacking here? Universally, lawyers are trained to minimize legal risks. As legal advisors we often find ourselves drawn between the need to be legally sound and time constraints given by ongoing operations. Often there are reasons that are, or appear to be, bureaucratic, that cause LEGADS to act in a certain way. LEGADS often tend to rationalize holding up command decisions by referring to formal procedures; '*Yes, General, but we have to do it like this. I'm sorry, Sir, but that is the Law.*' But is this the only way we can perform our job? Are there times we could [and should!] speed things up; serve our clients – the operational commanders – in a faster way? Our clients – be they Force Commanders or operators at a tactical level – sometimes perceive the 'delay' caused by us LEGADS as interfering with effective military action. Legal constraints then [to them] seem to – '*because of formal or process reasons only, not legitimate operational reasons*' – slow or prevent our commanders from reaching the desired *Effects* (EBAO).

In this unique operational pressure-charged environment it is necessary that we build upon our analytical skills in a different way than practicing in other settings and fields of law. The state of mind of a lawyer in an operation is – or should be – different than the state of mind of a lawyer doing administrative affairs. We must build on our analytical skills with other "tools in the toolbox". For instance, when working in an operation one often needs a multi-disciplinary approach. The issues that will be confronted are not purely legal, but also of a mixed political-legal nature. And the purely legal issues tend to cover multiple subject areas (for example: criminal, fiscal and international law). In this new operational world of NATO we need to define, hone, and master a new tool : **Legal ORM.**

Can ORM be seen as merely a tool to help us visualize and encourage common sense? There is nothing wrong with that vision. Keep in mind though that there are professionals looking and working on almost every field of management. For more than a decade long operational people have studied ORM, developed techniques to optimize ORM and implemented it in operations. So, yes, you can state it is all (only) common sense. Reality albeit, and especially reality in operational circumstances, is so complex that one needs a tool to be able to rapidly discover what legal advice would be in line with common sense, and what legal advice would result in acceptable risks.

This article starts with a quote from General MacArthur. I think it contains the need for Legal ORM and at the same time shows the inherent danger of doing ORM. Because, yes, I do know what happened with General MacArthur in the end !

We have to be aware that especially when dealing with policy or policy related issues that the result of an ORM analysis should be to stop ORM and return to legally sound, time-consuming hard work. All of us must tailor our use of ORM to their mission and local hazards. Working at SHAPE or at a JFC, it is more likely your legal advice is asked in a situation which has aspects similar to General MacArthur's than if you are working as LEGAD on a base, close to operations.

O.R.M. (Operational Risk Management)

During your career as a LEGAD your responsibilities entail risks with widely varying levels of complexity. The amount and also the type of ORM training required for sound risk management varies accordingly.

This article aims merely at whetting your appetite for ORM. Clearly ORM for LEGADS is a concept that needs to be developed. And Legal ORM needs to be vetted, that means a careful and critical examination of legal ORM within NATO needs to take place.

This article and the presentation I am working on are efforts to start this process. Hence all your ideas and remarks on Legal ORM, your examples of situations where you used, or maybe thought about using, ORM, are welcome and highly appreciated. Please send any comments you may have to Ronald Gilissen, at afslegal@afsouth.nato.int

For those who may be interested, as to be expected, there are no leading references on ORM and LRM. I used Google to access the ORM sites of the different armed services. I would say that the (US) Navy site offers the most extensive information on ORM.

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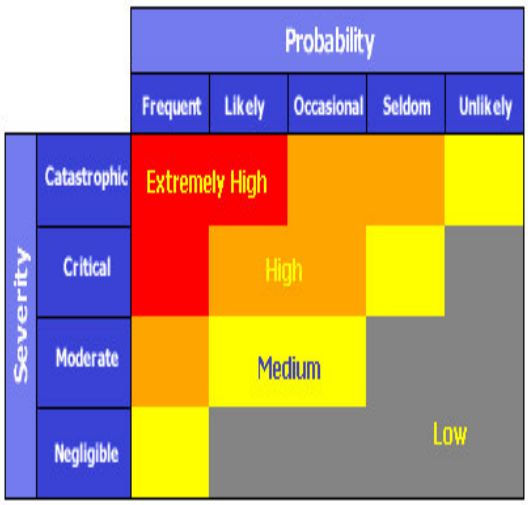
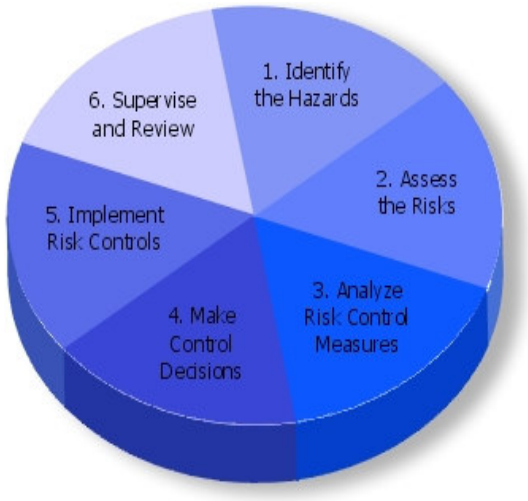


The Risk Matrix



The Six-step ORM Process :

HAIL

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FAREWELL

Lawyers are like rhinoceroses : thick skinned, short-sighted, and always ready to charge --- David Mellor

Hail

JFC HQ Brunssum : Capt Luigi RUBINO (ITAR) joined on December 11, 2006 for three years.

HQ SACT : Cdr Jude Klena, JAG, USNR will join on February 5, 2007 for 5 months.

Farewell

JWC : Col Frode Berntsen on December 31, 2006.

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