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Introduction

This is our ninth edition of the NATO Legal Gazette. Like the eight previous editions, although most of the articles have been written by legal staff members working in NATO or at Ministries of Defence, by design this remains a non-agreed NATO document and does not represent the official opinions of NATO or individual governments. Rather, we continue to seek the personal views of authors who wish to inform, challenge, and sometimes even provoke, our international audience of more than 250 readers interested in topical NATO legal matters.

To further the aim of better communication and sharing knowledge among the large NATO Legal Community, all readers of this Gazette are encouraged to pass on this edition to persons interested in NATO legal matters and to consider writing a short article in a conversational tone (with or without footnotes) for the tenth or eleventh edition.

Additionally, for the benefit of our Alliance, legal insights published in languages other than English, papers concerning the legal aspects of civil-military coordination in disaster relief and other missions, civil-military information sharing, and anti-terrorism that would be of interest to the NATO community are requested. Where possible please send an internet link or PDF document to the SACT/SEE Legal office :

Dominique.degreve@shape.nato.int or Sherrod.bumgardner@shape.nato.int along with a summary of the article and its value for sharing.

Finally, the attention of all readers is invited to the General Interest section where a number of NATO announcements such as the Voluntary National Contribution request for the HQ SACT Legal Office and our calendar of upcoming events are included.

I look forward to your articles for next month!

Sherrod Lewis Bumgardner
Legal Advisor, SACT SEE

Command Responsibility

Andres Munoz-Mosquera - SHAPE

INTRODUCTION

Accountability of Commanders is a vital requirement for nations that have integrated in their government institutions - the Armed Forces included - reliance on the Rule of Law, adherence to universal principles of human rights, and the importance of the application of International Humanitarian Law.

When conducting military operations, civilian leaders and military officers have an abiding responsibility for the actions and omissions that occur during the planning and execution of military missions. When both civilian leaders and military officers direct the planning and control of military efforts, the modern trend increasingly holds both accountable for success or legal failure. Most discussions of Command Responsibility focus on the lawfulness of strategic decision to use military force (*jus ad bellum*) or its tactical applications (*jus in bello*). This short article invites consideration of the accountability of the operational level field Commander who intrinsically serves as a quasi-regulator of military and civilian issues.

Historically, military matters alone filled the sphere of responsibility of a field Commander. In the communication hampered days before quad-band cell phones, video teleconferences, and the deluge of daily emails, some national colonial systems dispatched

viceroy to provide immediate civilian guidance to remote military field Commanders. But in the main, military, diplomatic, economic, and civil society issues received treatment as separate realms, devoid of complementary policies or a comprehensive approach.

To remedy this deficiency, in recent multinational military actions a hybrid civilian-military organization was created that gave civilian representatives direct influence or control over the military commander. Examples include the High Representative and EU Special Representative (EUSR) in Bosnia and Herzegovina who continues to oversee the implementation of the 1995 Dayton Peace Agreement, Special Representatives of the Secretary General who direct and administer the peacekeeping missions of the United Nations, and the Civilian Administrator of Iraq who led the Coalition Provisional Authority in that country from May 2003 until June 2004.

The expressions "mission-specific law" or "mission-made law" neatly describe the intrinsic quasi-regulatory regime created by these hybrid organizations. The modern field Commander or civilian head-of-mission and staff translate strategic objectives into operational plans.

Within the operation's legal framework¹, these plans, with their branches and sequels, are further developed through orders, guidelines, directives, regulations, and standard operating procedures (SOPs). This guidance, the authoritative detritus of the mission, is tangible evidence of the Commander's quasi-regulatory decisions on a host of sophisticated topics. They include, *inter alia*, the use of force, detention, treatment of civilians, interaction with the receiving state's military and police forces, and the myriad other details attendant to military maneuvers and operations such as controlling airspace, territorial waters, roads, rail lines, ports, airfields, communication networks, electrical power grids, and the protection of cultural property.

¹ The **legal framework** of an operation is made of:

- a) International Law materials: UN Charter, North Atlantic Treaty and SOFA and subsidiary documents, HR treaties and conventions, LOAC/IHL, customary law and jurisprudence from international tribunals;
- b) Receiving-state national laws when not a failed state;
- c) Sending state or Troop Contributing Nations laws, caveats, ROE caveats, and;
- d) Mission specific instruments:

(1) Authority or Status stemmed from the UNSCRs, NAC decisions, EU Joint Actions, Peace settlements, SOFA/SOMA/Military Technical Arrangements, etc., and (2) Guidelines and procedures: OPLAN, FRAGOs/OPORDs, ROE, SOPs, Directives, etc.



Command Responsibility

The importance of these orders becomes crucial if, and when, a Court is called to examine allegations of internationally illicit acts committed during the operation.

Referencing this mass of authority, sub-unit Commanders enforce the field Commander's quasi-regulatory guidance in their functional or geographical areas of responsibility. In this dynamic *ad hoc*, dangerous, multi-national environment, commanders and their forces are to accomplish their mission using correct means. Governments worry about conducting operations inside the margins of the universally accepted principle of human rights and humanitarian law basics. They want their armed forces to be ready and capable to fulfill this political goal. To address this complexity and prevent illegal actions or omissions requires effective training and insight. In simplest words, providing this training is a preeminent national responsibility; ensuring its effective application is the Commander's.

HISTORICAL BACKGROUND

Nearly 2,500 years ago Sun Tzu described the obligation of Commanders to control their army and officers and assure disciplined behavior during battle.² At the Second Peace Conference at the Hague, Netherlands, in 1907 the delegates produced the Laws and Customs of War on Land (Hague IV), the first multinational description of the responsibility of a Commander for his subordinate.³ The trials of Nuremberg⁴ and Tokyo, Additional Protocol I of 1977 to the Geneva Conventions of 1949⁵, rulings by the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and the General Principles of Criminal Law codified by Article 28 of the Rome Statute of the International Criminal Court are the contemporary developments and contributions to the concept of Command Responsibility.



Tomoyuki Yamashita, 1945

² Eugenia Levine, *Command Responsibility*, Global Policy Forum, www.globalpolicy.org, 2005.

"There are other examples as in 1439 when Charles VII of France issued the Ordinance of Orleans, which imposed blanket responsibility on Commander for all unlawful acts of their subordinates, without requiring any standard of knowledge. The first international recognition of Commanders' obligation to act lawfully occurred during the trial of Peter Von Hagenbach by an *ad hoc* tribunal in the Holy Roman Empire who convicted Von Hagenbach of murder, rape, other crimes which "he as a knight deemed to have a duty to prevent". The General Orders no 100 passed during the United States Civil War set up the "Lieber Code" that imposed criminal responsibility on Commanders for ordering or encouraging soldiers to wound or kill already disabled enemies. Convention (IV) 1907 was the first attempt to codify this embryonic practice.

³ "The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions : To be commanded by a person responsible for his subordinates." Annex to the Convention, *The Qualifications of Belligerents*. Section 1, Chapter 1, Article 1 <http://www.yale.edu/lawweb/avalon/lawofwar/hague04.htm>

⁴ *Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with commentaries*, Yearbook of the International Law Commission, 1950, vol. II. http://untreaty.un.org/ilc/texts/instruments/english/commentaries/7_1_1950.pdf

⁵ Additional Protocol I of 1977 to the Geneva Conventions of 1949 was the first international treaty to codify the doctrine of Command Responsibility. Article 86.2 states that "the fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from [...] responsibility [...] if they know, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or about to commit such a breach if they did not take all feasible measures within their power to prevent or repress the breach." <http://www.yale.edu/lawweb/avalon/diana/undocs/war-01.htm>

Command Responsibility

The difference between the pre-WWII and post-WWII concept is one of expectations. In addition to being responsible for their own actions, modern commanders are responsible for acts of their subordinates that they should have known. This expanded view of Command responsibility adds to the positive perception of the military when implementing peace support operations. Through the mechanism of the Commander's active oversight to ensure the application of the highest standards, the "Armed forces can be successfully integrated into a system of good governance based on human rights and the rule of law."⁶

KNOWLEDGE

Legal scholars and practitioners have formed two visions of the Commander's knowledge *ante* to illegal acts of subordinates or troops. In one view, Commanders should have known about the crimes committed by their subordinates or troops maneuvering in their AOR; in the second, Commanders may be derelict if they fail to discover the crimes. The first approach stresses the criminal intent, or *mens rea*, of the Commander. The latter considers a strict liability standard that finds accountability without looking at the Commander's criminal intent.

⁶ Ulf Haussler, *Ensuring and Enforcing Human Security – The Practice of International Peace Mission*. Wolf Legal Publishers, Nijmegen, The Netherlands, 2007, p.51.

Because jurisprudence and customary law have not agreed on the role of *mens rea* in the concept of Command Responsibility, the question remains unresolved and with a casuist appearance.

THE ROLE OF LEGADS

While this discussion continues, NATO is more-than-ever under a heavy scrutiny, not only by individuals, non-government organizations, international institutions, and governments that oblige the Alliance to be extremely scrupulous in dealing with the controversial question of Command Responsibility. NATO has no choice but to seek the higher standard, i.e., "Commanders should have known". This, instead of being seen as an obstacle, must be accepted as an incentive for the Alliance and its Troop Contributing Nations to better plan and conduct operations.

Is it "legal-fiction" to think that it is a question of time before we see an international court accepting as admissible claims brought against NATO as an international organization and not against the individual member nations or all together? This possibility compels Civilian Representatives and Commanders to be proactive bottom-up and top-bottom in every phase of the operation. Their dialogue must be constant with the political part of the operation, (the Secretary General, the Military

Committee, and the North Atlantic Council) and with subordinates (TCN contingents) and other troops operating in his AOR (Receiving State government and armed forces). In the NATO realm, the planning process and the conduct of operations must be done with reference to the line drawn in the horizon by the mission-tailored Command and Control and the mission's legal framework.

NATO Legal Advisors are not expected to disguise wrongdoings by anyone, Civilian Representatives or Commanders included. Rather, Legal Advisors have an affirmative obligation to participate in the mission planning process and through good staff action encourage Civilian Representatives and Commanders to take wise decisions during the execution of the mission. The Legal Advisor's awareness of all NATO-related issues at international and national levels will positively contribute to the operation, particularly by offering legal transparency to important external observers like non-governmental organizations and other international organizations such as the United Nations and the International Committee of the Red Cross. Based on these foundations, Civilian Representatives and Commanders can build their actions to reach the end-state defined at the highest political level of the Alliance annulling or at least minimizing the risk of crimes under their Command.

Mr. Andres Munoz-Mosquera
NCN 254-5267
Comm +32-65-44-5267
Andres.Munoz@shape.nato.int

Legal Aspects in Operations in Kosovo

LTC Thomas Toussaint – HQ KFOR

At HQ KFOR LEGAD Office we have two mottos :

The first one is:
« **There is nothing more beautiful than the law served by the force** ».

To illustrate the first motto I would like to precisely quote the legal basis which legalizes KFOR action :

- Chapter VII United Nations Security Council (UNSCR 1244 which authorizes KFOR forces to use all necessary means to fulfil the mission).

- The list of Rules of Engagement (ROE) approved by all 35 KFOR contributing nations at the political and military strategic levels.

- The KFOR Directives, Standard Operational Procedures (SOP) and orders.

The second motto is:
« **No more than fair, no more than useful** »

This motto fixes the limits of the use of force.

Whatever the level of the intensity of the combat (high, low or riot control) we must comply with the international legal principles of necessity and proportionality, the use of force necessary to accomplish the mission or act in self-defense, and the requirement to minimize the potential for collateral damage. KFOR personnel are required to obey international law

and apply ROE in accordance with that law.

All KFOR contributing nations approved the ROE, but some of their national laws fix more restrictive limits in the use of force (the famous caveats !). Therefore, according to their national laws each nation can be more restrictive in the use of force but not more permissive. That is to say that the ROE fix the maximum level of the use of force.

In the event of civil disorder or riot where the police are overwhelmed by violence to such a degree that they are no longer able to protect members of the civil population or themselves, and it is deemed by the UN Special Representative of the Secretary General (SRSG), acting on the advice of the Police Commissioner or his nominee, that the Rule of Law has for the time being broken down, KFOR may be requested, by written request of the SRSG or verbal request subsequently confirmed in writing, to provide military aid in order to restore the Rule of Law (such a request may be confined to a particular area and may contain specific conditions according to the circumstances at the time).

Kosovo has a context of Crowd Riot Control (CRC) different than the Ivory Coast, Iraq or Afghan context. **The police primacy is the rule and the KFOR leads the exception.** Nevertheless, if needed, pursuant to its operational and tactical primacy given by the UNSCR 1244, COMKFOR is free to decide to act in order to maintain a Safe And Secure Environment (SASE) throughout Kosovo.

LTC Thomas Toussaint
NCN 681-2087
Comm +038-503-603-2087
toussaint@hq.kfor.nato.int



EBAO (Effects Based Approach to Operations) and NATO Operational Claims

COL Jody Prescott – JWC

Some NATO units, like the CIMIC Centre of Excellence in the Netherlands, have appreciated that EBAO (Effects Based Approach to Operations) is not just about enhancing staff performance, but about working with people in the theater of operations as well. This article suggests that as NATO continues its efforts to develop EBAO, and it creates new tools to help make this concept operational, one of the things it should consider is building a better operational claims system. To help explain why this should be a priority for NATO, this article will first briefly review the history and the impact of NATO operational claims and then propose steps to be taken to create a more effective NATO operational claims program.

NATO operational claims

A. Bosnia-Herzegovina and Croatia



NATO led an international Stabilization Force (SFOR) in Bosnia and Herzegovina, helping to maintain a secure environment and facilitating the country's reconstruction in the wake of the 1992-1995 war

NATO's first significant out-of-area operation found itself working under a complicated and untried system involving host-nation participation in claims settlement and appeals. Under the Claims Annexes to the Technical Arrangements that implemented SOFAs and the General Framework for Peace (GFAP), the receiving states were to have the primary responsibility for collecting claims against IFOR and its Troop Contributing Nations (TCNs). Claims Commissions were to resolve disagreements between the receiving state agencies and the IFOR forces regarding claims. These commissions would be made up of two IFOR representatives and two receiving state representatives, all of them legally qualified. If the parties still disagreed after the commission decision, then the claim could be referred to an Arbitration Tribunal composed of three members, whose decision was final and binding. If IFOR or a TCN did not comply with a payment order, then the claim could be sent to NATO headquarters in Brussels for disposition. The Claims Commission decisions were unanimous and claimants themselves were allowed to appeal to the Arbitration Tribunal.

When the TCNs and the claimants could not agree on settlement, the newly established IFOR Claims Offices in Sarajevo and Zagreb would seek to mediate the cases. Only when mediation was unsuccessful would cases go to the Claims Commission. However, several NATO TCNs quickly identified that being required to pay claims under the Technical Agreements was not possible under their respective domestic fiscal laws.

Damages to the receiving state roads were another high-level issue. IFOR forces extensively used theater roads to bring in troops, equipment and supplies. It was decided that these claims should be denied as being 'unavoidable results of conducting the operation', similar to combat damages.

Finally, many TCNs either had no claims program or saw no reason why they should be paying claims on this sort of operation. For the current European Union Force (EUFOR)/NATO Headquarters Sarajevo Claims Offices the claim procedures remain the same as they were under IFOR.

B. Kosovo

Under the 1999 Military Technical Agreement between the Kosovo Force (KFOR) and the Federal Republic of Yugoslavia the KFOR forces were not liable 'for any damages to private or public property that they may cause in the course of duties related to the implementation of this Agreement.' This caused some political awkwardness, since the UN Interim Administration Mission in Kosovo (UNMIK) intended to pay claims.

EBAO and NATO

Eventually, the problem was resolved by UNMIK/KFOR joint declaration that included the commitment for both international entities to 'establish procedures in order to address any third party claims for property loss or damage and personal injury caused by them or any of their personnel.'

The first KFOR Claims Office in Kosovo did not begin operations until 2001. The KFOR claims operation was similar in many respects to the claim operations in IFOR/SFOR, and it dealt with similar challenges, such as the difficulty in establishing property ownership in a formerly communist country.

Some KFOR units were based in countries that were already NATO members, like Greece, or which had signed the PfP SOFA, like Albania and the Former Yugoslav Republic of Macedonia. The claims provisions of Article VIII, NATO SOFA, applied in these countries, which meant that the host nation, or 'receiving state', was responsible for collecting, investigating, and adjudicating claims and then billing the responsible TCN, or 'sending state', for 75% of the costs of the claims.

The HQ KFOR Claims Office serves as a primary 'point of contact for all claims against KFOR generally.' Claims against HQ KFOR are handled there, and claims against TCNs are forwarded to them to be handled under their respective national procedures.

The HQ KFOR claims officer is responsible for maintaining oversight of all claims in Kosovo and convening the Kosovo Claims Appeals Commission when necessary. The decisions of the Commission must be unanimous but they are not binding.

C. Afghanistan

Under the Military Technical Agreement between Afghanistan and NATO, ISAF is not legally liable for 'any damages to civilian or government property caused by any activity in pursuit of the ISAF mission.' Claims resulting from property damaged or injuries incurred outside the scope of the mission, however, were to be submitted to the Afghan Transitional Authority.

For force protection reasons after the operation began, however, an ISAF Commander decided ISAF would compensate for mission-related damages where it was at fault since he recognized that the payment of otherwise proper claims supported ISAF efforts to help restore the rule of law in Afghanistan. TCNs would handle their own claims, and although not legally obliged to pay mission-related claims, could decide to settle them on an ex-gratia basis.

Claimants are not required to submit their claims through Government of Afghanistan officials because of the austere conditions, and in cases where the responsible TCN cannot be identified, the ISAF HQ Claims Office will pay the claims if they are meritorious. Claims against the TCNs are handled under those countries' respective procedures. In cases involving claims against TCNs, the ISAF HQ Claims Officer will offer non-binding advisory opinions on the claims if the claimants file requests for reconsideration. The TCNs are obliged to forward the claims files to the ISAF HQ Claims Officer when such request is made. If a claimant is unhappy with the ISAF Claims Officer's decision on a case, then the claimant may 'submit a request for consideration to the ISAF HQ Senior Legad.'

It is worth noting that certain NATO countries created and contributed to the so-called Post-Operational Humanitarian Relief Fund. Unfortunately, only a handful of countries have donated to this account.



KFOR Kosovo Claims Office –
CDR Lone Kjelgaard



Afghanistan

EBAO and NATO

D. Pakistan

Pakistan requested humanitarian assistance from NATO in the aftermath of the devastating earthquake it suffered in October 2005. The Draft Exchange of Letters (DEOL) gave the NATO personnel and the foreign contractors a status of experts-on-mission. Claims for damages against NATO personnel and contractors by third parties were not waived and were to be 'transmitted through the governmental Pakistani authorities to the designated NATO Representative.'

A proposal for a NATO operational claims system

NATO currently has a claims policy at the strategic level but it is very basic. A headquarters may impose an obligation upon itself to pay claims in a particular way, and may suggest that its process is a model – but the NATO members and other TCNs must be free to follow their own fiscal laws and regulations.

The first step to creating a more effective NATO Operational Claims program should be to create a NATO Operational Claims Office at the SHAPE level. This office could serve many functions: an advocate for operational claims at the strategic level, the developer of a standard administrative program for conducting operational claims, a point of contact for operational claims information, a trainer for deploying units or individuals, a potential funds manager, and a resource for planners and a repository for operational claims information and files.

There is no reason why NATO headquarters should deploy without a standard operational claims program. It would of course need to be adapted to best fit each mission. Its core should consist of a ready-to-use database to track claims, a filing system and a standard claims forms that could be translated into local languages. With the increasing use of funds like the Post-Operation Humanitarian Relief Fund to settle meritorious but legally barred claims, it may be useful to take a more holistic approach to manning and funding.

Conclusion

NATO needs to consider creating new tools that reflect an understanding of EBAO in practice. A standing NATO Operational Claims Office and a ready-to-deploy operational claims program should be high on the list of new initiatives to be considered.

*Colonel Jody Prescott
NCN 325-2115
Comm +47-5134-2115
Jody.Prescott@jwc.nato.int*

EU Law Applicability towards NATO ?

Ms. Desislava Zhelyazkova – SACT-SEE Intern



With 22 of the 26 member states of NATO also belonging to the European Union, a natural question arises concerning the superiority of one legal order to the other when contradictions occur. The critical issue for the nations belonging to both international organizations is which legal regime is superior: NATO obligations created by Agreements or the European Union law; because neither the 1947 North Atlantic Treaty, nor the NATO Status of Forces Agreement (SOFA), the Paris Protocol and the Ottawa Agreement contain a provision like Article 103 of the UN Charter: "...in the event of conflict the UN Charter always prevails"¹, an "always-overrules" principle in favour of NATO cannot apply. Addressing the question of superiority requires a short analysis of the obligations of EU and NATO membership.

European Union states are bound by treaties their nation are parties to and treaties EU institutions are entitled to conclude for the whole community. Members of NATO find their constituting provisions in the Washington Treaty, Ottawa Agreement, NATO SOFA, Paris Protocol and Supplementary Agreements.² National laws of the EU and NATO nations implement these treaties and agreements.³

When considering a possible conflict between EU Law and NATO agreements, legal advisors should look to the lowest possible level where obligations were created. This requires a review of the EU/EC Treaty⁴ and the relevant NATO agreements where state or states were parties and exercised their sovereign rights to conclude, object, or withdraw.⁵

The European Union is subject to international law and uniquely dependant on the proper functioning of the international legal order. Central to the EU legal order is the "principle of direct effect." This principle may be defined as a rule that causes European legislation to be enforceable by the citizens of the Member States.

¹ Oppenheim's International Law, Sir Robert Jennings, Sir Arthur Watts, Ninth Edition, Longman 1996, p. 1216.: The UN Charter establishes a significant hierarchy in the system of conventional international law. Certain other treaties, such as the EC Treaty, may be regarded as constituting 'higher law'. However, the EC Treaty has no greater legal significance than any other treaty in the relations between EC Member States and third parties.

² NATO Basic documents: <http://www.nato.int/docu/basics.htm>

³ Article 27 Vienna Convention of the Law of Treaties 1969: "national laws cannot be used to justify a failure to perform a treaty".

⁴ Consolidated Versions of the Treaty on European Union and of the Treaty establishing the European Community:
<http://eurlex.europa.eu/LexUriServ/site/en/oj/2006/ce321/ce32120061229en00010331.pdf>

⁵ The comparison of (EU/EC) Directives with NATO Agreements is unfeasible because the EU Member States are bound by the Directives (direct effect) but do not show a free will as a party (not a treaty).

EU Law Applicability towards NATO ?

The European Court of Justice extended the principle of direct effect⁶ to international agreements in the *Kupferberg* case⁷ where the judges ruled: "...the European Community has no interest in following a priori restrictive attitude to the direct effect of international agreements." In addition to this decision, the treaties of the European Community and the European Union explicitly consider the relationship between the pre-existing international commitments. Article 307 (formerly Article 234) of the 1957 Treaty of Rome establishing the European Community provides: *The rights and obligations arising from agreements concluded before the entry into force of this Treaty between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.*

The *Kupferberg* case and Article 307 show that NATO treaties or agreements pre-existing the EU/EC Treaties do not become part of the European Union legal order.⁸ This means these NATO agreements, while binding on the NATO nations that entered into them, are not binding on the EC as a whole.

In practical terms, a state that is both a member of the EU and NATO must determine whether a NATO international agreement has direct effect on its obligations arising from the 1957 Treaty of Rome (the EC Treaty). If a conflict does exist, the state has the responsibility to "take all appropriate steps to eliminate any incompatibilities between the EC Treaty and the international agreement."⁹ Interestingly, while these efforts frequently occur, accessible descriptions of this national process are few.

One example is the *Levy*¹⁰ case. In this 1993 opinion, the European Court of Justice examined the equal treatment of men and women regarding access to employment, vocational training and promotion, and working conditions. The Court determined there is a positive obligation for states to abolish 'incompatibility' under Article 307 EC Treaty¹¹ stating "...it is not enough to invoke principles such as the principle of equal treatment to put an end to the discharge of obligations incumbent upon Member State in this field under a prior international agreement."

⁶ European Court of Justice decision *Van Gend en Loos v. Nederlandse Administratie der Belastingen* (Case 26/62); [1963] ECR 1; [1970] C.M.L.R. 1— general test for direct effect of community law measures: 1/ The provision must be clear and unambiguous; 2/ It must be unconditional; 3/ Its operation must not be dependant on further action taken by the community or by national authorities.

⁷ European Court of Justice decision: *Hauptzollamt Mainz v. Kupferberg*, C-104/81.

⁸ European Union has a separate legal personality under international law and the European law constitutes a distinct legal order.

⁹ Cases C-241/91P and C-242/91P, *Radio Telefis Eirean (RTE) and Independent Television Publications v Commission*: "EC member states can only rely on Article 234 EC Treaty when the international agreement has an obligation to a third state that is relevant but not in intra-community relations if the rights of non-member states are not involved."

¹⁰ *Levy* case, C-15891, Rec, p. I-4287.

¹¹ Article 307:

(1) The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.

(2) To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude. [http://eur-](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/ce321/ce32120061229en00010331.pdf)

<http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/ce321/ce32120061229en00010331.pdf>

EU Law Applicability towards NATO ?



NATO Secretary General, Jaap de Hoop Scheffer (left) and the European Union High Representative, Dr Javier Solana mark the end of NATO's SFOR Operation and the establishment of the EU "ALTHEA" Operation

Some legal practitioners go further. A view espoused by some professionals in the legal office of the Supreme Headquarters Allied Powers Europe (SHAPE) argues that if an EU Member State denounces the Protocol on the Status of International Military Headquarters due to incompatibility in the meaning of Article 307 (2) of the EC Treaty,¹² that would entail loss of legal capacity of each supreme headquarters and affect other international agreements signed by the state.¹³ Moreover, in the framework of the 1969 Vienna Convention of the Law of Treaties, states cannot rely on their participation in the European Union as a justification to avoid obligations created by NATO agreements since "treaties are binding on the parties and must be performed by them in a good faith."¹⁴

This noted, the special position of the EU Member States towards the European Union must always be considered. The European Court of Justice concluded in the *Van Gend en Loos* case:¹⁵ "By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which became an integral part of the legal systems of the Member States and which their courts are bound to apply." This formula is relevant to the policy areas where the EU Member States limited their sovereign rights and transferred powers to the Community. However, where Member States pursue the European Security and Defence Policy on an intergovernmental basis,¹⁶ their EU membership cannot be justification to deviate from obligations under NATO agreements because of Article 307 and the application of the Vienna Convention on Treaties.

Recognizing that NATO documents signed after the 1957 EC Treaty fall outside the scope of Article 307, the further question to be asked must concern the position of any Supplementary Agreements with host nations or other agreements between states and NATO that occurred after this date. This question has a simple answer. Problems of compatibility between community treaties and subsequent NATO agreements are not expected to arise due to the existence of specific procedures to avoid them.¹⁷ Should incompatibility occur, the primacy of international treaties must be recognized.¹⁸ Examples of this are the special EU regulations in place for these later agreements that respect the rights and obligations arising from legal documents adopted after entry into force of the EC Treaty. For instance, Community law does not exclude the application of more favorable international agreements in regard to customs and value added tax exemptions.¹⁹

¹² *ibid*

¹³ Michele Vrijdag, *Assistant Legal Advisor, SHAPE, Memorandum 7110/SHGLX-11/02, 16 January 2002.*

¹⁴ See Footnote 3.

¹⁵ *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

¹⁶ Wolfgang Wagner, *The democratic Legitimacy of European Security and Defence Policy, Occasional Paper no. 57* (Paris: European Union Institute for Security Studies, April 2005).

¹⁷ See Footnote 13.

¹⁸ Nguyen Quoc Dinh. *Droit, International Public Law, 6th edition, Paris, 1999, p.280, note 181.*

¹⁹ See Footnote 13.

EU Law Applicability towards NATO ?



For instance, the Sixth EEC VAT Directive²⁰ on the value added tax on supply of goods or services and importation of goods within the European Economic Community in Article 15.10 explicitly exempts from its regime the supplies of goods and services in the member state parties to the North Atlantic Treaty. Hence, NATO entities are independent from the EEC value added tax rules.

A second example of the special correlation between the EU law and the NATO is the 1992 Western European Union's Petersberg Declaration.²¹ The WEU, is an organization created by the 1948 Brussels Treaty²² for "collaboration in economic, social and cultural matters and for collective self-defence" by Western European nations "to promote the unity and to encourage the progressive integration of Europe." The Petersberg Declaration states clearly in Part III. how the relations between the EU and NATO legal orders are built: "the security guarantees and defence commitments in the Treaties which bind the member states within the Western European Union and which bind them within the Atlantic Alliance are mutually reinforcing and will not be invoked by those subscribing to Part III of the Petersberg Declaration in disputes between member states of either of the two organizations."

In addition to these acknowledgements of NATO in EU Regulations and the political declarations, the EU imposes strict limits to guarantee NATO's primacy on defence over obligations arising from EU law.²³ Article 17 of the 1992 Treaty of Maastricht (the EU Treaty) states that matters related to security and self-defence are subject to NATO regulation as highest rank provisions in that area.²⁴

²⁰ SIXTH COUNCIL DIRECTIVE of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax : uniform basis of assessment (77/388/EEC), <http://europa.eu/scadplus/leg/en/lvb/l31006.htm>.

²¹ WESTERN EUROPEAN UNION COUNCIL OF MINISTERS, BONN, 19 JUNE 1992, PETERSBERG DECLARATION, <http://www.cip.fuhem.es/ueh/documentos/ueo/92-petersberg.htm>.

²² The Brussels Treaty signed on 17 March 1948 was amended by the Paris Agreements signed on 23 October 1954, <http://www.weu.int/Treaty.htm>.

²³ Prof Dr Heike Krieger, *Common European Defence: Competition or Compatibility with NATO?*, Oxford (Harto Publishing), 2007.

²⁴ Article 17: 1. The common foreign and security policy shall include all questions relating to the security of the Union, including the progressive framing of a common defence policy, which might lead to a common defence, should the European Council so decide. It shall in that case recommend to the Member States the adoption of such a decision in accordance with their respective constitutional requirements. The policy of the Union in accordance with this Article shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States, which see their common defence realized in the North Atlantic Treaty Organization (NATO), under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework. The progressive framing of a common defence policy will be supported, as Member States consider appropriate, by cooperation between them in the field of armaments.

2. Questions referred to in this Article shall include humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking.

3. Decisions having defence implications dealt with under this Article shall be taken without prejudice to the policies and obligations referred to in paragraph 1, second subparagraph.

4. The provisions of this Article shall not prevent the development of closer cooperation between two or more Member States on a bilateral level, in the framework of the Western European Union (WEU) and NATO, provided such cooperation does not run counter to or impede that provided for in this title.

5. With a view to furthering the objectives of this Article, the provisions of this Article will be reviewed in accordance with Article 48.

<http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/ce321/ce32120061229en00010331.pdf>

EU Law Applicability towards NATO ?

The five paragraphs of Article 17 declare subjects where NATO is absolutely independent from the EU legislation. But when are these provisions relevant? For instance, if a NATO international military headquarters seeks electricity suppliers²⁵ for its garrison furnaces is Article 17 of the EU Treaty a shield from EU regulations?

Fortunately, the limits of application of Article 17 EU Treaty have been discussed among the legal community extensively. The common understanding points to a very broad interpretation based on three points: foremost, "The EU's policy respects the NATO obligations of the Member States concerned and the Common Security and Defence Policy as determined within this framework;"²⁶ second, common Defence Policies are all activities where military personnel are involved;²⁷ and, third, "Article 17 of the EU Treaty refers to an understanding of security which covers political, economic and military aspects."²⁸

An illustrative example of the broad conception of 'security' within the North Atlantic Treaty Organization is the recent case brought to the attention of NATO legal community concerning standards for service vehicles procured for NATO International Military Headquarters.²⁹ The question raised was whether the registration of these vehicles must be subject to the EU directives in the receiving state - member of both, NATO and the EU. In a 2007 joint ACT-ACO legal opinion determined that: "service vehicles of a force or civilian component shall carry, in addition to their registration number, a distinctive nationality mark. There is no mention of any requirement to comply with, or apply in any way, the vehicle standards of the receiving State."³⁰ SHAPE being the customer for those vehicles shall apply "the legal safety and registration requirements of the parent headquarters/Command/NCSA."³¹ It follows that matters with security implication are to be regulated by NATO agreements for the states parties to them excluding EU law applicability.

In addition to the broad character of the provision of Article 17 (1) the EU Treaty emphasizes that security matters are national responsibility of the NATO members. As stated above in the discussion of the *Van Gend en Loos* case, the EU differs from other international organizations in that it involves transfers of sovereignty in certain policy areas from member states to central institutions. Security and defence are areas that fall under the Second Pillar within the European Union that establishes Foreign and Security Policy. Under this Pillar of the European Union, Member States did not transfer their sovereignty to the EU institutions. Common defence is not yet an EU competence but a future option which would need ratification by Member States.³²

²⁵ Article XI (11) of NATO SOFA provides for special arrangements to be made by the receiving state so that fuel, oil and lubricants for use in service vehicles, aircraft and vessels of a force or civilian component may be delivered free of taxes.

²⁶ EU Glossary, http://europa.eu/scadplus/glossary/nato_en.htm

²⁷ Christian Calliess/ Matthias Ruffert, *Kommentar zu EU-Vertrag und EG-Vertrag*, 2e Auflage, 2002, para. 8.

²⁸ Prof Dr Heike Krieger, *Common European Defence: Competition or Compatibility with NATO?*, Oxford (Harto Publishing), 2007, p. 178.

²⁹ ACT and ACO Memorandum 7110/SHGLX/031/07.

³⁰ *Ibid*, p. 2.

³¹ ACO Transportation Management Instructions (TMI) sections 12.2b and 4.2. TMI 6.

³² Wolfgang Wagner, *The democratic Legitimacy of European Security and Defence Policy*,

EU Law Applicability towards NATO ?

Hence, Article 17 (1) EU Treaty aims to protect states' sovereignty and their free will to become parties to international agreements. From a political perspective NATO and EU are moving towards closer collaboration based on respect of their views. Legally, the European Union is bound by Article 17 of the EU Treaty to obey national obligations to NATO policies in regard to security and defence.

To conclude, in case of a perceived conflict between EU law and obligations accepted by participation in NATO, members may first rely on the broad definition of Article 17 (1) EU Treaty for matters that are covered as 'political and economic' aspects of security. The example of who the electricity supplier is for an international military headquarters in Mons, Belgium, for instance, would not fit within this perception. Hence, the local law and EU law would apply. This conclusion would be different if the search for an electricity supplier was in an operational area; headquarters can be considered as a "decision having defence implication" in the meaning of Article 17 (3) of the EU Treaty due to the security demands of that environment. In such a case the NATO would regulate the issue and EU law will not be applicable.

Perhaps the most useful perspective on this complicated issue is a practical one. NATO can best address the issue of conflict between its obligations and EU regimes by absorbing the local laws and EU laws in its own regulations - **if** those laws provide the highest possible standard in the area of question. Thoughtfully and systemically adopted, this approach offers a strategic and reasonable solution to legal compatibility issues between NATO and the European Union.

*Ms. Desislava Zhelyazkova
ACT-SEE Intern
NCN 254-8409
Comm +32-65-44-8409
Desislava.Zhelyazkova@shape.nato.int*

Report on 2007 ICRC Colloquium: Current Perspectives on Regulating Means of Warfare

Ms. Cecile Vandewoude – SHAPE Intern



ICRC

On 18 and 19 October the ICRC together with the College of Europe organized in Bruges its annual Colloquium on issues related to international humanitarian law (IHL). This year's edition was titled "Current Perspectives on Regulating Means of Warfare" and dealt with the legality of "new weapons." The conference was built up around three roundtable discussions during which three experts gave a brief presentation followed by a questions and answers period leading to a more general discussion.

During the first session "current and emerging norms" the speakers talked about the successes and the remaining implementation challenges of existing treaties and policies concerning weapons.

- With regard to the Mine-Ban Convention (MBC) Ambassador Caroline Millar (Australia) stated that the full and effective implementation of the Convention (e.g. short deadlines to clear the territory of mines and to destroy the stockpiles, the effective use of funds, providing for victim assistance) and the fact that the "universalization" of the treaty has not yet been achieved (e.g.

in the Middle East the majority of the countries are not a party yet) are the two main challenges.

- With regard to the 5th protocol to the "Convention on prohibitions or restrictions on the use of certain Conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects" (CCW) on explosive remnants of war (ERW) Lt. Col. Darren Stewart (speaking from a NATO perspective) highlighted as a legal impediment to the full implementation of the 5th protocol to the CCW the fact that only 14 of the NATO member states have ratified it. NATO policy on ERW can be found in STANAGs, OPLANs and OPORDs.
- With regard to cluster munitions Prof. Gro Nystuen (Oslo University) described the still ongoing process (and the difficulties involved) of creating a treaty on cluster munitions.

The second session was dedicated to "implementation challenges". Prof. Michael Schmitt talked about the challenges a US military Commander faces with regard to the principles of distinction and proportionality. He argued that vast superiority in weapons ("asymmetry") impels the enemy towards new weapons/tactics that violate IHL which makes it harder for your own forces to comply with IHL.

Elisabeth Ruesse-Decrey president and co-founder of the impartial international humanitarian organization "Geneva Call" described a "mechanism" that was created by Geneva Call in order to improve compliance with IHL by armed non-state actors. This "mechanism" provides non-state actors who do not participate in drafting treaties and thus may not feel bound by their obligations to express adherence to the norms embodied in the 1997 Anti-Personnel Mine-Ban Treaty through their signature of the "Deed of Commitment for Adherence to a Total ban on Anti-personnel Mines and for Cooperation in Mine Action." Geneva Call monitors compliance with these Deeds of Commitment and assists signatory groups to fulfill their obligations.

A panel on "arm transfers and IHL" (Margrit Bruck-Friedrich, Jacqueline Macaleesher and Camilla Waszink) outlined the obligations on states and criteria for weapon transfer under IHL. They identified two criteria that have to be taken into account before a state can legally transfer weapons. First, the state needs to assess the recipient's likely respect for IHL. Second the state is not allowed to transfer the weapons if they are to be used in violation of IHL.

Current Perspectives on Regulating Means of Warfare

There might be additional IHL criteria in regional arms transfer documents (e.g. the EU Code of Conduct on Arms Exports dated 1998, which will be revised shortly, and in national laws and regulations).

The final roundtable discussion dealt with "new weapons". Professor Jurgen Altmann, a physicist, explained some new laser techniques. Robin Coupland talked about "incapacitating weapons" and some legal concerns with regard thereto (such as recognizable by soldiers, possibility of surrender, and principle of distinction).

Stéphane Kolanowski and Frederik Naert discussed the obligation of states under article 36 of API which states that "in the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would in some or all circumstances be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting party." They also addressed the question whether new weapons can be used during peacekeeping

operations.

In conclusion, the eighth Colloquium of Bruges can be considered to be a success as it brought together experts in the field of IHL, all from different backgrounds (US, NATO, academic) to discuss new trends and developments adding to and fine-tuning the current state of the debate. As every year, the paper copy of the speeches held at the conference will be made available at next year's colloquium.

For further information on the Colloquium and College of Europe, please go to www.coleurop.be

*Ms. Cecile Vandewoude
SHAPE Intern
NCN 254-5855*

*Comm +32-65-44-5855
Cecile.Vandewoude@shape.nato.int*

Spotlight



Emma Hart

Legal Assistant

HQ SACT



Name: Emma Kay Hart

Rank/Service/Nationality: NATO CIV B4, British

Job title: Legal Assistant, NATO HQ SACT, Norfolk, Virginia, USA

Primary legal focus of effort: To provide legal assistance to staff members regarding a variety of issues they encounter while serving in the United States to include matters such as immigration/visa, customs, licensing and vehicle registration, work permits, lease reviews, landlord tenant issues.

Likes: Travelling, Aerobics, bike rides with my 2 year old and shopping.

Dislikes: iced tea

When in Norfolk, everyone should: eat at MI Hogar, a Mexican restaurant - a weekly lunchtime haunt for this office!

Best NATO experience: National Flag raisings at the NATO HQ SACT. As I have only been in post since September, I look forward to travelling and meeting members of the Legal Community.

My one recommendation for the NATO Legal Community: Enjoy the multi-national work environment and come to visit us at HQ SACT, the kettle is always on for "hot tea" as they say in America!

hart@act.nato.int



HAIL

&

FAREWELL

Hail

NRDC-GR (NATO Rapid Deployable Corps): MAJ Mortopoulos Konstantinos (GRC A) joined in October 2007

SHAPE : OR8 Fabrice Braccio (BEL A) joined on October 29, 2007

Farewell

JFC Brunssum : Major Joris Legein (NDL A) left in September 2007

SHAPE : OR8 Christian Ponchaut (BEL A) left on November 2, 2007

ACT/SEE : Mr. Arnt Glienke and Ms Alexandra Stein-Lausnitz ended their three-month internship in October 2007

GENERAL INTEREST/UPCOMING EVENTS

- "Advanced Training on International Humanitarian Law and Policy": organized by Humanitarian Policy and Conflict Research at Harvard University on January 24-28, 2008 in Amman, Jordan. "International Humanitarian Law and Current Conflicts: New Challenges and Dilemmas" is tailored to meet the needs of policy makers and practitioners working within the field of humanitarian assistance and protection. This advanced training will serve as an opportunity for acquisition and refinement of the skills necessary to address humanitarian challenges through operational training and instruction on International Humanitarian Law (IHL), plenary debates and policy discussions on key challenges, as well as working group sessions, simulation exercises, and case studies. Faculty will be comprised of experts in humanitarian law and policy, drawing from experienced practitioners and leading academics. Selected topics will include:
 - Introduction to IHL and its implementation
 - Distinction between civilians and combatants
 - Humanitarian access
 - Occupation law and peace-building
 - Islamic law and IHL
 - New actors and technologies in current conflicts

The course fee is €1200 and is inclusive of accommodations, meals and training materials.

- The quarterly newsletter of the Lieber Society on the Law of Armed Conflict (Interest Group of the American Society of International Law) includes an interesting article on "International Law and Military Operations" by CDR Eric M. Hurt, JAGC, USNR. <http://www.asil.org/liebersociety/index.html> (for members of ASIL only)
- A seminar on "Prisoners in War" will be organized at the University of Oxford from December 10 to 12, 2007. The questions raised are :
 - "how have legal and moral standards pertaining to Prisoners of War and detainees evolved over time, and under what circumstances have they changed ?"
 - "what are the specific challenges to the Geneva Conventions in contemporary conflicts ?"

More information on <http://ccw.politics.ox.ac.uk>

- The NATO International Staff (IS) is expanding its database of potential candidates who can be called upon for short-term assignments as temporary staff at NATO Headquarters in Brussels.
More information on : http://www.nato.int/structur/interim_staff/index-e.html
- The International Society for Military Law and the Law of War organises its VIIIth International Seminar for Legal Advisors to the Armed Forces from 3 to 9 March 2008 in Windhoek, Namibia.
More information on : www.soc-mil-law.org
- The next NATO Legal Advisors Course will be held at the NATO School from May 19 to 23, 2008.
- The next Operational Law Course is scheduled at the NATO School from July 7 to 11, 2008.
- Mark your calendars for the week of April 21st, when the Legal Conference will take place in Istanbul, Turkey

**Many receive
advice,
few profit by it**

*Publilius Syrus (Latin
writer)*

GENERAL INTEREST/UPCOMING EVENTS

VNC (Voluntary National Contribution) for HQ SACT in Norfolk, Va.

HQ SACT has an emergent requirement to fill the position of Staff Officer/Legal Advisor in the office of the ACT Legal Advisor. This post will focus on legal aspects of the expanding HQ SACT role in providing support for NATO Operations, exercises, and pre-deployment training.

In accordance with Annex A to Chapter 2 of AAP 16(C), this post is being established as a Voluntary National Contribution for a limited period of 18-24 months to deal with a surge in requirements related to operational support.

The candidate should have a broad understanding of operational law and also practical knowledge of current NATO operations, preferably from experience as a NATO legal advisor previously deployed to Afghanistan, Iraq, or the Balkans. We expect that one of the focus areas for the individual will be in CIMIC-related issues such as stabilization policy, Rule of Law operations, IO/NGO relations, and Provincial Reconstruction Team best practices. In terms of technical requirements, the candidate should have a law degree from a university located in a NATO nation, English language skills at the SLP 4343 level, and be eligible for a security clearance of NATO SECRET.

The Nations have been invited to nominate candidates in the grades OF-3/OF-4 to fill the position beginning Spring/Summer 2008. If you are interested in finding out more information about this request, the point of contact is CDR James Orr, HQ SACT, NCN 555-3295, COMM: 1-757-747-3295, orr@act.nato.int

The best way to become acquainted with a subject is to write a book about it

Benjamin Disraeli (British Politician)



Articles/Inserts for next newsletter can be addressed to Lewis Bumgardner (Sherrod.Bumgardner@shape.nato.int) with a copy to Dominique Palmer-De Greve (Dominique.Degreeve@shape.nato.int) and Kathy Bair (bair@act.nato.int)

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