

Special Interest Articles

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Introduction



Our tenth edition of the NATO Legal Gazette contains articles by five Legal Advisors from Australia, the United States, the Netherlands, Spain, and Belgium who work in Rheindahlen, Germany, Stavanger, Norway, Brunssum, Netherlands, Florence, Italy and Brussels, Belgium. Although nationally diverse and geographically dispersed, each attorney addresses a topic of common interest to our extended NATO (and EU!) legal community. Each contribution is greatly appreciated. Mr. Vincent Roobaert is specially commended for writing the first book review published by our Gazette, *Lessons for the Conduct of Complex International Criminal Proceedings*, by Gideon Boas, Cambridge University Press, 2007, and Lieutenant Colonel Angel Serrano is particularly thanked for providing to our readership current insight about the EU-NATO military relationship.

With 2007 drawing to a close and 2008 nearly upon us, all of the authors of the articles of the past nine editions are thanked for their thoughtful efforts to share and improve legal knowledge within our Alliance and with our NATO-partners. All readers are thanked for their attention which has sustained our publishing. Both past authors and current readers are encouraged to think about additional articles that need to be written in next year's Gazette. Our only requirement for publication remains that the article touches upon a subject of common interest to our broad, diverse, and unique community of legal professionals working for international organizations, non-government organizations, and national governments.



Sherrod Lewis Bumgardner
Legal Advisor, SACT SEE

Legal and Operational Perspectives associated with the issue of Explosive Remnants of War (ERW)

Lt COL D M Stewart OBE – Headquarters Allied Rapid Reaction Corps



College of Europe
Collège d'Europe



Natolin

Presentation made to Bruges Colloquium on International Humanitarian Law

October 18, 2007

Good morning Ladies and Gentlemen,

It is my very great pleasure to address you this morning on the Legal and Operational Perspectives associated with the issue of Explosive Remnants of War (ERW).

In addressing you from the perspective of a NATO staff officer working in one of the NATO High Readiness Force Headquarters, I must take care in ensuring that I do not represent any one NATO Member State's view over another. Hence I will confine my comments to those areas where there is unanimity thought, or otherwise put; the lowest common denominator. As such I will focus on the practical application of the law referring where necessary to the provisions of the Convention on Certain Conventional Weapons 1980 (CCW).

Context

The conference organisers have, however, made my task considerably easier by asking that I direct my attention to ERW covered by CCW Protocol V *excluding* Cluster Munitions; although this will no doubt be something the panel discussion will explore in more detail. I shall therefore deal with Unexploded Ordnance (UXO), including munitions delivered by aerial and ground based platforms¹, and Abandoned Explosive Ordnance (AXO).

Why the military interest? Historically, UXO's have posed significant hazards to military forces operating both in Armed Conflict and Peace-Keeping Operations. In addition to the long term threat posed by ERW to the civilian population, ERW has and continues to constitute a significant limitation on the freedom of manoeuvre available to military commanders to achieve mission success, particularly with respect to force protection.

I intend considering NATO's involvement in this area in two respects; firstly those measures taken by the Alliance, collectively, in applying the spirit of CCW Protocol V and its Technical Annex in the areas of weapon production and modification. Second, what measures are taken in the field to give effect to the principles outlined in CCW Protocol V drawing upon current practice in Afghanistan as it has been shaped by NATO experiences in both Bosnia Herzegovina (BiH) and Kosovo.

NATO has little doctrine on the subject of ERW. What policy it does have (if it can be described as such) is to be inferred from the practical processes at work in Standing Committees such as the Ammunition Safety Group which promulgates Standardisation Agreements (or STANAGS) designed to reflect best practice and agreed minimum standards across the Alliance which member states undertake to adhere to. In addition, although not specifically described as policy on ERW, operational documentation (e.g. Operational Plans and Orders – OPLANS/OPORDS) directing and guiding the conduct of NATO operations will cover matters such as Battlefield clearance which of course involves activity consistent with the application of CCW Protocol V.

¹ This includes munitions such as TLAM (cruise missiles) and gunfire delivered by naval platforms.

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All 26² NATO Member States are parties to the CCW. 22³ of these 26 are parties to the CCW Amending Article 1⁴ which provides for the application of CCW to those circumstances covered by Common Article 3⁵ of the Geneva Conventions; i.e. Armed Conflicts of a non-international character. The Table at the end of this paper shows the positions of NATO Member States in respect of signature, ratification and accession to the CCW, Amending Article and Protocols.

Definitions

It is perhaps useful in the first instance to remind delegates of the definitions contained within CCW Protocol V (Article 2). UXO is defined as a launched or emplaced munition which has been operationally employed but where its propulsive, pyrotechnic and/or explosive content has failed to function as intended. AXO is explosive ordnance which has not been used during an armed conflict and which has been left behind or dumped by a party to an armed conflict and is no longer under the control of that party. It includes explosive ordnance which may not have been primed or fused or otherwise prepared for use. ERW then includes both UXO and AXO. Importantly the CCW Protocol V definition of explosive ordnance does not include mines (of any type), booby traps or other devices defined in CCW Protocol II.

Cooperation and Assistance on ERW - the Alliance Perspective

Incidents of UXO can be attributed to a variety of causes including; improper design of the munition and/or weapon delivery system, inadequate quality control during manufacture, improper storage, degradation due to deterioration of either explosive content or certain components, effects of the operational environment including terrain (e.g. elevation) and weather, and human error. Given these realities, NATO sees the mitigation of UXO necessitating a Systems Engineering approach to address each of the possible failings described. Of these particular emphasis within NATO has been placed upon initiation systems with a specific desire to develop best practices for design, qualification and manufacture of these systems across NATO member states.

This work includes the development of increased reliability of self destruct and neutralisation mechanisms, reducing the requirement for circumstances where weapons are armed manually and factoring Explosive Ordnance Disposal (EOD) tools and tactics into explosive ordnance production. These measures are combined with numerous others including quality assurance standards and monitoring and technical data sharing to produce a Systems Engineering approach.

The output from groups such as the Ammunition Safety Group in considering these issues includes the production of STANAGS designed to be implemented across member states of the Alliance. This in turn allows member states to use various ammunition types interchangeably with a surety as to the technical specification, construction and performance of that ammunition type.

² Source: ICRC website. Note; Iceland has signed but not ratified the CCW

³ *ibid*

⁴ CCW Amendment article 1, 21 December 2001

⁵ Geneva Conventions of 12 August 1949

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It is clear that such cooperation and assistance is what is anticipated in CCW Protocol V (Articles 8 and 9) and CCW Protocol V Technical Annex (Article 3) on Generic preventative measures. Although constituting what is in effect a regional initiative, NATO procedures in this area I would suggest is reflective of international best practice. I am unaware of the existence of any similar multi-lateral arrangements. Work within the Alliance is not restricted solely to these areas with a number of member states taking the lead in convening conferences dedicated to the consideration of ERW. Notable amongst these efforts is that of France who to date has coordinated several multi-lateral conferences on ERW, the outputs of which she briefs regularly to fellow Alliance member states.

The aforementioned initiatives focus on improving the reliability of explosive ordnance so as to mitigate the risk of failure associated with their use and which in turn is perceived as the major contributing factor giving rise to ERW. There are several other measures undertaken in the operational environment which deal with the fact of ERW.

ERW - Operational Aspects

Over the past 12 or so years NATO forces deployed on operations have consistently encountered ERW which has to varying degrees influenced the nature and manner of delivery of a particular NATO mission. In BiH the existence of ERW constituted not only a significant movement and force protection restriction; it also fundamentally undermined the capacity for reconstruction of the civil society. Battlefield clearance of ERW therefore became a major priority with substantial resources allocated to addressing the issue.

By comparison Kosovo, with the exception of ERW arising from the aerial bombardment and certain AXO left behind by the FRY⁶ military, did not see the same emphasis (and in turn resource allocation) on ERW clearance. That is not to say this did not occur, as ERW when encountered by NATO forces was subject to Battlefield clearance procedures. However, greater reliance was placed upon and assistance given to Non-Government Organisations (NGO's) dedicated to this type of activity. A largely benign security environment greatly aided this approach.

Afghanistan by contrast poses one of the most challenging environments for NATO forces to operate in. Not only are there substantial ERW which are the legacy of a decade of insurgency aimed against Soviet occupation followed by a period of civil war, but current combat operations, of significant intensity and duration, has resulted in certain areas in the South and East of Afghanistan posing a considerable ERW threat to NATO ground forces and the civilian population.

What measures then has NATO (ISAF⁷) taken to deal with this threat? Central to Military Engineer efforts in ISAF is the sharing of information with all interested parties concerning the whereabouts of ERW. This includes details of grid references for the location of ERW, types of ERW found/observed and any marking which has been carried out. Headquarters ISAF has and continues to encourage maximum information sharing between all interested parties (especially NGO's) in order to increase overall situational awareness and in turn improve either ERW removal or protection measures.

⁶ Federal Republic of Yugoslavia

⁷ International Security Assistance Force for Afghanistan

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This is seen as an important 'two-way' discourse with benefits ascribed to both the military and civil actors. In addition, ISAF participates in the destruction of large dumps of AXO which pose a significant threat throughout Afghanistan as well as assisting NGO's in education programmes for the civilian population on the threat of ERW. Such measures are consistent with the provisions articulated in CCW Protocol V (Articles 4, 5 and 6) and CCW Protocol V Technical Annex (Articles 1 and 2).

The passage of information, recording of data, warnings and where possible, Battlefield clearance of ERW, given the relatively limited ERW clearance capability within ISAF must be seen as part of a broad, civil-military effort encompassing the Afghan Government, ISAF, NGO's and the International Community if it is to be successful in reducing the ERW threat in Afghanistan.

I would however, add a cautionary note here. Whilst in many respects NATO forces in Afghanistan seek to meet either national obligations or NATO best practice with respect to ERW, the underlying security situation in parts of the country has a significant impact on our ability to deal with ERW in those areas. In particular the ability to mark, clear, inform, communicate warnings of and monitor ERW. The last of these challenges is perhaps the most problematic and is not only influenced by the tactical situation on the ground, but by the availability of resources to monitor ERW on anything more than an occasional basis; even then often by remote means. Indeed in an environment where national capacities to conduct comprehensive Battlefield clearance of ERW continue to be limited, the degree of compliance with CCW Protocol V through measures designed to warn the civilian population and monitor ERW will very much rely upon the qualifying language of Article 5 as to what feasible precautions are practicable taking into account the circumstances ruling at the time. The challenges associated with conducting ERW clearance in a difficult security environment should not be underestimated.

Conclusion

In each successive deployment of NATO forces lessons have been learned from dealing with ERW. Coupled with initiatives in the area of munitions development, NATO is addressing the issue of ERW in a positive manner. This of course will be seen by some as too little, not quickly enough and without addressing the difficult issues of type and use of certain weapon systems. I would, however, point to the fact that no other regional alliance such as NATO has taken steps similar to those I have described and that by definition an Alliance governed by the founding principle of consensus will always find it difficult to address issues which are contentious.

Notwithstanding these factors, both in terms of weapon and ammunition system development and the tactical consideration of ERW in the field, NATO practice has taken considerable steps towards furthering the principles enshrined in Protocol V if not *de jure* then certainly as a matter of policy.

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Afghanistan

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. Geneva, 10 October 1980

STATUS OF NATO MEMBER STATES

COUNTRY	CCW 1980	CCW 2001 Amdt 1	Protocol I	Protocol II	Protocol III	Protocol IV	Protocol V
Belgium	07/02/1995	12/02/2004	07/02/1995	07/02/1995	07/02/1995	10/03/1999	
Bulgaria	15/10/1982	28/02/2003	15/10/1982	15/10/1982	15/10/1982	03/12/1998	08/12/2005
Canada	24/06/1994	22/07/2002	24/06/1994	24/06/1994	24/06/1994	05/01/1998	
Czech Republic	22/02/1993	06/06/2006	22/02/1993	22/02/1993	22/02/1993	10/08/1998	06/06/2006
Denmark	07/07/1982	15/09/2004	07/07/1982	07/07/1982	07/07/1982	30/04/1997	28/06/2005
Estonia	20/04/2000	12/05/2003	20/04/2000		20/04/2000	20/04/2000	18/12/2006
France	04/03/1988	10/12/2002	04/03/1988	04/03/1988	18/07/2002	30/06/1998	31/10/2006
Germany	25/11/1992	26/01/2005	25/11/1992	25/11/1992	25/11/1992	27/06/1997	03/05/2005
Greece	28/01/1992	26/11/2004	28/01/1992	28/01/1992	28/01/1992	05/08/1997	
Hungary	14/06/1982	27/12/2002	14/06/1982	14/06/1982	14/06/1982	30/01/1998	13/11/2006
Iceland ⁸	10/04/1981						
Italy	20/01/1995	01/09/2004	20/01/1995	20/01/1995	20/01/1995	13/01/1999	
Latvia	04/01/1993	23/04/2003	04/01/1993	04/01/1993	04/01/1993	11/03/1998	
Lithuania	03/06/1998	12/05/2003	03/06/1998		03/06/1998	03/06/1998	29/09/2004
Luxembourg	21/05/1996	13/06/2005	21/05/1996	21/05/1996	21/05/1996	05/08/1999	13/06/2005
Netherlands	18/06/1987	19/05/2004	18/06/1987	18/06/1987	18/06/1987	25/03/1999	18/07/2005
Norway	07/06/1983	18/11/2003	07/06/1983	07/06/1983	07/06/1983	20/04/1998	08/12/2005
Poland	02/06/1983	15/09/2006	02/06/1983	02/06/1983	02/06/1983	23/09/2004	
Portugal	04/04/1997		04/04/1997	04/04/1997	04/04/1997	12/11/2001	
Romania	26/07/1995	25/08/2003	26/07/1995	26/07/1995	26/07/1995	25/08/2003	
Slovakia	28/05/1993	11/02/2004	28/05/1993	28/05/1993	28/05/1993	30/11/1999	23/03/2006
Slovenia	06/07/1992		06/07/1992	06/07/1992	06/07/1992	03/12/2002	22/02/2007
Spain	29/12/1993	09/02/2004	29/12/1993	29/12/1993	29/12/1993	19/01/1998	02/09/2007
Turkey	02/03/2005	02/03/2005	02/03/2005			02/03/2005	
United Kingdom	13/02/1995	25/07/2002	13/02/1995	13/02/1995	13/02/1995	11/02/1999	
United States of America	24/03/1995		24/03/1995	24/03/1995			

Source: ICRC

⁸ Iceland has signed but not ratified the CCW 1980

STANAG 2449 – Training in the Law of Armed Conflict

COL Jody Prescott – HQ SACT Deputy Legal Advisor

Training in the Law of Armed Conflict (LOAC) is first and foremost a national responsibility under international law, and this is recognized in a number of important treaties, such as the Geneva Conventions of 1949. The current military security environment, however, and the conduct of combat operations by multinational military headquarters such as the International Security Assistance Force (ISAF) have shown the need for a certain degree of standardization in LOAC training. NATO Standardization Agreement (STANAG) 2449, "Training in the Law of Armed Conflict," recognizes the inter-operational necessity for setting out a basic scheme of training and recommended content which nations may consider or even follow in their own training programs.

The aim of STANAG 2449 is to establish "a minimum standard of training in the LOAC to ensure that military operations are conducted in accordance with international law." Participants in the STANAG "agree to use the training guidelines described in [it] for units and individuals deployed on NATO duties under OPCOM or OPCON to NATO." The STANAG has three primary training principles: regular training, both prior to and during deployment, inclusion of LOAC issues into training exercises whenever possible, and a structured program of instruction

beginning with basic training for all personnel and additional training for those with specific duties or positions, such as commanders.

The STANAG has been ratified by 19 nations to date, and of these, seven have ratified with reservations. NATO Legal Advisors will find the reservations worthwhile to review, because they provide an insight in some cases into the national caveats currently in place for different nations in the ISAF mission. Certain NATO nations, such as Norway, have used the STANAG extensively in the design and conduct of their LOAC training programs. Other nations, such as the United States, have not yet ratified the STANAG. Partnership for Peace (PfP) nations are encouraged to adopt the STANAG, but at the moment there is little visibility within NATO on the implementation efforts of the partners.

In October 2007, a NATO training working group met in Brugge, Belgium, to begin consideration of whether STANAG 2449 should be updated, and the process whereby this revision might be best effected. The working group will meet again in January 2008 to review the progress made up to that point, and to chart the way ahead for gaining the requisite national input to ensure that the STANAG remains up to date.

Legal Advisors from ACT will continue to be involved in this project as it proceeds, and will keep the greater NATO legal community advised of project developments.

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ISAF Training Event for ISAF HQ (ISAF TE 07/03) at JWC

Capt David Nauta – JFC Brunssum



In November the Joint Warfare Centre (JWC) in Stavanger, Norway, and Joint Force Command (JFC) Brunssum organised the Training Exercise (TE) for personnel that will be deployed at the ISAF Headquarters. The training coincided with the Training Exercise of Regional Command South. Commonly, JWC and JFC Brunssum conduct three ISAF Headquarters Training Exercises each year, and the Joint Force Training Centre (JFTC) in Bydgoszcz, Poland, and JFC Brunssum conduct two Regional Command TEs each year. As each TE attracted a crowd of well over 300 participants it was an impressive get-together.

The Legal Advisors in the training audience included OF3 Julie Deschenes (CAN - HQ ISAF), OF4 Marc Gendron (CAN - HQ RCS) and OF3 Gilles Thal Larsen (NLD - HQ RCS) all to be deployed in the beginning of next year. Col Geir Fagerheim (NOR, Chief Legal Adviser, JWC), and Col Jody Prescott (USA, Staff Legal Adviser, JWC), acted as controllers for the exercises. Lt Col Richard Allen (GBR), who recently redeployed from RC S, provided the latest legal developments within ISAF. As a newcomer to JFC Brunssum, and with ISAF being the JFC Brunssum main operation I was very interested in

attending this event. Fortunately, I could be fitted in. Starting with the functional area training (FAT), the training audience got acquainted with procedures, current developments and objectives within their area of expertise. For the Legal Advisors this included getting acquainted with the UN Security Council Resolutions, OPLANs, Rules of Engagement and relevant Standard Operating Procedures within ISAF, such as SOP 362 (Detention of Non ISAF personnel). The FAT was cross-functional, and included Political Advisor and force provost marshal participants.

The largest areas of concern were targeting procedures, detention operations, civilian casualties and assistance in counter-narcotics operations, and these were discussed more in-depth.

After several briefings and roundtable discussions the actual exercise started, for which JWC decided to use a replica of the historical data of ISAF's activities during a four day period in October 2007. Having to deal with events that have actually occurred in real life, with real targets, operations and incidents, gave the exercise participants a very realistic experience.

Of course, for exercise purposes several fictitious events had been generated to train a variety of situations with which the LEGAD could be confronted. We needed to cooperate with the Joint Targeting Working Group to determine whether their proposed targets were legal military objects appropriate for nomination to the Joint Prioritized Effects List. We advised the Dynamic Targeting Cell on whether a specific missile attack was discriminate and proportionate. We assisted the Force Provost Marshal as to what procedures to follow when confronted with an investigation on a deceased detainee. In all, the events gave a good taste of the work of the Legal Advisor in HQ ISAF.

During this training I had a unique opportunity to meet with all the different players within ISAF's organisation. No other exercise allows you to actually see how the ISAF organization works together in practice. The teamwork to solve certain events with other branches was, in my opinion, very useful and successful.

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Legal Aspects of Employment of European Multinational Headquarters in NATO Framework

LTC Angel Serrano (ESP A) – EUROFOR

1. INTRODUCTION

During the last few years, the political process aimed at reinforcing the importance of Europe in the military field has led to the constitution of an increasing number of European multinational military Headquarters, set up as a result of the military cooperation among European countries.

Most of these Headquarters are composed by European countries belonging to the Atlantic Alliance at the same time; because of this fact, their foundation documents envisage a potential employment in NATO framework, although the Headquarters themselves have never been integrated in the NATO Force or Command structure. This is the case, for instance, of EUROFOR HQs located in Florence (Italy) composed by France, Italy, Portugal and Spain. This article is going to refer in particular to these Headquarters (EUROFOR) and it is going to briefly examine the conditions of its employment in NATO framework; please bear in mind, however, that the conclusions drawn from the example of EUROFOR could also be valid for similar Headquarters since the problems they face don't differ that much.

Before examining the case of EUROFOR, it seems opportune to remind that there are other European Headquarters which initially had no direct link with the Atlantic Alliance, but whose situation has evolved to a closer relationship with NATO. It is e.g. the case of the Headquarters Eurocorps located in Strasbourg (France) composed by Belgium, France, Germany, Luxembourg and Spain and created as early as 1992 with a clear and very marked European character shown by the fact that participation to it was limited only to other European Nations. After some years, however, it has had an interesting evolution, passing from a rather traditional defensive-oriented and static mission Headquarters to a Rapid Reaction Corps more adapted to the new times; it went from a pure European Headquarters, clearly separated from NATO to a more Euro-Atlantic entity which has been finally integrated in the NATO Force structure as one of the NATO High Readiness Force (Land) Headquarters (HRF).

This evolution means that HQs Eurocorps had to successfully endure in due time the HRF certification process, opening its doors to other NATO Nations including non-European ones and it also had to conclude the necessary Command and Control (C2) Agreements with NATO. In principle, the legal regime of the Eurocorps' employment in NATO framework raises no particular legal concerns, since it is governed by the same kind of arrangements in force for the rest of HRFs HQs. I have said "in principle" because the special nature of Eurocorps always leaves room to some particularities; but in general terms it can be said that the legal framework of its employment in NATO Operations doesn't differ from others HRFs HQs and is based on the previously mentioned C2 Agreement as well as on a Technical Agreement on Manning, Funding Administration and Support which is concluded between all the participating Nations. As far as its conversion into a NATO HRF (L) HQs is concerned, a similar evolution to the Eurocorps HQs could be the case of the NATO Rapid Deployable Corps (German/Netherlands), located in Münster (Germany) and activated in 1995.

As a last introductory remark, I will mention that this article, necessarily short, will not address the participation of European HQs in EU-led operations using NATO assets under the "Berlin plus" agreements, something that I consider to be beyond the scope of the article.

And now, let's come back to EUROFOR HQs.

Legal Aspects of Employment of European Multinational Headquarters in NATO Framework

2. EUROFOR HQs GENERAL LEGAL REGIME

EUROFOR HQs were created as a result of a political decision embodied in the so called "Lisbon Declaration", made on 15 May 1995 by the Ministers of Defence and Foreign Affairs of the four countries: France, Italy, Portugal and Spain. The Declaration decided the constitution of a permanent multinational Land HQs at Division Level, denominated EUROFOR (Rapid Operational Euroforce) with forces on call and with the specific aim of providing a substantial contribution to the development of European own military capabilities. Thus, it is the result of the military co-operation of just four countries. At the same time, the Lisbon Declaration decided the establishment of a maritime multinational, non-permanent multinational Force called European Maritime Force (EUROMARFOR).

Being a political document, the Lisbon Declaration did not define the legal framework of the new HQs. But it laid down, however, the basic principles of its structure, the missions that might be entrusted to this new Force (the so-called "Petersberg" missions¹) and its employment framework (autonomous or in the framework of certain international organizations). In this last regard, it was expressly envisaged in the Declaration that EUROFOR might be employed within NATO framework in order to reinforce the European pillar of the Atlantic Alliance.

As far as the status of personnel is concerned the problem emerging from the lack of a legal framework clearly defined "ab initio" was partially solved through the application in a provisional way of the NATO SOFA which was agreed by the four countries' Ministers of Defence. It was only some years later that the gap was filled when the Treaty on the Status of EUROFOR, hereinafter referred to as the "EUROFOR Treaty", was concluded in Rome on 05 July 2000 entering into force four years later.

The EUROFOR Treaty was made following the model of the NATO SOFA which is expressly mentioned in the Preamble but also taking into account the European Union Law as well as the basic principles referred to in the Lisbon Declaration. The Treaty can be considered a combination of a constitutional and a status of forces agreement since it lays down the legal foundations and framework of the HQs and it also deals with the status of its personnel.

The negotiators of the Treaty wanted to stress the European character of EUROFOR defining it as a multinational European Force but also declaring that it is open to the participation of other countries, provided that they are members of the Western European Union (WEU). The Treaty grants legal capacity to EUROFOR to make contracts but this capacity doesn't mean that EUROFOR may be considered a subject of international law. Its Commander has no authority to enter into any international agreements on his own authority; therefore at least a specific mandate or delegation from the Member Nations to act on their behalf is necessary.



¹ "Petersberg missions" are the missions laid down in the Petersberg Declaration of the Ministerial Meeting of the WEU of 19 June 1992, namely:

- Humanitarian missions or evacuation of nationals
- Peacekeeping missions
- Combat force missions for crisis management, including peace-enforcement missions

Legal Aspects of Employment of European Multinational Headquarters in NATO Framework

In other words, EUROFOR (and it is also the case of others multinational Headquarters, Eurocorps included) cannot be considered as an international organization even if it has some features that could lead to a similar conclusion. The Treaty confirms "Petersberg" missions currently embodied also in article 17(2) of the European Union Treaty as missions earmarked for EUROFOR², specifying that EUROFOR may be employed in the European Union but also in the NATO framework. It is important to point out that the Treaty itself stresses that the accomplishment of the above mentioned "Petersberg" missions must not in any case interfere with the availability of EUROFOR units for article 5 missions.³ Finally, the political-military direction of EUROFOR is the responsibility of a High Level Inter-ministerial Committee composed by representatives of the Ministries of Defence and Foreign Affairs of the four Member Nations. This Committee is referred to as the "CIMIN".

Although not stated neither in the EUROFOR Treaty nor in the Lisbon Declaration, current working language in EUROFOR HQs is English.

3. CONDITIONS OF EMPLOYMENT OF EUROFOR WITHIN NATO FRAMEWORK

It has been mentioned before that EUROFOR was born with a clear European character. But being composed by four European countries belonging to NATO, it was not strange that in its foundation document, the Lisbon Declaration, it was already envisaged to have a potential employment of this Force in NATO operations.

Pursuant to this provision, only few months after the constitution of the Headquarters the four Member Nations produced a Joint Declaration on the Conditions of Employment of EUROFOR (and also EUROMARFOR) in the Framework of the Alliance (30 November 1995), what represents without a doubt a proof of the interest in establishing a close relationship with the Atlantic Alliance. The four Nations invited the North Atlantic Council to approve the Declaration and this approval took place in Permanent Session on 24th July 1996.

This availability of EUROFOR for NATO operations has been endorsed by the EUROFOR Treaty which, as it has been previously mentioned, envisages (art 4 a.) the possible employment of EUROFOR in NATO framework. This employment must be done in accordance with the terms of the aforementioned Joint Declaration, which can be summarized as follows:

² Current art. 17. 2 of the EU Treaty will become art. 27. 1 in its new version adopted in Lisbon in October 2007. The new wording establishes that the Union may use its operational capacity on missions outside the Union for peace-keeping, conflict prevention and strengthening international security.

³ The new version of the EU Treaty, agreed in Lisbon and that has been adopted by Member Nations in December this year stipulates in its Article 27 "in fine" that "commitments and cooperation in this area (security and defence policy) shall be consistent with commitments under the North Atlantic Treaty Organization which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation"

Legal Aspects of Employment of European Multinational Headquarters in NATO Framework

- The decision to make EUFORFOR available to NATO for a given operation must be initially coordinated by the four EUFORFOR Nations in the High Level Inter-ministerial Committee. This first step must be followed by a consultation process within the NATO Military Committee and the NAC where final decisions will be discussed, agreed and approved.
- If participation of EUFORFOR in NATO operations is finally agreed, NATO planning procedures will always be followed.
- In any case, for all NATO operations in which EUFORFOR could take part, the principle of unity of command must be complied with and thus, appropriate command authority must be transferred to NATO.
- Even after transfer of authority, EUFORFOR participating Nations remain in all circumstances responsible for their personnel, administration of the units and for their specific logistic support.
- In order to ensure interoperability with NATO Units, it is envisaged the possibility for EUFORFOR to take part in NATO exercises. Permanent contacts and exchange of information are also authorized to this purpose.

In application of this principle, EUFORFOR has already been employed in a NATO operation in Albania (from 01 November 2000 to end April 2001) where EUFORFOR took over command of the Communications Zone West as part of KFOR; and there are currently some sound possibilities for EUFORFOR to be employed again in the framework of NATO in the very near future.

3. CONCLUSION

Some final conclusions can be drawn from the EUFORFOR example that might be valid for any similar European multinational Headquarters:

- a. In the first place, EUFORFOR shows that multinational efforts aimed at the building up of European own military capabilities are made having in mind the need of a close cooperation with NATO. This is why the employment of these Headquarters in the framework of NATO is often envisaged since the early stages of their foundation.
- b. An adequate cooperation with NATO requires, however, the existence of appropriate arrangements in order to ensure an efficient working relationship both under normal circumstances and in a crisis.
- c. Those arrangements should address at least the following aspects:
 - i. General terms and conditions of the transfer of authority to NATO. (In this regard, two principles will always be present: final decision will be taken by the NAC; and unity of command is an absolute must, vested in a NATO Commander). In any case, given the fact that decision-making process in multinational environment is normally very complicated, Nations should try to put in place a flexible and easy procedure to make the Headquarters available to NATO.



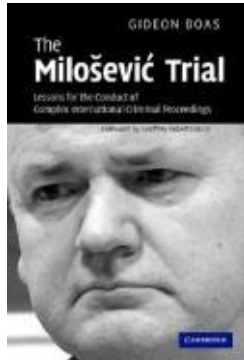
Legal Aspects of Employment of European Multinational Headquarters in NATO Framework

- ii. Mechanisms to enable participation in NATO training on a regular basis with a twofold goal: make the European Headquarters familiar with NATO doctrine and operational procedures; and, on the other side provide NATO the opportunity to check the operational capabilities and skills of a given Headquarters.
- iii. Procedures to establish regular contacts with NATO military authorities in order to allow an appropriate exchange of information.
- e. In case the exchange of classified information is not covered by the standing arrangements mentioned above, particular arrangements will be needed on a case by case basis in order to guarantee the access to and the exchange of relevant classified information for a given operation.
- f. Following a well-established practice, Nations remain responsible for their personnel and administration of their units even after the transfer of authority has taken place.
- g. Once the transfer of authority has been made for a given operation, the European Headquarters involved become a part of the NATO-led forces in the operation and will be subject to the same legal status as the rest of NATO forces deployed.

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Book Review : The Milosevic Trial

Mr. Vincent Roobaert – NC3A



Lessons for the Conduct of Complex International Criminal Proceedings, by Gideon Boas, Cambridge University Press, 2007

For those of us with an interest in greater accountability for genocide, crimes against humanity and war crimes, the Milosevic trial was both an accomplishment and a disappointment. An accomplishment as it constituted the first trial of a former Head of State before an international tribunal. In a sense, this trial legitimized the efforts of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") to put on trial those accused of mass scale atrocities committed in the former Yugoslavia irrespective of their rank or status. The Milosevic trial, however, came to an unexpected ending. Indeed, after more than four years of legal proceedings, suspended several times due to the ill-health of the accused, the trial abruptly ended in March 2006 with Mr. Milosevic's death at the UN detention unit in The Hague. Despite all the time and resources devoted to the prosecution and trial of Slobodan Milosevic, the ICTY was not able to issue a final judgment in the Milosevic case.

As Senior Legal Advisor of the ICTY Trial chamber handling the Milosevic trial, Mr. Gideon Boas was a privileged observer of the trial. In his book, he offers us a critical assessment of the Milosevic trial with a view to improving international criminal trials to ensure that they are conducted fairly and expeditiously.

Before addressing the Milosevic trial in details, Mr. Boas starts by pointing out that fairness and expedition may clash with one another. While reviewing the fair trial rights granted under international law and their application by international tribunals, he examines how these rights may delay the prosecution and trial of a case. Therefore in order to be efficient international tribunals will need to strike a right balance between fairness and expedition. The remainder of the book is devoted to assessing whether or not the Milosevic trial has stricken a right balance between these two requirements.

It is maybe not surprising that as a previous member of the trial chamber Mr. Boas' main criticisms on the conduct of the Milosevic trial are aimed at the prosecution. Before the ICTY, Milosevic was accused under three separate indictments for his actions in relation to Croatia, Bosnia and Kosovo. Although Mr. Boas recognises that the prosecution may feel under a duty to seek redress for all victims, in our view he nevertheless rightly underlines that the role of an international tribunal should be to try an accused in the best manner, both fairly and expeditiously, rather than writing history or acting as a truth commission. In his view, therefore, the prosecution erred when it issued massive indictments covering as many criminal acts as possible and later found itself unable to provide conclusive evidence on a substantial portion of these accusations. Also, the prosecution's request to join the three cases and the appeals chambers decision to do so were, in Mr. Boas's view, major mistakes. Indeed, the resulting case was so wide in scope (three conflicts over eight years) that the prosecution and the trial chambers proved unable to effectively manage the trial. If they are to become effective, international tribunals should ensure that the cases pending before them remain manageable.

¹ This article reflects the author's view only and does not represent the official opinion of NC3A, NATO or individual governments.

Book Review : The Milosevic Trial



The International Criminal Tribunal for the Former Yugoslavia building in the Hague, Netherlands

Mr. Boas then turns to the role of the tribunal in relation to the management of the case. In his view, the Milosevic trial led to some innovative decisions to ensure progress in the case. Although international justice remains torn between the common law's accusatorial proceedings and civil law's inquisitorial proceedings, he argues that it is time to consider the international criminal justice system as a *sui generis* system. In his view, in order for international tribunals to be effective judges should take a more active role in managing the trial. This could involve putting time limits for the presentation of the case of the prosecutor and the accused, limiting the number of witnesses and the like. This could also involve resisting some requests from accused for self-representation, a right which is examined in great details by Mr. Boas. Although self-representation is a right of the accused under the statute of various international tribunals, this right should not be considered as an absolute one, especially when it is used by a manipulative accused for delaying the case. Mr. Boas examines some of the reasons leading a court to restrict this right as well as the practical solutions which have been imposed up to date to deal with an uncooperative accused (such as amicus curia and standing counsel).

Rather than limiting its analysis to criticizing the Milosevic case, Mr. Boas concludes by proposing some guidelines for the prosecution and trial chamber to improve the management of case before international tribunals. Indeed, although the creation of international tribunals constitutes an important step in favour of accountability for international crimes, the efforts made by the international community to create these courts would be vain if they were not able to handle cases in a fair and expeditious manner, thereby failing to fulfil the very mandate for which they have been created. Mr. Boas' book constitutes an invaluable document full of hindsight on how to avoid this peril and it will prove worthwhile reading for all those interested in the events in the former Yugoslavia and international criminal justice.

Gideon Boas, *The Milosevic Trial. Lessons for the Conduct of Complex International Criminal Proceedings*, Cambridge University Press, Cambridge, 2007, Paperback (ISBN-13 978-0-521-70039-9) £23.99 (US\$45.00), Hardback (ISBN-13 978-0-521-87699-5) £ 60.00 (US\$ 115.00).

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Spotlight



Dr. Katharina

Ziolkowski

Legal Advisor

NATO School



Name: Dr. Katharina Ziolkowski, LL.M. (UNSW)

Rank/Service/Nationality: DEU-Civ.

Job title: Legal Advisor and Instructor Operational Law

Primary legal focus of effort: International Public Law (especially LOAC, ROE), including International Law of Treaties (especially SOFA), German Employment, Taxation and Military (Discipline) Law

Likes: traveling; meeting nice people; reading a good book on the beach (subject to weather conditions)...

Dislikes: unfairness and spinach

When in Oberammergau, everyone should: have an interesting day of fascinating and extremely exciting lectures at the NATO School, a ski trip and a cool Bavarian beer afterwards!

Best NATO experience: friendly and excellent colleagues, always ready to help

My one recommendation for the NATO Legal Community: visit the NATO School in Oberammergau (see above)!

Ziolkowski.Katharina@natoschool.nato.int



HAIL

&

FAREWELL

Hail

NATO School : Dr. Ziolkowski (DEU CIV) joined in November 2007

Farewell

SHAPE : LTCOL Joanna Bowen (GBR A) left on December 7, 2007

Christian Ponchaut (SHAPE) bids Farewell

Dear all,

After 8 years of service in the SHAPE Legal Office, time has arrived to leave.

In my whole career I have covered the functions of Logistician Chief Assistant, Company Second Commander, S2/S3 Operation and Security Officer Assistant and finally Chief Administrative Assistant in the SHAPE Legal office. I have so worked in an international environment and more specifically in national, international and European law matters and this was the best experience I have ever had.

I am confident that you will give my replacement, Fabrice Braccio, the same level of support you gave me.

I would like to take this opportunity to thank those who supported me and to wish you all a Merry Christmas and a Happy New Year.

Kind regards,
Christian
NCN 254-7886
Comm +32-65-44-7886



GENERAL INTEREST/UPCOMING EVENTS

- Central Research Unit : is a section made up of 4 people located at NATO Headquarters. One of their main tasks is to get files ready for the interpreters in preparation of the meetings they will participate in. Another mission is to keep and organize a paper copy of all published NATO records; these documents are filed and kept before archiving, some of them are not even archived or registered in DMS (Document Management System). The Central Research Support becomes a sort of reference library for authorized requesters from both inside and outside the NATO Headquarters. If you're desperately looking for a document and can't find it the traditional way, send an e-mail to **Mailbox IS-EM(ICTM-AIM Central Research)**.

- Call for Papers for the 2008 Lieber Society Military Prize.

The Lieber Society, an interest group of the American Society of International Law, bestows each year, without regard to nationality, a prize based upon an exceptional writing in English by a member of or person retired from the regular or reserve armed forces of any nation that significantly enhances the understanding and implementation of the law of war.

The Prize. The winner will receive a Certificate confirming that he or she has won a Lieber Society Military Prize and a monetary grant of \$500.00. The judges may also select up to two additional persons to receive Lieber Society Certificates of Merit for exceptional papers.

Request for Assistance. Any person receiving this Call for Papers who is aware of an exceptional writing that meets the qualifications of this competition is requested to forward this Call to the author of that paper or nominate the paper directly.

For additional information please go to : <http://www.asil.org/liebersociety/index.html>

- On 3 December 2007 NATO launched the first ever Mediterranean Dialogue Trust Fund with Jordan to assist this country with the elimination of Explosive Remnants of War (ERW), through the funding of a survey and by delivering ERW location and search equipment to the Jordanian Armed Forces.

Representatives of Norway, Spain and Switzerland, the lead nations on the project, signed two agreements with the NATO Maintenance and Supply Agency (NAMSA) and the Office of Financial Controller, during a ceremony at NATO Headquarters hosted by the NATO Deputy Secretary General, in the presence of the Ambassador of Jordan to the Kingdom of Belgium. Representatives of Belgium, Finland and Italy, the other contributing nations also attended the ceremony.

The conclusion of these two agreements follows the signing on 25 April 2007 of the Memorandum of Understanding between the NATO Maintenance and Supply Agency (NAMSA) and the Jordanian Authorities.

- On 12 December, the House of Lords handed down an important ruling in the case R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent), see

<http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd071212/jedda-1.htm>.

The case concerns detention by UK forces in Iraq (post occupation), in particular the question whether such conduct is attributable to the UK or to the UN (compare the ECtHR's May 2007 decision in the Behrami & Saramati cases concerning Kosovo - see issue 6 of the NATO Legal Gazette) and the impact of articles 25 and 103 UN Charter on articles 5 (and 15) ECHR. It is particularly important for peace operations and detention in such operations. The court dismissed the appeal against the detention.

GENERAL INTEREST/UPCOMING EVENTS

- Director of the Military Faculty - International Institute of Humanitarian Law (IIHL) Sanremo, Italy

The President of IIHL invites applications from candidates with a distinguished record in the study and practice of international law and military operations for the position of Director of the Military Faculty. IIHL is a non-profit humanitarian association that has acquired a reputation for excellence in the promotion, dissemination and teaching of international humanitarian law (also known as the law of armed conflict).

Detailed information concerning IIHL may be found on its website at: <http://web.iihl.org/>.

The successful candidate will assume the position on April 1st, 2008 and will serve for an initial term of three years.

The Director will reside in Sanremo and report directly to the President, IIHL. He will coordinate all aspects of IIHL military courses, and supervise the teaching staff. Further, the Director will be expected to teach segments of most IIHL military courses.-

Academic requirements include a J.D. or L.L.B. degree and significant professional experience in the practice and teaching of law. English language speaking and writing skills are required. Language skills in Arabic, French, Italian, Russian, Spanish or in the language of another IIHL course are desirable.

Additionally, substantial military experience as a legal advisor to headquarters and/or field activities is required, as is expertise in international humanitarian law. Expertise in the law of land, naval and air warfare and an advanced degree in international law and/or advanced military service college education are desirable. The Director will be expected to have and to maintain a network of counterparts who serve in key operational law rules around the world.

Applications, including a curriculum vitae or resumé and a cover letter, should be submitted to President, International Institute of Humanitarian Law, Villa Ormond, Corso Cavallotti 113, 18038 Sanremo, Italy.

Applications should arrive no later than December 31, 2007.

Applicants will be informed of the receipt of the application.

It is expected that the interviews of selected candidates will take place in early January 2008 and that a hiring decision will be made late that month.

Questions may be addressed to Ms Stefania Baldini, IIHL Secretary-General at baldini@iihl.org Tel. +39 0184 541848, fax +39 0184 541600.

- Car City vs. SHAPE Community Services Fund, 30 October 2007

On 30 October 2007 the Court of First Instance sitting at Mons in the Province of Hainaut, Belgium, handed down a judgement concerning the termination of a public service concession contract between SHAPE and the owner of Car City, a business that sold tax-free cars at SHAPE from 1991 until 2005. The plaintiff, Car City, claimed losses provisionally estimated at € 585,000. SHAPE raised objection to the proceedings because, under the terms of the contract, only recourse to arbitration was possible if there was a dispute. The plaintiff claimed he was not subject to arbitration due to special conditions dealing with the termination of the contract. The Court concluded that SHAPE was correct and, by virtue of the contract, it did not have jurisdiction to hear the dispute. The Court ordered the Plaintiff to pay own costs and outstanding costs of SHAPE.

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(D), 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 country, 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 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.



**The secret to creativity is to
know how to hide your
sources**
Albert Einstein

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.Degreve@shape.nato.int) and Kathy Bair (bair@act.nato.int)

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