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General Interest – Upcoming Events

Introduction

Our 11th issue of the NATO Legal Gazette contains articles about Human Rights, the new EU Directive on the application of the Value Added Tax to NATO, the militarization of space, and the review of two books dealing with export controls. Additionally, three pages of General Interest items and upcoming events are provided.

Attached to the email containing this newsletter is an index of the authors and topics discussed in all eleven editions. Beginning 2008 with the publication of this 11th issue and a review of the articles published makes the remarkable breadth and variety of legal practice within NATO easily apparent. The contributions of the more than 30 authors to this Gazette show the importance of knowledge sharing and the possibilities that greater collaborative efforts offer to our extended community. In the coming year we hope to take additional steps to improve both the communication and the effective collaboration between NATO legal offices. More specifics to follow in the coming weeks.

May each of our readers enjoy a great 2008 and consider writing an article for this Gazette. We are now putting together our February issue but continuously seek short articles (2-5 pages) written in a conversational tone about any topic of interest to our greater NATO legal community. If you desire to submit an article or have questions about anything contained in this issue or the past ten issues of the Gazette please contact me at Sherrod.bumgardner@shape.nato.int or dominique.degreve@shape.nato.int

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More on Al Skeini and Extraterritorial Effects of Human Rights Treaties

Capt Federico Sperotto – TA (Truppe Alpine) HQ

The obligations set forth in the international and regional instruments on human rights traditionally have a strictly territorial scope. The European Convention on Human Rights, in its Article 1, contains a general obligation to ensure the rights enlisted in its first section apply to all individuals *within the jurisdiction* of a member State. The Court specified in *Bankovic* that the jurisdiction of a State is primarily territorial and that the exercise of extra-territorial jurisdiction by a Contracting State is exceptional. ⁽¹⁾

In recent years, following the 9/11 attacks and the regime change in Iraq, some European States joined the US in its "global war on terror". Some episodes of alleged violation of human rights occurred during military operations in Iraq. In December 2004, the Queen's Bench Division of the High Court under the Human Rights Act contextually examined six cases of alleged violation of the European Convention during military operations in the province of Basra, Iraq. ⁽²⁾

⁽¹⁾ ECtHR, *Banković and Others v. Belgium and 16 Other Contracting States* - 52207/99 [2001] ECHR 970 (19 December 2001), §§ 59 and 61.

⁽²⁾ *The High Court of Justice Queen's Bench Division (Divisional Court) Al Skeini Ors, R (on the application of) v Secretary of State for Defence* [2004] EWHC 2911 (Admin) (14 December 2004).

Five complaints concerned the violation of the right to life of Iraqi civilians killed during clashes between UK troops patrolling the streets and militias. The sixth complaint concerned the death of an Iraqi national detained in a British military prison. The preliminary investigation concluded that the killings were lawful because soldiers acted in accordance with the established rules of engagement (ROE).

Before the High Court, the applicants held that the exercise of the State's power abroad depends on two forms of authority: a *personal jurisdiction* or an *overall effective control*. The first entails authority and control over individuals; the second consists of an effective control upon an area situated outside national borders, as specified by the European Court in *Loizidou v. Turkey*. ⁽³⁾ According to the claimants, both are expressions of the same general principle that of *control* over person or land. Such a control resulted in this case because of the Government's acceptance that the UK was at that time an occupying power.

⁽³⁾ ECtHR, *Loizidou v. Turkey* - 15318/89 [1996] ECHR 70 (18 December 1996), § 52.

Thus, the UK government was responsible for alleged deaths under the provision of the Human Rights Act which embodied the European Convention. The defendant considered Iraq to be outside the territorial reach of the Convention, remarking also that the doctrine of personal jurisdiction does not have common ground in international law.

Considering the degree of control of British troops over the provinces of Basra and Maysan, the High Court held that notwithstanding the number of troops deployed, the United Kingdom did not retain an *effective overall control* on the area where the situation was extremely fluid. In the case of Mr Baha Mousa's death in the custody of British forces, there was a breach of the procedural investigative obligation arising from articles 2 and 3 of the Convention. The Court of Appeal decided that all further proceedings should be held until the conclusion or other disposal of the pending court martial proceedings. ⁽⁴⁾

⁽⁴⁾ *Courts martial alleging ill-treatment, amounting to torture or inhuman or degrading treatment, have been held in Osnabrück, Germany and recently at the Bulford Military Court Centre, Salisbury, UK.*

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Lord Justice Sedley significantly affirmed that "The one thing British troops did have control over, even in the labile situation described in the evidence, was their own use of lethal force", and added that "The [Human Rights] Act reaches the same parts of the body politic as the Convention. For my part I also see good grounds of principle and of substantive law for holding that at least where the right to life is involved, these parts extend beyond the walls of the British military prison and include the streets patrolled by British troops." ⁽⁵⁾

In a recent publication, the Joint Committee of Human Rights appointed by the House of Lords reported that the British Government did not think that the UK exercised jurisdiction in Iraq or Afghanistan which were sovereign states. That means that neither the UN Convention against Torture (UNCAT) nor Article 3 ECHR was applied to the transfer of prisoners to Iraqi or US physical custody within Iraq, since prisoners

⁽⁵⁾ *The Supreme Court of Judicature Court of Appeal (Civil Division) Al-Skeini Ors, R (on the application of) v Secretary of State for Defence [2005] EWCA Civ 1609 (21 December 2005) §§ 197 and 205.*

taken into custody in Iraq had at all times been subject to Iraqi jurisdiction. ⁽⁶⁾

The issue of whether and to what extent a State party of the European Convention is accountable for human rights violations perpetrated by its armed forces abroad, particularly in Afghanistan and Iraq, essentially depends on the Court assumptions on the content of Article 1. After *Bankovic* the Court held firmly its principal assessment - the jurisdiction of a State is primarily territorial - but progressively enlarged the range of the Convention, introducing *non-territorial factors* - such as in *Assanidze v. Georgia* ⁽⁷⁾ - and no longer considering the territorial reach of the Convention as limited to the European legal space - as in *Issa and Others v. Turkey*. ⁽⁸⁾

⁽⁶⁾ *House of Lords, Joint Committee on Human Rights, 19th Report of the Session, 2005-06, Published on 26 May 2006, § 69.*

⁽⁷⁾ *ECtHR, Assanidze v. Georgia - 71503/01 [2004] ECHR 140 (8 April 2004), § 137.*

⁽⁸⁾ *ECtHR, Issa and Others v. Turkey - 31821/96 [2004] ECHR 629 (16 November 2004), § 74.*

It could mean perhaps that the Court was going to admit the possibility of adopting a dual approach on jurisdiction, giving autonomous relevance to the concept of "personal jurisdiction", so far considered a limited exception to a primary doctrine of "territorial jurisdiction."

Recently, the European Court of Human Rights decided on two complaints against Member States of the Council of Europe operating in Kosovo under NATO command and control (*Behrami v. France, Germany and Norway*). ⁽⁹⁾ The complaints have been declared inadmissible because the Court held that it lacks any power to scrutinize the behaviour of troops under UN mandate. The adopted solution is not persuasive.

Since the landmark case of *Loizidou v. Turkey* cited above, the Strasbourg Court held that while the state jurisdiction is essentially territorial the responsibility of a Contracting Party

⁽⁹⁾ *ECtHR, Behrami v. France and Saramati v. France, Germany and Norway, 71412/01 and 78166/01 [2007] ECHR (2 May 2007).*

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could also arise when it exercises effective control of an area outside its national territory because of lawful or unlawful military action. Military operations conducted by multinational forces give rise to the issue of accountability of States for violations committed by military personnel operating under command and control of an international organisation.

Kosovo has been under interim administration since the UN Security Council Resolution 1244 issued on June 10, 1999. The Respondent States disputed their jurisdiction *ratione loci* arguing *inter alia* that the applicants were not resident in the "legal space" of the Convention. As pointed out by the Court Article 1 requires Contracting Parties to guarantee Convention rights to individuals falling within their "jurisdiction", which is primarily territorial. According to the Court assessment a notion of "personal jurisdiction", or *ratione personae*, was in question. However, it considered the issue of the extraterritorial jurisdiction as a marginal question, arguing that the core question was whether it was competent to examine States' contribution to the civil and security presences under the Convention endorsed by the Security Council.

As usual, all key actors declined responsibility before the Court. In deciding the question, the Court raised a number of question marks. The most controversial was "Can the impugned action and inaction be attributed to the UN?" The Court stated that "UNSC Resolution 1244 gave rise to the following chain of command [in the present cases]: The UNSC was to retain ultimate authority and control over the security mission and it delegated to NATO (in consultation with non-NATO member states) the power to establish the international presence, KFOR, as well as the operational command thereof. This "delegation model" is not convincing. Actually, since the Military Technical Agreement (MTA) was signed by COMKFOR the day before Resolution 1244 was issued, the chain of command stops at the North Atlantic Council (NAC) level ⁽¹⁰⁾.

Accordingly, the statement that "[...] KFOR was exercising lawfully delegated Chapter VII powers of the UNSC so that the

the impugned action was in principle "attributable" to the UN" cannot be subscribed to. While KFOR was exercising powers lawfully delegated under Chapter VII, its actions were not directly attributable to the UN. Indeed, the UN in its submission to the Court held that "KFOR was established as an equal presence but with a separate mandate and control structure: it was a NATO- led operation authorised by the UNSC under unified command and control. There was no formal or hierarchical relationship between the two presences nor was the military in any way accountable to the civil presence."⁽¹¹⁾.

In the Court's view, the fact that troop contributing nations (TCN) provided materially for their troops would have no relevant impact on NATO's operational control.

⁽¹¹⁾ *Behrami v. France and Saramati v. France, Germany and Norway*, § 118.

⁽¹⁰⁾ *Military Technical Agreement between the International Security Force ("KFOR") and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia, 9 June 1999.*

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Nevertheless NATO's operational control should not affect the obligations of each participating TCN assumed by the Council of Europe, first of all the one of guaranteeing to everyone within their jurisdiction the rights and freedoms defined in the Convention. In *Berić and Others against Bosnia and Herzegovina*, the British government shares this opinion. Intervening as a third party, it was supportive of the jurisprudence of the Court that the Contracting States were not completely absolved from their Convention responsibilities in respect of compliance with obligations resulting from their membership of an international organisation to which they had transferred part of their sovereignty. ⁽¹²⁾

The Court held on the contrary that when the responsibility of contributing States for

actions or inactions of KFOR is at issue the question raised is less whether the respondent state exercised extra-territorial jurisdiction in Kosovo, but rather whether this Court is competent to examine under the Convention that State's contribution to the civil and security presences exercised the relevant control of Kosovo. ⁽¹³⁾ This is the ultimate assumption on the matter, since the Court confirmed it in the cited *Berić and Others against Bosnia and Herzegovina* (16 October 2007).

⁽¹³⁾ *Gajic v. Germany*, 31446/02 [2007] ECHR (28 August 2007) § 1.

⁽¹²⁾ See on the matter *Berić and Others against Bosnia and Herzegovina*, 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 101/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05 and 25496/05 [2007] ECHR (16 October 2007).
Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi (Bosphorus Airways) v. Ireland [GC] 45036/98, [2005] ECHR.

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Value Added Tax – The New European Directive and NATO

Mr. James G. McLaren – Northern Law Center

The new European VAT Directive, Council Directive 2006/112/EC, 28 Nov 06, came into force January 2007. Member States must have complying legislation in effect by January 2008.

This new VAT Directive runs to 118 pages, 66 of which are substantive text. It is a complete recast of the previous VAT Directive "The Sixth Directive" 77/388/EEC. The 1977 Directive had 33 articles. However, by 2006 it also had 90 amendments and 140 derogations, running to 100 pages in the consolidated version. None of these amendments or derogations appears to have affected NATO SOFA VAT exemptions.

The "simplified" new Directive has 414 articles, 15 titles and 12 annexes. There is a subtle change of language from the previous version to the new version of which our NATO practitioners should be aware.

The now repealed Sixth Directive, 77/388, Article 15, paragraph 10 exempted "supplies of goods and services:

- under diplomatic and consular arrangements,
- to international organizations recognized as such by the public authorities of the host country, and to members of such organizations, within the limits and under the conditions laid down by the international conventions establishing the organizations or by headquarters agreements,
- effected within a Member State which is a party to the North Atlantic Treaty and intended either for the use of the forces of other States which are parties to that Treaty or of the civilian staff accompanying them, or for supplying their messes or canteens when such forces take part in the common defence effort.

This exemption shall be subject to limitations laid down by the host Member State until Community tax rules are adopted.

In cases where the goods are not dispatched or transported out of the country, and in the case of services, the benefit of the exemption may be given by means of a refund of the tax."

Article 15 paragraph 14 exempted "services supplied by brokers and other intermediaries, acting in the name and for account of another person, where they form part of transactions specified in this Article, or of transactions carried out outside the community."

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NEW DIRECTIVE 2006/112/EC

Title X of the new directive has the following articles directly affecting NATO goods and services:

Chapter 5, Article 143 (h): "Member States shall exempt ... The importation of goods, into Member States party to the North Atlantic Treaty, by the armed forces of other States party to that Treaty for the use of those forces or the civilian staff accompanying them or for supplying their messes or canteens where such forces take part in the common defence effort."

Chapter 8, Article 151 exemptions:

(c) "the supply of goods or services within a member state which is a party to the North Atlantic Treaty, intended either for the armed forces of other States party to that Treaty for the use of those forces, or of the civilian staff accompanying them, or for supplying their messes or canteens when such forces take part in the common defence effort."

(d) "the supply of goods or services to another Member State, intended for the armed forces of any State which is a party to the North Atlantic Treaty, other than the Member State of Destination itself, for the use of those forces, or of the civilian staff accompanying them, or for supplying their messes or canteens when such forces take part in the common defence effort."

Chapter 9, Article 153 states that "Member States shall exempt the supply of services by intermediaries, acting in the name and on behalf of another person, when they take part in the transactions referred to in Chapters 6, 7 and 8, or of transactions carried out outside the Community."

DISCUSSION POINTS

1. Host Nation Limitations.

VAT exemptions were previously subject to limitations laid down by individual Member States "until Community tax rules are adopted." The introduction of the new directive should have removed host nation limitations. However, Article 131 states that the exemptions in Chapters 2-9 (the NATO exemptions are in 5, 8, and 9) shall apply "in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse." Despite this caveat, the new directive should be interpreted unambiguously. Member States may argue that certain goods or services are not intended for the use of the force or civilian staff. However, if it is established that the armed force or staff is the user, this is conclusive for the use of the exemption under the directive.

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2. No More Refunds.

Under the sixth directive, Member States were allowed to grant the exemption by way of a refund. They are no longer allowed to do this. They cannot charge and repay - they must exempt. Refunds are the favoured practice in Turkey, which, while not yet an EU member, may be encouraged to harmonise its VAT laws with the rest of the EU.

3. Intermediaries.

Lastly, there is slightly amended language for exempting intermediaries. This is an unexplored area of possible VAT exemption which may flow to our contractors and the host nations with whom we deal when they act as our contracting agents.

SUGGESTIONS FOR PRACTITIONERS

Host nation agreements sometimes mandate contracting through the host nation for construction or other goods and services. VAT exemption may at times flow through the host nation to the prime contractor, but not to the subcontractors for whose services and supplies VAT is charged. This may occur because of limitations imposed by the host nation or lack of assertion of our VAT exempt privileges. The practical effect can be that paying VAT for all subcontractor activity eviscerates the exemption. Legal advisors should first advocate an interpretation of Article 151 that exempts goods and services intended for "end-use" by the visiting force at all stages of the supply chain. Limited interpretation of the exemption may be due to the status of the host nation itself as the contracting party. If this is argued, legal advisors should advocate the broad interpretation of Article 153 and explore how far the term "intermediary" can stretch down the supply chain.

The new directive retains the VAT exemptions for NATO forces "taking part in the common defense effort." Regional tax authorities in the past have sought to deny tax exemptions to individual NATO members whose warfighting assets were not engaged in a NATO exercise. This is a fallacious interpretation of the "common defense effort" and the problem was solved at host nation ministerial level. If such problems occur in the field, legal advisors should immediately elevate the problem through their supervisory chain.

Full text of Directive 2006/112/EC can be found at :

<http://eur-lex.europa.eu/JOHtml.do?uri=OJ:L:2006:347:SOM:en:HTML>

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Two New Books to Start Solving the Export Control Puzzle

Mr. Vincent Roobaert⁽¹⁾ – NC3A

NATO and the member nations are often involved with export control rules when participating in projects and operations with governments or private companies that involve the transfer of certain sensitive information, goods and services. While private companies aim at ensuring that they comply with their national legislation when exporting defence goods and services, NATO and its member nations must ensure that they can use these defence goods and services to the fullest in the course of their activities and operations (e.g., for procurement purposes, out of area operations,...). How to achieve this in practice may prove challenging at times given the multinational character of NATO operations and the current complexity of the export control rules. Indeed, the law of export control finds its sources not only in treaties (e.g., the 1971 Nuclear Non-Proliferation treaty) and national or regional legislation (e.g., European Union) but also in rules and guidelines issued by the four multilateral export control regimes (e.g., Australia group, Wassenaar Arrangement) and their implementation by the participating nations. In order to shed some light on this somewhat obscure matter, I thought that it might be useful to review two recent books of interest to the practitioner of export control.

Daniel Joyner's *Non-Proliferation Export Controls. Origins, Challenges, and Proposals for Strengthening* provides a very good starting point to discover the world of export controls. Leaving aside treaty-based export control rules (such as those found in the Nuclear Non-Proliferation treaty, the Biological Weapon Convention and the Chemical Weapon Convention), the book covers the four multilateral export control regimes ("MECR"), namely the Australia Group (biological and chemical weapons), the Missile Technology Control Regime, the Wassenaar Arrangement (dual-use goods and technologies) and the Nuclear Suppliers Group.

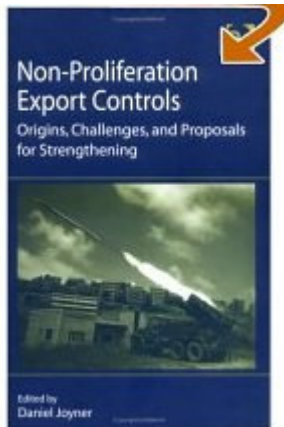
The first two contributions of the book give an overview of the four MECR and an economic analysis of export controls. Daniel Joyner's introductory contribution provides a brief but clear presentation of the four MECR, their common characteristics (political forum, consensus rule, no legal commitment) and how they depart from the formal treaty regimes. Although there is an understanding that the MECR certainly contributed to slowing the proliferation of weapons of mass destruction,

it is also recognised that the MECR may not be adapted to the post cold war reality anymore (there is not a common perception of the threat anymore) and that many challenges lay ahead. The following introductory chapter on the economic analysis of export controls investigates the effect of export controls taking into account the specificities of the arms industry (still mostly national and outside the scope of WTO rules). This contribution also helps explaining what is possible in terms of sanctions for violations of export controls rules.

The four following chapters each cover in detail a specific export control regime and examine respectively the origins of each regime, its development and the challenges it currently faces. What transpires from these chapters is that the complexity of the export control regimes may lie in the absence of harmonized rules. For example, the rules regarding the provision of information of denial of export licences to other members of the regime may vary from one regime to the other. This examination of the various challenges faced by the MECR serves as background to the three following chapters, each covering a specific country or region (the United Kingdom, Denmark and East Asia).

(1) This article reflects the views of the author only and does not represent the official opinion of NC3A, NATO or individual government.

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While the case study on the UK mainly addresses the difficulties in adequately balancing executive discretion and parliamentary oversight in the national legislation on export licences and the statutory adjustment of this balance following legal challenges in the UK, the authors of the two other case studies call for some harmonization of the multilateral export control regimes. Some of the reasons invoked to support such changes range from the lack of resources for small states to participate fully in all the four MECR to the need to improve efficiency by selecting the nations that have a common security interest and adjusting the regime's membership accordingly.

To conclude, Daniel Joyner reviews the recent success of the Proliferation Security Initiative, a recent scheme to allow interception and inspection at sea of cargo suspected to contain weapons of mass destruction and their means of delivery. After underlining the structural problems currently faced by the MECR (*i.e.*, informality and consensus decision making), he calls for the adoption of a new centralized and formal regime that would not be based on consensus

voting, thus allowing greater flexibility and adaptation to changes. According to him, such new regime could be based on a framework agreement as is the case for the WTO regime.

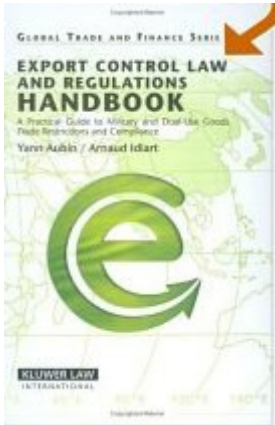
Overall, the book is well written. In approximately 250 pages, it provides an excellent background to the multilateral export control regimes and will provide the reader with all he/she needs to know about the basics rules of export control.

For those who are passionate about export controls or who just need to know more about export controls for their daily work, Yann Aubin and Arnaud Idiart's *Export Control Law and Regulation Handbook* may prove valuable. Written by practitioners from EADS for their peers, it may prove too detailed for the rookie in export controls, with the exception of the excellent overview of the international arms control regimes by Mr. Achilleas. This contribution covers both limitations of the trade in certain materials (*e.g.*, nuclear weapons, bacteriological weapons, chemical weapons, landmines and dual use goods) and limitations relating to use and deployment in certain geographical zones (*e.g.*, so called "nuclear free" zones, Antarctica, deep seabed, etc...).

For the practitioner, the *Export Control Law and Regulation Handbook* contains very useful and practical information on the export and import of military and dual-use goods and defence services, although the latter is mainly covered by reference to the legislation on military and dual-use goods. The book comes also with a CD-rom containing the electronic version of the forms needed for export control purposes as well as a standard compliance programme handbook for companies.

The two editors selected eleven jurisdictions on the basis of their respective importance in relation to the trade in defence and dual-use goods. Although great emphasis is placed on the European Union and several European Union Member States (*i.e.*, France, Germany, Italy, Spain and the United Kingdom), the book nevertheless avoids being Eurocentric by examining the export control regimes of China, India, Japan, the Russian Federation and the USA. In line with the intention to make this book a practical one, all contributors were invited to follow a similar structure,

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thereby allowing quick comparisons between jurisdictions and convenient access to the information. Each contribution subsequently examines the overall philosophy, the history of the national/regional export control regime concerned and the participation of that particular country in the international regimes. Thereafter, the requirements for export, import and licensing of military and dual-use goods are studied, together with a designation of the competent authorities and the sanctions in the event of a breach of the rules. The book also draws the reader's attention to certain specificities of particular regimes, such as the requirements for brokering military goods. It also refers to specific regime put in place by certain States, such as the framework agreement and letter of intent put in place by France, Germany, Italy, Spain, Sweden and the United Kingdom to facilitate the movement of military goods among these States.

The contribution on the US export control regime will also be of particular interest to the practitioners, given the extent of the applicability of the US export controls laws. It is therefore not a surprise that the contribution on the USA is quite extensive. The historical background helps explaining some provisions of the International Traffic in Arms Regulations ("ITAR") and there is an extensive discussion on the US sanctions regime and their implications for export controls. The author also raises several hot issues that will require further examination for export controls purposes, such as the emergence of collaborative work environments, outsourcing and the global supply chain and the impact of export control rules on attempts at improving inter-operability between national systems.

In conclusion, the two books under review will prove very useful to understand the export control regimes whether you need a general theoretical overview or an advanced practitioner's handbook. It is only regrettable that the contributors have not paid more attention to the particular situation of international organizations, such as NATO. For example, the ITAR contains specific provisions regarding NATO and it is unfortunate that some of these provisions have only been alluded to, rather than subjected to a thorough examination.

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- DANIEL JOYNER (ed.), *Non-Proliferation Export Controls. Origins, Challenges, and Proposals for Strengthening* Ashgate, 2006, Hardback (ISBN-13 978-0-7546-4460-6)
- YANN AUBIN AND ARNAUD IDIART (eds.), *Export Control Law and Regulations Handbook. A Practical Guide to Military and Dual-Use Goods Trade Restrictions and Compliance*, Kluwer Law International, 2007, Hardback (ISBN 90-411-2601-5)

Militarization of Space: Policy and Legal Aspects Conference

Ms. Desislava Zhelyazkova – ACT/SEE

"If you can not do it, you should do it!"
Astropolitik

An international conference hosted by the Belgian National Group of the International Society for Military Law and the Law of War on "The Militarization of Space: Policy and Legal Aspects" took place at the Royal Military Academy in Brussels on 6 December 2007. It gathered legal scholars and practitioners from Europe and overseas.

The speakers presented the United States and the European perspective on the military use of space while stressing on the legal framework that must correspond to the outer space activities.

The developed US Military Space Policy underlines that the national government will oppose any new legal regime prohibiting US access to space. This is because the US Space Policy supports the US National Security Policy and the way US takes part in a war is dependent on the information provided by satellite/GPS. Furthermore, the entire US economy is dependent on the space machinery production and use. On the other hand, while some emerging space powers such as China hardly can afford developing a 'Man is Space' program, they continue to believe it has political prestige. The international society is concerned with the non-existing transparency of who controls the Chinese Space Policy: the government, the ruling party or private actors? Hence, the rest of the world has no idea how China plans to train, educate and use its professionals in this programme. Moreover, Chinese authorities have never provided an official explanation of their programme's goals or activities as a display of their sovereign independence in this manner.

The other major actor in the space arena – the European Union – follows the motto "Military uses of outer space but peaceful uses." The European Space Council Resolution from 22 May 2007¹ identified the challenges and goals that the EU faces. These include transforming the existing systems of the Member States into a real joint military architecture and synchronizing the Common Foreign and Security Policy² and the European Space Policy.³ The participants of the conference emphasized the obligation to avoid a non-united Europe in the area of missile defense as well as building a common capacity for situational awareness. Europe should escape its full dependency from the US on the information received.

Case studies show that the EU countries have also difficulties forming a common statement in critical occasions regarding space military activities. The EU reaction is either late as was the case when China conducted its anti-satellite missile test on 11 January 2007⁴ or non-focussed due to contradiction between 'Old' and 'New' Member States when the US announced its missile shield plans in February 2007.⁵

(1) See

http://www.smm.lt/smt/docs/tm_tyrimai/esmtep/st10037%20Resolution%20on%20ESP%20as%20a%20dopted%20in%20EC%20CC%20%20en2007-05-25.pdf

(2) See http://ec.europa.eu/external_relations/cfsp/intro/index.htm

(3) See http://ec.europa.eu/comm/space/themes/intro_space_en.html

(4) The European Union institutions announced their call for respect of international law on 24 January 2007 – almost 2 weeks after the actual incident;

http://www.eu2007.de/en/news/CFSP_statement/index.html. See also

http://en.wikipedia.org/wiki/2007_Chinese_anti-satellite_missile_test

(5) US aim to integrate Poland and the Czech Republic with radar installations. See

http://www.spacedaily.com/reports/US_missile_shield_would_be_major_change_of_strategy_analysts_999.html

Militarization of Space: Policy and Legal Aspects Conference

With 21 common members NATO and the European Union must look for a closer cooperation related to the military use of outer space. NATO is involved in exploring and using the space for military purposes via its Centres of Excellence and the Joint Air Power Competence Centre (JAPCC). However, the scale of space efforts by the Alliance remains incomparable with the hard work and enormous investment by nations.

Regardless of the initiator of the military use of space, the applicable law⁶ must be obeyed. Since the 1950s space law has existed as a policy and technological advice. However, there is no conventional law yet. The competition between the former USSR and USA in exploring and using the outer space attracted the attention of the United Nations as reflected in the November, 1957 General Assembly Resolution (1148 XII)⁷ and several others to follow.⁸

Other documents providing regulation in the area of outer space military projects are the 1967 Outer Space Treaty⁹ and the 1979 Moon Agreement¹⁰ that prohibit the militarization of the moon and other celestial bodies. In addition, the 1972 Liability Convention¹¹ applies to damages caused by space objects to another state-party. The Convention introduces a dual standard for liability and a principle of recoverability when damages occur.

The existing legal order proclaims the 'peaceful use of space' as a main principle but does not define it yet. The participants at the "Militarization of Space: Policy and Legal Aspects" conference emphasized that the term 'use for peaceful purposes' implies intention while 'peaceful use' is a more objective criterion. The world has already faced different approaches of the biggest space powers – the US and the USSR – in the very early years of the space era. While for the US 'peaceful' is 'non-aggressive', the USSR defined it as 'non-military'. With that noted, no prohibition of armament in outer space continues except for arms for mass destruction.

(⁶) The term "space law" is most often associated with the rules, principles and standards of international law appearing in the [five international treaties and five sets of principles governing outer space](#) which have been elaborated under the auspices of the United Nations Organization. However, space law also includes international agreements, treaties, conventions, rules and regulations of international organizations (e.g. the International Telecommunications Union), national laws, rules and regulations, executive and administrative orders, and judicial decisions.

(⁷) See

<http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0119/31/IMG/NR011931.pdf?OpenElement>

(⁸) UN General Assembly 1348 (XIII); See

<http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0747/92/IMG/NR074792.pdf?OpenElement>, United Nations Committee on the Peaceful Uses of Outer Space (UNCOPOUS):

<http://www.unoosa.org/oosa/en/SpaceLaw/gares/index.html>.

(⁹) Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, January 27, 1967

<http://www.state.gov/t/ac/trt/5181.htm>

(¹⁰) AGREEMENT GOVERNING THE ACTIVITIES OF STATES ON THE MOON AND OTHER CELESTIAL BODIES (MOON AGREEMENT), 1979,

http://www.nti.org/e_research/official_docs/inventory/pdfs/moon.pdf

(¹¹) Convention on International Liability for Damage Caused by Space Objects (1972),

<http://www.islandone.org/Treaties/BH595.html>

Militarization of Space: Policy and Legal Aspects Conference

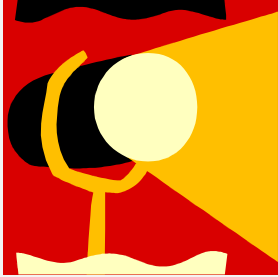
As underlined by several of the conference speakers, in the aftermath of the 9/11 attacks, the concept of 'global security' requires new thinking about the realities threats all nations face. In this environment, the policy and law of outer space policies must respond not only to the traditional understanding of military operations but also to new and evolving threads including terrorism and natural diseases.

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*Belgium Royal Military Academy
Brussels*

Spotlight



LT Col Mike Cole

Assistant Legal

Advisor

SHAPE



Name: Mike Cole

Rank/Service/Nationality: Lt Col (OF4) / Army / British

Job title: Assistant Legal Advisor, SHAPE

Primary legal focus of effort: HNS, TA, SOFA , PFP/MD/ICI

Likes: TLAs

Dislikes: People who use TLAs, but don't know what they mean (& the inevitable fine I will get from my colleagues for appearing on this page).

When in Mons, everyone should: Start planning their escape.

Best NATO experience: Recent deployment to Helmand Province, Afg.

My one recommendation for the NATO Legal Community: Remember that everything we do is all about improving the operational effectiveness of the bloke on the ground. Everything else is just fluff.

Mike.Cole@shape.nato.int



HAIL

&

FAREWELL

Hail

JFC Naples : WG CDR Sarah Dureau (GBR RAF) joined in January 2008

SHAPE : LT Col Mike Cole (GBR A)joined in January 2008

ACT/SEE : Mr. Richard Coenraad (NLD – Intern) joined on January 28, 2008

Farewell

JFC Naples : WG CDR Mark Phelps (GBR RAF) left in December 2007

GENERAL INTEREST/UPCOMING EVENTS

Think like a wise man but
communicate in the
language of the people -

William Butler Yeats

- There are an increasing number of interesting free web-based legal research tools. One recent discovery with an intellectual property and technology focus is Groklaw <http://www.groklaw.net/index.php>. This resource is the blog/webpage of a U.S. based journalist and paralegal named Pamela Jones (PJ) who created this site as a means to publish developments in the Free and Open Source Software (FOSS) movement. Its research page is exceptionally detailed:
<http://www.groklaw.net/staticpages/index.php?page=legal-links>

The emphasis on copyright and patent law subjects. Although the majority of the links have a U.S. focus, European legal resources are also provided. The title of this webpage taken from the word "grok" coined in the 1961 science fiction book, **Stranger in a Strange Land**. It means "to understand intuitively or by empathy; to establish rapport with." Possessing this knowledge provides an insight to Groklaw's unique perspective. For instance, this webpage's disclaimer has great appeal:

"The information on Groklaw has been prepared as a service to the FOSS community in particular and the general public. It is not intended to constitute legal advice. PJ is a paralegal, not a lawyer. Even when lawyers write or contribute to articles, it is still not legal advice. You need to hire your own lawyer to solve your own legal matters. Groklaw is informational only. We use reasonable efforts in collecting, preparing and providing quality information and material, but we do not warrant or guarantee the accuracy, completeness, adequacy or timeliness of the information contained in, or linked to, this web site. If you know more than we do, let us know, so we can improve."

- The Turkish PfP Training center in Ankara will conduct a Law of Armed Conflict Course between 10 and 21 March 2008. Purpose of the course is to provide military or civilian personnel an appropriate balance of academic and practical knowledge in the principal areas of international law relating to the Law of Armed Conflict. For more information see: <http://www.bioem.tsk.mil.tr/>
- The convention between the Government of the Kingdom of Belgium and the Government of the United States of America for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income was published in the Official Belgian State Gazette (Moniteur belge) on January 9, 2008. <http://www.ejustice.just.fgov.be/cgi/welcome.pl>
- The International Society for Military Law and Law of War has opened its archive of past newsletters to the public. This newsletter archive may be found at: < <http://www.soc-mil-law.org/>>
- The NATO Secretary General and SACEUR welcomed the nomination of General David McKiernan as the next commander of the NATO-led International Security Assistance Force in Afghanistan
<http://www.nato.int/docu/update/2008/01-january/e0118b.html>

GENERAL INTEREST/UPCOMING EVENTS

- The School of Law at the University of the West of England is hosting an **International Symposium on the Regulation of Armed Conflict by International Law**. The Symposium will be held in Bristol (United Kingdom) from 3 to 5 September 2008.

The aim of this symposium is to review and examine the challenges facing international law relating to armed conflict and to identify gaps in knowledge, policy and practice. The symposium will provide an open forum where invited experts, presenters and other participants can discuss relevant issues and perspectives and candidly exchange their views.

Issues that may be explored within the framework of the symposium include:

- The emergence of new threats to peace and security e.g. terrorism, environmental damage, health pandemics, etc.
- The contributory role of non-state actors as a catalyst of conflict.
- Proliferation and control of (small) arms and weapons.
- The role of private military/security companies in armed conflict.
- The role and capabilities of non-governmental and international organisations during conflict.
- The role of international law in addressing the abuse and exploitation of women and children during conflict.
- The impact of armed conflict on migration (patterns) e.g. refugees, internally displaced people, etc.
- The role of international, regional, and non-governmental organisations in maintaining and restoring peace and security.
- The accountability of states, individuals, and organisations during peacekeeping operations.
- The role of international law in post-conflict reconstruction.
- Consideration of prosecution and dispute resolution methods.
- The role of international(ised) courts and tribunals in dealing with conflicts.
- The curbing and regulation of 'commodity conflicts' by economic measures e.g. diamonds in Sierra Leone, timber in Liberia, etc.
- The impact of conflict on (sustainable) development and governance.

The organisers call for papers addressing the aforementioned issues, or other issues related to the theme of the conference. Papers will be selected on the basis of abstracts of no more than 300 words. Abstracts should be submitted by email to ilac@uwe.ac.uk by 3rd March 2008. Notification of the outcome of submissions will be given no later than 31st March 2008.

If you have any queries relating to the symposium please contact the organising committee at ilac@uwe.ac.uk.

- The UN Treaty Series collection online can now be accessed without subscription. It is offered via a single generic username/password combination: Username : treaties – password : 12345
<http://untreaty.un.org/English/access.asp>.

Whenever people agree
with me I always feel I
must be wrong – *Oscar*
Wilde

GENERAL INTEREST/UPCOMING EVENTS

- Amnesty International Publishes a Report Concerning the Transfer of Detainees to the Afghan Authorities in the Framework of ISAF

In this report of 13 November 07, Amnesty International states its concerns about the handing over of detainees by ISAF troop-contributing nations to local Afghanistan authorities. See

<http://web.amnesty.org/library/Index/ENGASA110112007>. for the summary. For the longer version:

[http://web.amnesty.org/library/pdf/ASA110112007ENGLISH/\\$File/ASA1101107.pdf](http://web.amnesty.org/library/pdf/ASA110112007ENGLISH/$File/ASA1101107.pdf)

- 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 [insert the number] of this 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.

- The second Administrative Law Workshop is scheduled on March 12 and 13, 2008 at ACT/SEE. Workshop invitations have been emailed to legal professionals currently working in NATO legal offices.
- Mark your calendars for the week of April 21st, when the Legal Conference will take place in Istanbul, Turkey
- The next NATO Legal Advisors Course will be held at the NATO School from May 19 to 23, 2008

Good advice is something
a man gives when he is too
old to set a bad example -

François de la Rochefoucauld



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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