

Special Interest Articles

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General Interest – Upcoming Events

Introduction

Fellow Legal Professionals,

Thanks to Lieutenant Colonel Jerry Lane, Mr. Ulf Haussler, and Lieutenant Commander Darren Reed this 12th issue of the *NATO Legal Gazette* addresses three current legal challenges faced by our Alliance and Partner Nations.

Lieutenant Colonel Jerry Lane (Ireland) has just returned from six months of duty in Kosovo and reports on his insights and experiences as the Legal Advisor for the Multinational Task Force Centre. Mr. Ulf Haussler (Germany) is the Legal Advisor for the Joint Command Special Operations, a former Legal Advisor in Kosovo, and the author of *Ensuring and Enforcing Human Security, The Practice of International Peace Missions*, Wolf Legal Publishers, The Netherlands 2007, which is part of CHALLENGE (The Changing Landscape of European Liberty and Security) a research project funded by the European Commission. In his article Mr. Haussler offers zestful response to the November 2007 report by Amnesty International concerning NATO's detention practices in Afghanistan. Lieutenant Commander Darren Reed (Great Britain) the Legal Advisor for the NATO Maritime Component Command Northwood provides the first article on maritime legal matters published in this *Gazette* and the first of three articles concerning maritime law enforcement as a response to the use of the High Seas by terrorists and other criminal groups.

Each of these articles is a thoughtful and timely contribution to sharing knowledge within the extended community of legal professionals concerned about NATO matters. It bears emphasizing, the email addresses and phone numbers of these author-attorneys, like the contact information for all of the other authors whose articles have been published in past editions of the *NATO Legal Gazette*, are provided to encourage further discussion between our readers and these authors. If an article raises a question in your mind, contact the author. They stand ready for inquiries and welcome them. We presently email each edition of this *Gazette* to the 32 NATO Legal Offices in 19 countries and to most of the Ministries of Defence of the NATO and PFP countries so while personal introductions are nearly impossible, we can all establish contact on subjects that interest us.

And, as always, please forward this edition to fellow legal professionals interested in NATO issues and consider writing an article for our future editions!

Sincerely,
Sherrod Lewis Bumgardner
Legal Advisor
Allied Command Transformation. Staff Element Europe

A Quill in the Knapsack ?the Thoughts of a LEGAD PfP Officer post KFOR Deployment

Lt Col Jerry Lane (Ireland) – Barrister at Law, LL.M, MA, LEGAD, MNTFC



As I have recently completed a six month tour of duty as LEGAD MNTF(C) at the Multinational Task Force Centre HQ in Camp Vile I have been asked to reflect upon the taskings and duties of the Legal Adviser at the task force. The views and any opinions expressed herein are of course my own.

Can you 'convert' an infantryman?

In my case I bring a somewhat curious mix to the job. Having twenty years service in the Irish Defence Forces, the first thirteen with the infantry corps and more recently as a LEGAD I felt that there was a danger of a clash of cultures (I have deployed abroad previously to both UNIFIL and KFOR). I am happy to report that my concerns were unfounded; there was no such difficulty. Indeed my previous military experience both in KFOR and elsewhere has proved of great assistance in the performance of my LEGAD functions. What has proved noteworthy is the realisation that the LEGAD post itself is a valuable professional learning experience.

I have been fortunate throughout my deployment to have been able to avail of the advice and experience of Lt Col Thomas Toussaint (FRA), Chief LEGAD, HQ KFOR. Thomas and his staff provided a valuable source of assistance and "corporate" knowledge. A good example of this was the regular KFOR LEGAD conference which afforded

further opportunity to discuss matters of common interest as well as 'flag' future developments. Merci beaucoup Thomas!

Setting the stage: Pre-deployment activity

LEGADs who have previous deployed experience will be familiar with the myriad of administrative requirements and national training that is required to be completed before the boots 'hit the ground'. My involvement with the Irish Contingent (IRCON) included lectures on the missions legal framework, operational plans, ROE (which understandably occupies a large amount of time and effort), claims etc etc - the list goes on. In addition I was to be "double hatted" throughout as the IRCON LEGAD.

A particularly vital part of the pre-deployment stage is familiarisation and work-up exercises with members of the staff who will deploy and operate together as the task force staff. In my view this fostered a spirit of collegiality and a 'team' ethic thus enhancing the operational capability of the task force HQ.

Ireland assumed the role of framework nation in KFOR's Multinational Task Force (Centre) from 31 July 2007, the first time we assumed such a role in KFOR. As I was listed for deployment in the LEGAD post from an early stage I was immersed in the rounds of briefings and meetings necessitated by the framework nation commitment. This meant an early 'baptism' in the negotiation of MOUs (between the TCNs in MNTF(C)) as well as technical agreements, implementation agreements – essentially the myriad of administrative, financial and logistics 'nuts and bolts' of involvement in a multinational military deployment. In addition it provided a timely introduction to the requirement of **interoperability**, i.e the TCNs of the task force have a separate administrative responsibility that requires to be completed quite a while before troops deploy into the mission area.

Many of these meetings and conferences were conducted on site in Kosovo and a useful spin-off benefit of this for me was the briefing and handover I received from my Swedish colleagues (Sweden holding framework nation in MNTF(C) prior to Ireland). It would be correct to say that another old military adage was borne out, i.e. "time spent on recce is seldom wasted."

"They say soldiers and lawyers could never thrive both together in one shire"
Barnaby Rich: The Anatomy of Ireland 1615 (!)

(¹)Cited by Watkin, K. Colonel (CA) "the Operational Lawyer: an Essential Resource for the Modern Commander."

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Furthermore my professional legal education has been buttressed with LEGAD and LOAC courses at the International Institute of Humanitarian Law (San Remo), the School of Law (Liverpool University) but most particularly by my attendance at the NATO Legal Advisors Course at Oberammergau. Notwithstanding the LOAC and LEGAD instruction the contacts and friendships formed at the school have stood me in good stead as two of my classmates have been serving with me in KFOR during my deployment. I am happy to report that the informal LEGAD 'network' functions well and is an effective and a useful source of reference.

Producing the goods: deployment in theatre

From the outset a considerable amount of time was devoted to achieving a high level of operational capability early in the deployment; on my part this necessitated a fair amount of study and in turn dissemination of the relevant instruction, directives, SOPs etc. Detailed advance preparation is advisable in this particular context. Here as abovementioned the lengthy and comprehensive handover from my predecessor meant this was not a problem.

Nature of the post: -As LEGAD my main responsibilities included:

- the provision of legal advice to the MNTF(C) commander and his staff on all aspects of our operations and activities.
- advice relating to the application and interpretation of international documents, treaties, non-binding instruments (MOUs & TAs) and operational documents during the MNTF(C) operations.
- responsibility for the updating of national caveats and ongoing legal assessment of our operations.

Day to day routine operational matters:

The involvement of the MNTF(C) LEGAD in operational matters included, *inter alia*, advice regarding current operations and activities; the monitoring and update of national caveats; participation in the planning process and preparation of operational documents and their subsequent interpretation; legal assessment of MNTF(C) operations; assistance to UNMIK, the international community and NGOs; educational activities both internal and

external (e.g. the Kosovo Protection Corps) and any necessary participation in cooperation between the task force and civil entities.

Ok, so what do you really do?

The roles of the LEGAD are varied and are difficult to quantify. The draft deskbook correctly refers to the LEGAD as a subject matter expert, advocate, an ethical advisor and counsellor. In the latter role the deskbook states: "...the legal advisor does not simply provide legal advice, but also serves as a confidante to the Commander, providing an independent voice and analysis to issues presented by other members of the staff.

Here analytical skill, judgment, combined with legal knowledge is relied upon. The legal advisors provide advice early in the decision-making process to enable the command to accomplish missions."

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Occasionally the LEGAD will be required to voice concerns or even opposition to a proposed course of action or what may be stated as: "... *ego gratiora dictum alia esse scio; sed me vera pro gratis loqui, et si meum ingenium non moneret, necessitas cogit...*"⁽²⁾ Livy's words while respectful in tone and firmly rooted in antiquity reflect authoritatively on the character and necessary personality which may be required of a Legal Advisor. This needs to be viewed as the balance that a LEGAD brings to the operational arena.

On the plus side for commanders Michael Ignatieff captured the inherent benefit of the LEGAD: "[Lawyers] provide harried decision-makers with a critical guarantee of legal coverage, turning

⁽²⁾ I am aware that there are other things more pleasant to say than these; but even if my natural disposition did not incline me thereto, necessity compels me to say what is true rather than what is pleasant.' (Livy, Bk III, ch 75).

complex issues of morality into technical issues of legality, so that whatever moral or operational doubts a commander may have, he can at least be sure he will not face legal consequences."⁽³⁾

One of the particular areas of activity for me was in the planning and conduct of a Human Rights Awareness programme for all personnel of the taskforce. This necessitated preparation of a syllabus, liaison with the relevant stakeholders as well as internal co-ordination and planning.

The particular nature of Coalition operations and the LEGAD

Command and control of multinational military elements in a PSO environment brings its own challenges and by extension (operational) risk. These include a requirement to harness elements as diverse as national military cultures, requirements of interoperability and national capability. The LEGAD has a vital role to play here. Establishing and maintaining contact with contingent LEGADs whether deployed in theatre or through national 'reach back'

⁽³⁾ Ignatieff, M (2000) *Virtual War Kosovo and Beyond*, Great Britain, Chatto and Windus: 19.

type mechanisms assists greatly in facilitating many aspects of the task force mission. A particular aspect within interoperability is the application of ROE and national caveats. There is no doubt that caveats are a part of operational life and must be managed carefully so as not to degrade the operational efficiency and capability of the task force. It could be referred to as the LEGAD needing to identify problems while concurrently examining possible solutions in order to facilitate operational tempo and posture.

What's next?

- Even in a short six months' timeframe, valuable lessons have been learned which I return to my home country with. Not least of these is the pressing requirement of interoperability which transcends the staff functions but is obviously of particular importance to us LEGADs.

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- KFOR is a mission in transition and the debate regarding the currency of UNSCR 1244 continues. Its legal interpretation may well alter the position of several of the TCNs. There are interesting legal issues looming in the short term given the onset of the EU mission and other expected political developments.

I would have to agree that my previous military experiences stood me in good stead on this tour but that previous deployment experience is not an absolute prerequisite. What is gratifying is the benefits of the LEGAD 'network' and harnessing the experiences and expertise of colleagues whether NATO or non-NATO.
- On a personal level I have been struck by the requirement to remain prepared for whatever challenge the mission space brings as illustrated by the MNTF(C) motto: "*Ad Utrumque Paratus*" ('prepared for anything'). You could say that the old movie adage of "*Improvise, Adapt, Overcome*" is as relevant and true in the LEGAD context!

I leave MNTF(C) with my task completed and professionally enriched – roll on the next deployment!
- MNTF(C) and indeed KFOR is a challenging and varied operational law post. The fact that the mission is well established means that a 'library' of operational law has developed which is of great assistance to those serving as LEGAD.

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Meeting the Lawfare Challenge

Why NATO should listen to Amnesty International – yet shouldn't believe everything they say

Mr. Ulf-Peter Häußler() – Legal Advisor, German Armed Forces*

Introduction

Following decisions made in 1979, in 1984 the North Atlantic Treaty Organization answered the Warsaw Pact's Intermediate-Range Nuclear Forces (INF) in Eastern Europe by deploying Pershing II and Cruise Missiles to Germany, Italy, and the United Kingdom. In Western Europe, huge protests ensued. Hundreds of thousands of people demonstrated peacefully while a smaller, but still significant number violently blockaded inter alia U.S. military installations. Both flavours of these "peace" activists believed NATO's response rather than the Soviet Union's provocation posed the greater threat and they directed considerable effort to stand against the security decisions of the Alliance.

Less than a decade later the Cold War ended. Self-evident from the events of the 1980s and 1990s is the truth that NATO, and not the popular movements, achieved sustainable peace. By their voluntary decision to join the North Atlantic Treaty Organization, most of the former Warsaw Pact nations give the best evidence of NATO's historical success.

Nearly twenty-five years onwards, while many things have changed, NATO continues to maintain peace and freedom for its members and offer it to others.¹ NATO contributes much to peace in the Balkans and is making a huge and similar effort in Afghanistan.

While events in Kosovo continue to unfold, Afghanistan presently offers the biggest political and military challenge NATO has faced in the post-Cold War world. The desired end-state for the Alliance in this troubled nation is easier to define than implement: Afghanistan reaches sustainable stability that allows a constitutional democracy based on the rule of law, good governance and respect for human rights to grow. NATO's main contribution is military stability. ISAF counters threats arising from non-compliant activities of opposing militant forces (OMF) while empowering the Afghan National Security Forces (ANSF) to increasingly contribute and, eventually, to assume complete responsibility for national security efforts (also known as "Afghan ownership"). As a result, NATO's military role compliments the development efforts in the civilian sector being made by the United Nations, the European Union, other international organizations and individual nations. The international community's involvement in Afghanistan reproduces the model used with success in the Balkans. Although the distance from Europe is greater and cultural differences more vast, Afghanistan still has the potential to become another success story for NATO provided the political will within the Alliance to continue the effort endures.

⁽¹⁾Obviously, the North Atlantic Treaty links the task of expanding peace in freedom to the overall aim to maintain international peace and security in the Euro-Atlantic region. This, however, is not a strict geographical limitation. As observed by then Secretary General Lord Robinson, "NATO goes where the threat is" (Manfred Wörner lecture given to the German Atlantic Society on 24 June 2003, typescript on file with the author).

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The views expressed herein are my own and do not necessarily correspond with the official position of the Federal Government, the Federal Ministry of Defence, or the German Armed Forces.

Meeting the Lawfare Challenge

With all this in mind, déjà vu occurs when reading the provocatively titled 2007 November report by Amnesty International, "**Afghanistan – Detainees transferred to torture: ISAF complicity.**"² As a non-government organization created in 1961, Amnesty International pursues the laudable, "... vision ... of a world in which every person enjoys all of the human rights enshrined in the Universal Declaration of Human Rights and other international human rights instruments. In pursuit of this vision, Amnesty International's mission is to undertake research and action focused on preventing and ending grave abuses of these rights."³

However noble Amnesty International's intent, its November 2007 report is a paradigm of lawfare⁴ where "the exploitation of real, perceived, or even orchestrated incidents of law-of-war violations . . . [are]... employed as an unconventional means" of confronting NATO. This report challenges and taints the means chosen by the Alliance to reach the desired end-state with the insinuation of conduct worse than the opposing militant forces NATO is engaging.

While uncomfortable, the lawfare challenge puts that extra pressure on legal professionals within NATO, NATO nations, and nations participating in this NATO-led operation --wrapped up in daily business as we often are-- to reconsider our values, reassure ourselves of the legitimacy and legality of how we implement them, and the importance of proactively communicating this to the people and the Government of the Islamic Republic of Afghanistan (GIROA) and the international community on whose behalf we are acting. This is why NATO should listen to Amnesty International. If we accept the challenge, we can win because we have the better arguments on our side.

(2) <http://www.amnesty.org/en/library/asset/ASA11/011/2007/en/8f7a4c33-a2d6-11dc-8d74-6f45f39984e5/asa110112007en.pdf>

(3) See Amnesty's International Statute, Our Vision and Mission: <http://www.amnesty.org/en/who-we-are/accountability/statute>

(4) Dunlap, Charles J., "Lawfare amid warfare," Washington Times, 3 Aug 2007 <http://washingtontimes.com/article/20070803/EDITORIAL/108030004/1013> For a further discussion of lawfare see also, Dunlap, Charles J., Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts <http://www.hks.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf>

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The Amnesty International Report released on 13 November 2007

The Facts: Torture in Afghanistan?

The November, 2007 Amnesty International Report alleges that handing over detainees to agencies of the Government of the Islamic Republic of Afghanistan infringes upon the rule of non-refoulement under Article 3 of the United Nations Convention Against Torture. Relying on statements of torture made by detainees⁵, the Amnesty International Report addresses ten cases of torture which allegedly have occurred since mid-2005. This allegation is based on a couple of factual contentions and legal assertions; Amnesty International does not seem to be prepared to subject any of them to close scrutiny.

The existence of these allegations was confirmed by the United Nations Secretary-General's report "The Situation in Afghanistan and its implications for international peace and security" dated 21 September 2007⁶. In this report the UN Secretary General calls upon the Government of the Islamic Republic of Afghanistan to investigate. By making this call, the UN correctly judges these allegations as unproven but worthy of additional fact-finding. Amnesty International avoids this measured approach to the facts by including such allegations as are unrelated to ISAF because they occurred in places such as Kandahar at a point in time – mid-2005 – prior to ISAF's southern extension⁷. Accordingly, the title of the report – **Detainees Transferred To Torture: ISAF Complicity** – promises more than the report demonstrates. This is the first step of a "lawfare" campaign: those engaging in it go out headline shopping on the basis of (at best) limited facts⁸.

The Law: What Legal Framework Applies?

The question of whether ISAF (or, more precisely, NATO) can be held accountable for "complicity" in acts of torture committed by GIRoA personnel is intrinsically linked to the ongoing controversy concerning extraterritorial applicability of human rights treaty law. Amnesty International has been advocating such applicability on a couple of occasions, including with respect to NATO-led peace missions⁹. Yet what law is properly applicable – international humanitarian or human rights law, or both?

(⁵) *AI Report*, at 12, referring to a newspaper report in the *Toronto Star* of 09 June 2007; *ibidem*, at 22sq, referring to newspaper reports in the *Canadian Globe and Mail* of 23/24 April 2007, respectively, and corroborating reports of the Afghan Independent Human Rights Commission (AIHRC); *ibidem*, at 29, quoting a statement of an individual made in December 2005; see also *ibidem*, at 20.

(⁶) UN document S/2007/555, at para 84.

(⁷) This holds true for the case of "AB", *AI Report*, at 29.

(⁸) *Nota bene*: This is not to say that there is no torture in Afghanistan nor to say that anyone could justify torturous practices were individuals actually tortured in Afghanistan. Simply, from the facts before the world community, we cannot conclude more than the existence of allegations of torture.

(⁹) Amnesty International has made submissions concerning KFOR detentions to the Human Rights Committee in the course of the latter's analysis of UNMIK practice in Kosovo sub specie the International Covenant on Civil and Political Rights. See "United Nations Interim Administration Mission in Kosovo (UNMIK): Briefing to the Human Rights Committee: 87th Session", July 2004 (AI document EUB 70/1007/2004).



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To date, no court established by the international community has decided upon the law applicable to peace missions¹⁰ deployed in accordance with a mandate based on Chapter VII of the UN Charter. Existing jurisprudence deals with all aspects of extraterritorial exercise of the sovereign powers of states, both in war-time¹¹ and peacetime¹². The Human Rights Committee believes that the International Covenant on Civil and Political Rights applies to the actions of international peace missions because they are attributable to the troop contributing states¹³. However, when the Human Rights Committee reviewed the practice of the United Nations Interim Administration Mission in Kosovo (UNMIK), UNMIK asserted that it submitted its report to the Human Rights Committee on the human rights situation in Kosovo since June 1999 as an exercise of its authority granted by United Nations Security Council Resolution 1244 (1999)¹⁴. The statement of UNMIK, undisputed by the Human Rights Committee, demonstrates that from a human rights perspective, actions of international peace missions can be attributed to the missions rather than the Personnel or Troop Contributing Nations alone despite these missions not being a party bound by the existing human rights treaties¹⁵.

(10) The term "peace mission" indicates that the strategic end-state to which the operation in question shall contribute is international peace and security re-established rather than implying that it is being conducted in peacetime.

(11) See, for instance, the Report No 109/99 of the Inter-American Commission on Human Rights of 29 September 1999 – *Coard et al. v United States* (case 10,951)

<http://www1.umn.edu/humanrts/cases/us109-99.html> and the advisory opinions of the International Court of Justice of 8 July 1996 – *Legality of the Threat or Use of Nuclear Weapons* (where at para 25 the ICJ opined that the protection of individuals by human rights contained in the International Covenant of Civil and Political Rights does not cease in times of war) and of 9 July 2004 – *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (where at paras 105 and 112, respectively, it has reinforced this point of view and extended it to the International Covenant on Economic, Social and Cultural Rights). See the judgment of the European Court of Human Rights of 23 February 1995 – application no. 15318/89 – *Loizidou v. Turkey* – preliminary objections, at paras 63sq.

(12) See, for instance, the judgments of the European Court of Human Rights of 16 November 2004 – application no. 31821/96 – *Issa v. Turkey* (concerning actions allegedly conducted by Turkish forces in Northern Iraq – paras 74 and 81) and of 12 May 2005 – application no. 46221/99 – *Öcalan v. Turkey* (assessing the applicant's arrest in Nairobi on 15 February 1999 – para 91). See also Report No. 86/99 of the Inter-American Commission on Human Rights of 29 September 1999 – Case 11.589 – *Alejandro et al. v. Cuba*, holding that: "when agents of a state, whether military or civilian, exercise power and authority over persons outside national territory, the state's obligation to respect human rights continues—in this case the rights enshrined in the American Declaration" (para 2).

(13) General Comment No. 31 – *Nature of the General Legal Obligation Imposed on States Parties to the Covenant* – UN document CCPR/C/21/Rev.1/Add.13, at para 10.

[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.21.Rev.1.Add.13.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.21.Rev.1.Add.13.En?Opendocument)

The Human Rights Committee has asked a variety of states to confirm its point of view in an attempt to generate uniform *opinio juris*. Considering, for instance, the U.S.'s objection (UN document CCPR/C/USA/3, Annex I) and Germany's differentiated statement (UN document CCPR/CO/80/DEU/Add.1) it is hard to believe that such *opinio juris* will grow. Note, however, that the International Court of Justice (advisory opinion of 9 July 2004, *op cit.*, at paras 110sq) and the European Court of Human Rights (*Loizidou* judgment of 23 February 1995, *op cit.*, at paras 15, 25, 26, and 27) have been hesitant to accept both either persistently voiced objections or restrictive declarations.

(14) See UN document CCPR/C/UNK/1 at part II para 1. Note that UNMIK also observed, concerning Article 4 of the Covenant, that: "The procedure for derogation set forth in Article 4 does not apply to UNMIK because it is not a State Party to the International Covenant on Civil and Political Rights (ICCPR)."

<http://www2.ohchr.org/english/bodies/hrc/docs/AdvanceDocs/CCPR.C.UNK.1.En.pdf>

(15) On attribution see also European Court of Human Rights, judgment of 02 May 2007 concerning application no. 71412/01 by *Agim Behrami and Bekir Behrami against France* and application no. 78166/01 by *Ruzhdi Saramati against France, Germany and Norway* (hereinafter referred to as "*Behrami & Saramati*"). For critical comments on this case see *Frederic Naert*, *NATO Legal Gazette* No. 6 and my review in *Journal of International Law of Peace and Armed Conflict* 2007, 238-244.

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Considering that the United Nations is the sponsor of the International Covenant on Civil and Political Rights and that both the Human Rights Committee and UNMIK are subsidiary organs of the UN, there is a clear indication that international human rights treaty law is not applicable even within one and the same international organisation if the organisation is not a party to the treaty. If, accordingly, the *pacta tertiis*¹⁶ rule is even applicable within the UN family, it must apply *a fortiori* to other international organisations (and their subsidiary organs or subordinate entities) like NATO and all NATO-led peace missions. Accepting the superiority of the UN Charter, Chapter VII mandates adopted thereunder, and the application of Article 103 of the UN Charter¹⁷ vis-à-vis the International Covenant on Civil and Political Rights, all support the view that international human rights treaties are not applicable to international organisations as a matter of law.

This, however, is not the final conclusion. It is NATO practice to apply international humanitarian treaty law, to which NATO is not a party (for instance the Universal Declaration of Human Rights embraced by Amnesty International) as a matter of legal policy¹⁸. This legal policy conforms with the concept that certain non-codified principles and rules of international law – in particular those with peremptory character – are binding upon all international legal persons. In this manner the universal ban on torture clearly comes within the ambit of NATO policy and *jus cogens*¹⁹. As a result, NATO (ISAF) is obligated not to torture in accordance with general principles of international humanitarian and human rights law²⁰ rather than under Article 7 of the International Covenant on Civil and Political Rights or the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment²¹. It is also submitted that the procedural safeguards for, and extensive interpretations of, the universal ban on torture are not binding on ISAF unless they share its peremptory character despite what Amnesty International asserts²².

⁽¹⁶⁾ *pacta tertiis nec nocent nec prosunt* Every treaty in force is binding upon the parties to it and must be performed by them in good faith. Conversely, treaties do not "create either obligations or rights for a third State without its consent" See Vienna Convention on the Law of Treaties, May 23, 1969, multilateral, Art. 34, 1155 United Nations Treaty Series 331.

http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

⁽¹⁷⁾ In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

<http://www.un.org/aboutun/charter/chapt16.htm>

⁽¹⁸⁾ See STANAG No. 2449 "Training in the Law of Armed Conflict" dated 29 March 2004 "NATO/PIF Unclassified" and all relevant SHAPE OPLANs of NATO-led peace missions.

See also the NATO Policy On Combating Trafficking In Human Beings of 29 June 2004 (<http://www.nato.int/docu/comm/2004/06-istanbul/docu-traffic.htm>) which aims at integrating the protection against specific threats to human rights of vulnerable individuals and groups protected by the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime into the framework of NATO-led peacekeeping operations.

⁽¹⁹⁾ See the judgment of the House of Lords of 24 March 1999 in *Regina v. Bartle ex parte Augusto Pinochet Ugarte* – 38 ILM 581 (1999), and the judgment of ICTY of 10 December 1998 in *Prosecutor v. Furundzija* – Case No. 17-95-17/1-T – paras 153-154.

⁽²⁰⁾ For the notion of "general principles of international humanitarian and human rights law" see my study "Ensuring and Enforcing Human Security" (2007), at 66sq.

⁽²¹⁾ The practice concerning KFOR confirms that NATO and its peace missions are not obligated under international human rights treaty law: if they were so obligated, the NATO Secretary General's letter to the Secretary General of the Council of Europe (CoE) concerning access of the CoE's Committee for the Prevention of Torture (CPT) to facilities where KFOR detains individuals were moot because the CPT would then be entitled to such access under Article 3 of the European Convention on Human Rights and simply would not have needed NATO's policy decision to be granted such access.

⁽²²⁾ AI Report, at 9sq.

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However, the relevant practice – and practice rather than *opinio juris*²³ only is required to demonstrate such peremptory character-- is not in the books.

This is the second step of a lawfare campaign: the legal reasoning used is based on a framework its advocates wish to create rather than law actually in force.

Developing and Applying the General Principle of International Humanitarian and Human Rights Law concerning Torture

Torture is clearly prohibited and criminalised under international humanitarian law²⁴. It is also both a crime against humanity²⁵ and a war crime²⁶. Pertinent provisions of international humanitarian law must be considered jointly with human rights treaty law²⁷ when the peremptory general principle to protect vulnerable individuals is inferred as an established obligation of international legal persons. In accordance with these obligations, states must adopt criminal legislation transforming the prohibition of torture into domestic law. All international legal persons must also ensure²⁸, within the remit of their powers, that torture will not be committed within the sphere of their authority²⁹. Even among recently adopted international human rights treaties only the United Nations Convention Against Torture contains an express *non-refoulement* rule³⁰. International humanitarian law has developed a protective mechanism different from *non-refoulement*. For instance, Article 12 of GC III confirms the sovereign right to transfer prisoners of war to third states; it only contains an obligation that the transferring state:

(²³) It is submitted in this respect that the Human Rights Committee's Concluding Observations concerning Canada (UN document CCPR/C/CAN/CO/5, para 5), on which Amnesty International relies (AI Report, at 9 text accompanying n. 26), reflects a suggestion as to what *opinio juris* the Human Rights Committee would prefer to see developing rather than actual *opinio juris*.

(²⁴) Cf. common Article 3(1)(a) of GCs I-IV; Articles 17, 87, 130 of GC III; Articles 32, 147 of GC IV; Article 75(2)(a)(iii) of GP I; Article 4(2)(a) of GP II.

(²⁵) Cf. Article 7(1)(f)/(2)(e) of the ICC Statute.

(²⁶) Cf. Article 8(2)(a)(ii) of the ICC Statute (international armed conflict) and Article 8(2)(c)(i) of the ICC Statute (non-international armed conflict).

(²⁷) Cf. Article 7 of the International Covenant on Civil and Political Rights; the United Nations Convention Against Torture; Article 37(a) of the Convention on the Rights of the Child; and various regional human rights instruments. – It is submitted that within a military environment, in the light of the command responsibility doctrine, clear directive and guidance – contained e.g. in an OPLAN – suffices.

(²⁸) Cf. Article 2(1) of the International Covenant on Civil and Political Rights "effective legislative, administrative, judicial or other measures".

(²⁹) International human rights law contains express references to jurisdiction (cf. Article 2(1) of the UN Convention Against Torture; Article 2(1) of the Covenant on Civil and Political Rights), viz. a source of *de jure* authority over individuals. By way of contrast, international humanitarian law builds on the *de facto* equivalent to jurisdiction, viz. actual authority (cf. Article 42 of the Hague Regulations; GCs III and IV speak of persons finding themselves "in the hands", i.e. subject to the factual authority, of a party to a conflict or occupying power).

(³⁰) By way of contrast, Article 37(a) of the Convention on the Rights of the Child only provides that "States Parties shall ensure that ... [n]o child shall be subjected to torture" but does not prescribe what means, measures and mechanisms must be applied to this end. The same applies to Article 7 of the International Covenant on Civil and Political Rights. It follows that the obligations stemming from these human rights treaties must be performed in good faith (see Article 26 of the Vienna Convention on the Law of Treaties), i.e. in such a manner as to reconcile legitimate sovereignty interests and the effectiveness and usefulness of the provisions at issue. That implies an obligation generating minimum rather than maximum standards concerning the means, measures and mechanisms of protection. Obviously, this limited obligation is without prejudice to policy decisions with a view to granting additional protection.

Meeting the Lawfare Challenge

Shall, upon being notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the prisoners of war. Such requests must be complied with.

Article 45 of GC IV contains similar protections for civilians. These protections are supplemented by a *non-refoulement* rule that is limited to fear of persecution for political opinion or religious belief, i.e. assimilated to the protection of refugees who do not, in fact, enjoy the protection of any government³¹. As a result, it is not possible to consider *non-refoulement* part of the general principle of international humanitarian and human rights law concerning torture. Hence it would be even less convincing to consider it as a rule of jus cogens. Accordingly, in addition to being bound not to torture NATO and ISAF are obligated to take effective measures to correct individual cases of torture or requesting the return of detainees transferred to Afghanistan National Security Forces (ANSF) if the Government of the Islamic Republic of Afghanistan fails to comply with its obligations under relevant human rights law³² or humanitarian law³³. NATO's obligation for action arises whenever there are substantial grounds for believing that individuals under GORoA authority would be in danger of being subjected to torture³⁴. Further, because of the request for co-operation between ISAF and the GIRoA made by the United Nations Security Council, in the absence of related ICRC requests³⁵ NATO does not need to specifically satisfy itself of the willingness and ability of the Government of the Islamic Republic of Afghanistan to abide by its obligations concerning the prevention and suppression of torture³⁶.

⁽³¹⁾ Cf. Jean Pictet (ed.), *Commentary on GC IV (1958)*, at 269.

⁽³²⁾ Article 29 of the Constitution of Afghanistan provides that: "Torture of human beings is prohibited." In addition, the Islamic Republic of Afghanistan is party to the Covenant on Civil and Political Rights (<http://www2.ohchr.org/english/bodies/ratification/4.htm>) and to the UN Convention against Torture (<http://www2.ohchr.org/english/bodies/ratification/9.htm>).

⁽³³⁾ It is argued that, in any event by virtue of para 25 of UNSCR 1746 (2007), where the UN Security Council "calls upon all parties to uphold international humanitarian and human rights law", the Government of the Islamic Republic of Afghanistan is bound by common Article 3 of GCs I-IV. Note, however, that the Islamic Republic of Afghanistan is not a party to GP II.

⁽³⁴⁾ The "substantial grounds for believing" test derived from international humanitarian law (Article 12 of GC III, Article 45 of GC IV) is different from the variety of approaches towards a test offered by Amnesty International, which comprise concurrence in the Human Rights Committee's reference to a "risk of being subjected to torture ... (AI Report, at 9), a quote from a report where reference is made to a "real risk" (*ibidem*, at 10), and "substantial risk" (*ibidem*, at 13) and "grave risk" (*ibidem*, at 21). The proper qualification (if any) remains unclear – and with it the obligation allegedly resting on NATO (ISAF).

⁽³⁵⁾ Such requests would require NATO (ISAF) to follow Amnesty International's recommendation to ISAF troop contributing states to investigate allegations of torture: AI Report, at 36 (recommendation 3).

⁽³⁶⁾ Any such express request implicitly establishes that the co-operation so requested is legitimate, i.e. that the co-operating partners can rely on one another's adherence to the standards whose respect the Security Council deems necessary in accordance with international law. See para 25 of UNSCR 1746 (2007) and paras 4-5 of UNSCR 1776 (2007) concerning the request for co-operation by way of rendering assistance, close coordination and training, mentoring and empowering the ANSF. Obviously, actual acts of co-operation should pursue the aim to contribute to a climate ostracising torture and those torturing.

Meeting the Lawfare Challenge

Miscellaneous Issues

Apart from the questions discussed so far, the Amnesty International Report touches on a number of issues of international law that exceed the scope of this brief contribution. Nevertheless it is worthwhile to briefly address a few of them because they highlight additional steps that can be part of a lawfare campaign³⁷. First, Amnesty International contends the cases it reports are true despite the absence of any medical evidence of torture. This advocacy is an overt ploy to place the onus of disproving the Amnesty International Report in the responsibility of states, here, the Islamic Republic of Afghanistan, and international organisations, NATO and, more radically, shift the responsibility for upholding human rights away from states and international organisations to NGOs like Amnesty International. Second, while the reported cases are small in number, Amnesty International contends that they represent a pattern of torture for which the Islamic Republic of Afghanistan is internationally responsible and that they are symptomatic of NATO's conduct in Afghanistan rather than considering the possibility of isolated or sporadic deviations from a legitimate mode of conduct. Amnesty International substitutes voicing grave concerns or fears³⁸ for offering evidence, reinforcing its advocacy that the onus concerning alleged violations of the guarantees enshrined in international humanitarian and human rights law is reversed and that the responsibility to protect has shifted from states and international organizations to NGOs. Despite Amnesty International's wish, however, as a matter of law there is no reverse onus provision in the principles and rules concerning state responsibility and responsibility of international organisation³⁹. Third, Amnesty International applies the concept of complicity, which belongs to criminal law⁴⁰, to states and international organisations. For the purposes of a lawfare campaign the power of the pejorative term "complicity" better attracts publicity than a dispassionate reference to responsibility deriving from rendering aid or assistance to the commission of an internationally wrongful act⁴¹.

⁽³⁷⁾In particular, Amnesty International's recommendation for in-field transfers and transfer MoUs would require a more detailed analysis than is possible here.

⁽³⁸⁾AI Report at 13 and 18 & 32, respectively.

⁽³⁹⁾Both the ILC draft articles on state responsibility (see UN document A/56/10) and those on responsibility of international organisations (still under review; see UN document A/62/10, at 185sq) do not contain any evidentiary rules. Note that the Statute of the International Court of Justice is also silent on the matter, and that the Rules of Procedure for the International Court of Justice are confined to stipulating that "Witnesses and Evidence are in any case subject to close scrutiny by the Officers of the Court ..." (rule 7.2.5).

⁽⁴⁰⁾The International court of Justice has observed that the term "complicity" – used for instance in Article III of the Genocide Convention (1948) – refers to a well known category of criminal law and, as such, appears particularly well adapted to the exercise of penal sanctions against individuals. ICJ-Judgment of 26 February 2007 – case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), at para 167.

⁽⁴¹⁾As observed by the International Court of Justice in its judgment of 26 February 2007 (op cit., at para 419), that: "although 'complicity', as such, is not a notion which exists in the current terminology of the law of international responsibility, it is similar to a category found among the customary rules constituting the law of State responsibility, that of the 'aid or assistance' furnished by one State for the commission of a wrongful act by another State." The Court has held that it "sees no reason to make any distinction of substance between 'complicity in genocide', within the meaning of Article III, paragraph (e), of the Convention, and the 'aid or assistance' of a State in the commission of a wrongful act by another State within the meaning of the aforementioned Article 16 [of the ILC's Articles on State Responsibility] ..." (ibidem, at para 20).

Meeting the Lawfare Challenge

Fourth, regardless of its extensive quotes from United Nations documents, Amnesty International has not discussed whether there is international responsibility of the United Nations, through possible failure to act on the part of its Assistance Mission in Afghanistan (UNAMA), for the alleged cases of torture. Given the unified effort of the international community in Afghanistan, this omission is indicative of bias on Amnesty International's part. Fifth, and finally, although Amnesty International acknowledges that ISAF has authority to detain under its international mandate, it only addresses such detentions as form "an integral part of any justice system"⁴² rather than also tackling operational detentions that are a necessity in virtually all military operations.

Conclusion

Can we meet the lawfare challenge? As NATO lawyers or lawyers from NATO countries, we can at least make a significant contribution. I have tried to show how by demonstrating that the law concerning the universal ban on torture in general and "complicity in torture" in particular is less clear than asserted by Amnesty International. If the test developed by the International Court of Justice to establish Serbia's international responsibility for "complicity in genocide" is substituted for Amnesty International's conglomerate of assumptions, allegations and assertions, the question of whether ISAF is complicit in Afghan torture is clearly off point. On the basis of the test suggested NATO and ISAF could only be held accountable under international law if its personnel, or persons acting on its instructions or under its direction or effective control, furnished 'aid or assistance' in the commission of torture in Afghanistan⁴³. In my view, the cases discussed by Amnesty International in its report are insufficient to withstand this test either as a matter of fact or as a matter of law. Consequently, ISAF operations, in particular those conducted in co-operation with ANSF, continue to be fully legitimate and, on that basis, must be presumed lawful until proved otherwise. The question of what additional "counter-lawfare" mechanisms are required to generate success (not only in Afghanistan) remains, but in my view, this is an issue for policy-makers rather than lawyers.

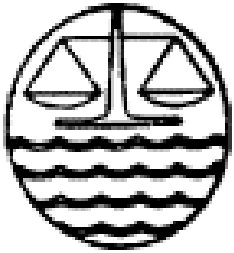
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⁽⁴²⁾ *AI Report*, at 2.

⁽⁴³⁾ *Cf. the judgment of the International Court of Justice of 26 February 2007 (op cit., at para 421).*

The Exercise of Enforcement Jurisdiction on the High Seas : Exemptions to Exclusive Jurisdiction of the Flag State

Lt Cdr Darren Reed GBR N – Legal Advisor MCC Northwood



PART 1 – The Exemptions under UNCLOS (United Nations Convention on the Law of the Sea)

Given the possible increase in the use of the High Seas by terrorists and other criminal groups and the corresponding response by States, including Member States of NATO, which involves using Navies for maritime law enforcement, this is the first in a brief series of three papers that will address the issue of when a ship belonging to one State can lawfully intercept¹ a ship of another State on the High Seas. This first paper will deal with the position under UNCLOS; the second will deal with exemptions under customary international law; and the third will look at the very real challenge that NATO faces in operating as an alliance in this area, with consideration of some recent incidents and example scenarios

Introduction

In *Mare Liberum* published in [1609](#), the Dutch jurist Hugo Grotius gave voice to the principle that the sea was international territory and all States were free to use it for peaceful purposes. Although this argument was opposed by my fellow countryman, John Selden, in *Mare Clausum* (1635), which argued that the seas could be appropriated just like any land territory, the former argument gradually found favour with a world more open to trading on the seas. Eventually a middle path was described by [Cornelius Bynkershoek](#) in his *De Dominio Maris* (1702), whereby maritime dominion was restricted to the actual distance within which cannon range could effectively protect it, which was about 3 nautical miles, thus leaving the remaining seas under the domination of no one State.

This position has been maintained in peacetime, with few changes, such as the increase in the size of the territorial sea and the creation of a zone contiguous to it and the principle of an Economic Exclusion Zone, since then. The United Nations Convention on the Law of the Sea 1982 (UNCLOS) codifies this principle of freedom of the seas:

“The high seas are open to all States...”² and that “no State may validly purport to subject any part of the high seas to its sovereignty”³.

That said, the High Seas do not exist in a moral or legal vacuum where everything is permitted and nothing is prohibited; the rule of law does not stop at the limit of a coastal State's Exclusive Economic Zone.

⁽¹⁾Such interception consisting of hailing, stopping, interrogating, boarding, searching, seizing and arresting the other vessel.

⁽²⁾ Article 87(1) UNCLOS.

⁽³⁾ Article 89 UNCLOS.

The Exercise of Enforcement Jurisdiction on the High Seas : Exemptions to Exclusive Jurisdiction of the Flag State

The High Seas



The High Seas are defined negatively in UNCLOS as “all parts of the sea that are not included in the economic exclusion zone, in the territorial seas or in the internal waters of a State, or in the archipelagic waters of an archipelagic State”⁴. UNCLOS states that the freedoms that attach to this area include the freedom of navigation⁵, overflight⁶, fishing⁷ and scientific research⁸, to lay submarines cables and pipelines⁹ and to construct artificial islands and installations¹⁰. These freedoms are subject to some minor restrictions and are to be exercised with “due regard for the interests of other States in their exercise of freedom of the high seas”¹¹.

Exclusive Jurisdiction of the Flag State on the High Seas

Given the principle that no State can “purport to subject any part of the high seas to its sovereignty”, the foregoing would tend to indicate that interference of those freedoms on the High Seas is very limited and, indeed, UNCLOS, based upon the customary international law position¹², reserves exclusive jurisdiction over ships on the High Seas to the flag State¹³. However, this jurisdiction does not appear to be absolute and there are a number of circumstances provided for in UNCLOS which allow a State, which is not the flag State, to interfere with a ship on the High Seas; furthermore there are a number of other exceptions to the flag State’s exclusive jurisdiction which are not included within that Convention, which will be the subject of further papers.

Ships with Total Immunity on the High Seas

There exist two classes of ships which have complete immunity from the interference of any other State apart from their own when on the High Seas; these are warships¹⁴ and ships used on government non-commercial service.¹⁵ Both types of ships are excluded from the discussions below¹⁶.

⁽⁴⁾ Article 86 UNCLOS.

⁽⁵⁾ Article 87(1)(a) UNCLOS.

⁽⁶⁾ Article 87(1)(b) UNCLOS.

⁽⁷⁾ Article 87(1)(e) UNCLOS.

⁽⁸⁾ Article 87(1)(f) UNCLOS.

⁽⁹⁾ Article 87(1)(c) UNCLOS.

⁽¹⁰⁾ Article 87(1)(d) UNCLOS.

⁽¹¹⁾ Article 87(2) UNCLOS.

⁽¹²⁾ As found by the Permanent Court of International Justice in *The Lotus Case* (France v Turkey (1927)) P.C.I.J. Reports, Series A, No 9 at 25 – “vessels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of freedom of the seas, that is to say the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them”.

⁽¹³⁾ “Ships shall sail under the flag of one State only and, save in exceptional circumstances provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas” - Article 92(1) UNCLOS.

⁽¹⁴⁾ Article 95 UNCLOS.

⁽¹⁵⁾ Article 96 UNCLOS.

⁽¹⁶⁾ Both types of ships will lose their immunity if their crew has mutinied, taken control of the ship and engaged in piracy (Article 102 UNCLOS), although it is arguable that on those events happening they have ceased to be a warship or a ship used in government non-commercial service.

The Exercise of Enforcement Jurisdiction on the High Seas : Exemptions to Exclusive Jurisdiction of the Flag State

Hot Pursuit

It seems logical that a State should be allowed some right, albeit limited, of pursuit of a vessel which has violated the laws and regulations of that State out of the State's territory and onto the High Seas and indeed this is what UNCLOS allows. Should a foreign ship fail to heed an order to stop and submit to a correct exercise of enforcement jurisdiction when the coastal State has "good reason to believe that the ship has violated the laws and regulations of that State", that ship may be pursued on to the High Seas and the coastal State may exercise enforcement jurisdiction over it there¹⁷. There are strict limits to this right, arguably the most important being that the pursuit must be commenced while the vessel is within the internal waters, territorial sea or the contiguous zone of the pursuing State and the right of hot pursuit will cease as soon as the ship pursued enters the territorial sea of its own State or of a third State¹⁸. Thus if a ship which has broken the State's laws is discovered by a warship of that State on the High Seas, the doctrine of hot pursuit will not operate.

Right of Visit

A warship¹⁹ has a certain limited jurisdiction (to board and search) if it encounters a ship on the High Seas not flying its flag and has reasonable grounds for suspecting²⁰ that that ship is:

- a. engaged in piracy;
- b. engaged in the slave trade;
- c. engaged in unauthorised broadcasting²¹;
- d. without nationality;
- e. in reality, of the same nationality as the warship²².

What the warship can do, having boarded the ship and had its suspicions confirmed, depends on what the ship is alleged to have done.

⁽¹⁷⁾ Article 111 UNCLOS.

⁽¹⁸⁾ Article 111(3) UNCLOS.

⁽¹⁹⁾ "a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer ... and manned by a crew which is under regular armed forces discipline" – Article 29 UNCLOS.

⁽²⁰⁾ Article 110 UNCLOS.

⁽²¹⁾ If there is a "link" between the unauthorised broadcasting and the State to which the warship belongs – Article 109 UNCLOS.

⁽²²⁾ If the ship is of the same nationality as the warship then the warship would be exercising flag State jurisdiction.

The Exercise of Enforcement Jurisdiction on the High Seas : Exemptions to Exclusive Jurisdiction of the Flag State

Piracy

Piracy²³ is a crime of universal jurisdiction²⁴, which all States have a duty to cooperate to repress²⁵, and consequently the warships of any State may seize and arrest pirate ships and/or pirates on the High Seas²⁶. Furthermore, the courts of the State that carried out the arrest can then try the case, i.e. that State not only has enforcement jurisdiction but adjudicative jurisdiction. It is not the case that the pirate vessel becomes stateless²⁷, but merely that States other than the flag now have jurisdiction over the vessel. Unfortunately, there is no right, analogous to hot pursuit, that allows a warship to pursue a pirate vessel from the High Seas into the territorial seas of another State. What should happen is that the pursuing ship should inform the coastal State, whose territorial seas the pirate vessel has entered, of this fact and then ask whether any assistance is required. Continuing to pursue, having failed to gain such consent would not be an exercise of "innocent passage" through the territorial seas of that coastal State and therefore would be a breach of international law²⁸. That said, all States are under a duty to repress piracy²⁹ and a failure of the coastal State to take any action in the scenario suggested, may be a breach of that duty which may eventually lead to the pursuing States or other States taking countermeasures³⁰.

(23) Defined, at Article 101 UNCLOS, as consisting of any of the following acts:

- "(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:*
 - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;*
 - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;*
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;*
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)."*

(24) The universal principle as a basis of jurisdiction maintains that certain offenses are so heinous and so widely condemned that any State may apprehend, prosecute, and punish that offender on behalf of the world community regardless of the nationality of the offender or victim. Piracy has long been treated as an exceptional case requiring exceptional measures, indeed as long ago as the 1st century BC, Cicero described pirates as "hostis humani generis".

(25) Article 100 UNCLOS – but note the duty is on States not individual warships which, arguably, would still be required to seek permission from their State before taking any action against pirates.

(26) Article 105 UNCLOS.

(27) "A ship ... may retain its nationality although it has become a pirate ship... The retention or loss of nationality is determined by the law of the State from which such nationality was derived." – Article 104 UNCLOS.

(28) As it would be an activity not having a direct bearing on passage – Article 19(2)(f) UNCLOS.

(29) Article 100 UNCLOS.

(30) Pursuant to Article 49 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts 2001 – i.e. State A fails to repress piracy, this is a breach of an international obligation, other States in the region (and, arguably States trying to repress piracy in the region) are injured and thus take countermeasures which consist entirely of pursuing pirates from the High Seas into State A's territorial seas in order to effect an arrest or seizure. This may involve some stretching of Article 105 UNCLOS, which limits seizure and arrest to "the high seas". That said, the act may fall within the definition of piracy if it takes place on the high seas or in a place "outside the jurisdiction of any State" (Article 101(a)(i)), which tends to suggest that there may well be some latitude in interpreting the area in which the arrest can take place.

The Exercise of Enforcement Jurisdiction on the High Seas : Exemptions to Exclusive Jurisdiction of the Flag State

The Slave Trade

Despite being equally heinous, slave trading is not a crime of universal jurisdiction and therefore only the flag State has the power of seizure and arrest on the High Seas. This would lead to the situation where after State A has stopped and boarded State B's vessel and discovered that that ship is in fact engaged in the slave trade, State B would have to take over or, more likely, give its consent from State A to act as its agent, which would no doubt entail State A escorting the ship into a port under the jurisdiction of State B. There is an expectation that State B would cooperate under its overarching duty to prevent and punish slave trading on ships flying its flag³¹.

Unauthorised Broadcasting

It is important to bear in mind that UNCLOS is a creature of its time and thus while today the issue of unauthorised broadcasting is seemingly not high on any State's agenda, it was in the mid part of the last century³². Nevertheless it gives wide powers of both enforcement and adjudicative jurisdiction to States other than the flag State, and a duty to use such powers, which are analogous to piracy³³.

⁽³¹⁾ "Every State shall take effective measures to prevent and punish the transport of slaves in ships authorised to fly its flag and to prevent the unlawful use of its flag for that purpose" – Article 99 UNCLOS.

⁽³²⁾ As evidenced by the European Agreement for the Prevention of Broadcasting from Stations Outside National Waters 1965.

⁽³³⁾ Article 109 UNCLOS states that:

- "1. All States shall cooperate in the suppression of unauthorized broadcasting from the high seas.
2. For the purposes of this Convention, "unauthorized broadcasting" means the transmission of sound radio or television broadcasts from a ship or installation on the high seas intended for reception by the general public contrary to international regulations, but excluding the transmission of distress calls.
3. Any person engaged in unauthorized broadcasting may be prosecuted before the court of:
 - (a) the flag State of the ship;
 - (b) the State of registry of the installation;
 - (c) the State of which the person is a national;
 - (d) any State where the transmissions can be received; or
 - (e) any State where authorized radio communication is suffering interference.
4. On the high seas, a State having jurisdiction in accordance with paragraph 3 may, in conformity with Article 110, arrest any person or ship engaged in unauthorized broadcasting and seize the broadcasting apparatus."

The Exercise of Enforcement Jurisdiction on the High Seas : Exemptions to Exclusive Jurisdiction of the Flag State



Vessels Without Nationality

While States are under an obligation to fix conditions for the grant of their nationality to ships³⁴, ships are under no obligation to have a nationality or to sail and thus to sail under a flag. However, if the ship has no flag State, the international customary law position is that it cannot benefit from the protection of any State³⁵. That is not to say that the crew of such a ship are without protection of any State since they will be citizens of some State and thus fall within their jurisdiction (and, arguably, protection) under the passive personality principle³⁶. Thus to interfere with either their personal or property rights on the High Seas (i.e. outside the territory of any nation) would, arguably, require some sound legal basis, if for no other reason than to avoid a diplomatic incident.

End Note

As we can see, while UNCLOS on the one hand reserves exclusivity of jurisdiction to the flag State over its ships on the High Seas, it also allows, in a very few exceptions, other States to exercise their own jurisdiction. However, there continue to exist other further exceptions under customary international law and these will be the subject of the next article.

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⁽³⁴⁾ Article 91 UNCLOS.

⁽³⁵⁾ So held the Judicial Committee of the Privy Council in *Molvan v Attorney-General for Palestine* [1948] A.C. 351, at 369 "No question of comity nor of any breach of international law can arise if there is no State under whose flag the vessel sails... having no [flag]... the Asya could not claim the protection of any State nor could any State claim that any principle of international law was broken by her seizure."

⁽³⁶⁾ The principle whereby jurisdiction is based on the nationality of the victim, irrespective of where the crime occurred or the nationality of the offender.

Spotlight



Major Ismail

Pamuk

Legal Advisor

NRDC-T



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Rank/Service/Nationality: Major, Military Judge, TUR

Job title: Legal Advisor to the Commander of NATO Rapid Deployable Corps - Turkey

Primary legal focus of effort: Public International Law (PhD student), Military Penal and Disciplinary Law.

Likes: Fishing and swimming.

Dislikes: Shopping.

When in Istanbul, everyone should: Follow our cultural program and spend the 26 and 27 April in Istanbul to see more.

Best NATO experience: ISAF VII deployment as Legal Advisor to COM ISAF.

My one recommendation for the NATO Legal Community: Come and see the other fantastic touristic places of Turkey.



HAIL

&

FAREWELL

Hail

KFOR : LT COL Gilles Castel (FRA A) joined in March 2008

ARRC : Mrs. Carlene Smith joined in February 2008

NCSA : Mrs. Suzannah Threlfall (GBR CIV) joined in March 2008

NATO HQ : Mr. Benedikt Stoiber joined on March 10, 2008

Farewell

KFOR : LT COL Thomas Toussaint (FRA A) left in March 2008

ARRC: Mrs. Janet White left in February 2008

GENERAL INTEREST/UPCOMING EVENTS

- *NATO to strengthen cyber defence role*. Article published on February 13, 2008 which informs on the set up of a new body to coordinate responses to cyber attacks carried out against NATO members.

<http://www.euractiv.com/en/infosociety/nato-strengthen-cyber-defence-role/article-170274>

- The Legal Advisors to HQ SACT and SHAPE invite the greater military legal community to a NATO Legal Training Conference to be held in Oberammergau, Germany at the NATO School. The Conference is scheduled for Wednesday 14 May through Friday 16 May. This Conference immediately precedes the NATO Legal Advisor Course, which will be held May 19-23.

The purpose of the Conference will be to share current initiatives on training forces on the legal issues connected with multinational operations. Legal Advisors who support NATO, national, and multinational training commands (such as the PfP Training Centres) are invited, both to attend and to present on the legal training provided by their commands.

More detail will be forthcoming in an invitation letter that will be disseminated through the National Liaison Representatives to HQ SACT. Those who are interested in attending can contact CDR Jaimie Orr, USA -N, HQ SACT Deputy Legal Advisor, at orr@act.nato.int.

- Information on environmental badge required for green zones in Germany can be found at :

<http://www.umwelt-plakette.de/umweltplakette/Ausland/Englisch/2008%20Webinfo%20Englisch.pdf?SID=8nodop1fn6jf3idr5drcik3d5>

- Please check <http://www.nato.int/shape/opinions/2008/s080228a.htm> for the speech given by Mr. Vaclav Havel, First President of the Czech Republic at SHAPE on February 28, 2008
- February Issue of the United Nations Newsletter posted on the United Nations Regional Information Centre for Western Europe.

http://www.unric.org/index.php?option=com_content&task=category§ionid=4&id=33&Itemid=155

- Article by Christopher J. Borgen on Kosovo's Declaration of Independence : Self-Determination, Secession and Recognition.

<http://www.asil.org/insights/2008/02/insights080229.html>

All great ideas are
controversial, or have
been at one time

Georges Seldes

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 laws of a nation forms
the most instructive portion
of its history – **Edward**
Biggon

GENERAL INTEREST/UPCOMING EVENTS

- 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.
- The next NATO Operational Law Course will take place at the NATO School from July 7 to 11, 2008.

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)

Committee – a group of men
who individually can do nothing,
but as a group decide that
nothing can be done – **Fred**

Allen



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