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Special Interest Articles

Introduction

Fellow Legal Professionals and Persons Interested in NATO,

Our thirteenth electronic NATO Legal Gazette contains five sections:

-*Special Interest Articles*—contributed in this issue by Belgian, British, Canadian, and Dutch attorneys serving in NATO;
-*Spotlight*—a picture and brief biographical information about one specific NATO legal professional;
-*Hail and Farewell*—our constant update of the changes of personnel within our NATO legal community that includes 32 legal offices in 19 countries;
-*General Interest/NATO in the News*—a current compilation of links to articles or statements about NATO; and
-*Upcoming Events*—where a description and calendar of courses, workshops, or other events that are of interest to the NATO legal community are provided.

As with our previous 12 issues, the goal of this Gazette is to share legal knowledge between NATO legal offices and with legal professionals working in national billets, International Organizations, or academia. We depend on the enthusiasm and support from our reading audience for the articles we publish. Please share this issue of the Gazette with others who are interested in NATO or international law. Please send us articles that you believe would be of interest to our broad community of readers. If you have an event, conference, or training program that you wish to publish to the NATO community, please provide us the details so that we may include it in our calendar.

Thanks to the help of several authors, we expect to publish issue 14 at the end of May that will include highlights from the 2008 NATO Legal Conference but we will endeavor to provide summer legal reading for June, July, and August with your assistance. I look forward to any comments or recommendation you may have concerning the Gazette and your future articles!

Sincerely,

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Amnesty International Canada et al v. Attorney General of Canada et al Federal Court of Canada – 7 February 2008

Lt Col Sylvain Lavoie - SHAPE

Context

On February 1st, 2007, Amnesty International Canada et al (AIC) filed an application for judicial review with respect to the transfers of detainees to Afghan authorities[1]. AIC alleges that the arrangements between Canada and Afghanistan do not provide adequate safeguards so as to ensure that transferred detainees are not exposed to a substantial risk of torture. It is in this context that AIC sought an interlocutory injunction prohibiting the Chief of the Defence Staff for the Canadian Forces, the Minister of National Defence, and the Attorney General of Canada (hereafter the "Canadian authorities") from transferring detainees to Afghan authorities or to the custody of any other country, pending the determination of their application for judicial review.

Reasons for order and order

The Court found that the evidence adduced clearly established the existence of very real concerns as to the effectiveness of the steps that have been taken thus far to ensure that detainees transferred to the Afghan authorities are not mistreated. The Court was, however, advised that the transfer of detainees had ceased, at least temporarily. to the right of AIC to renew their request should detainee transfers resume.

[1] *AIC also sought an interim injunction restraining the transfer of detainees until the hearing of the application for judicial review.*

Given the uncertainty surrounding the resumption of transfers and the lack of clarity with respect to the conditions under which those transfers might take place, the motion for an interlocutory injunction was dismissed, without prejudice to the right of AIC to renew their request should detainee transfers resume.

Interesting issues raised in the decision

The decision as to whether detainees should be retained in Canadian custody, released, or transferred is within the sole discretion of the Canadian Commander of Joint Task Force Afghanistan. Before transferring a detainee, the Commander must be satisfied that there are no substantial grounds for believing that there exists a real risk that the detainee would be in danger of being subjected to torture / mistreatment.
On 19 Dec 05, a first arrangement for the transfer of detainees between Canada and Afghanistan was signed. In February 2007, following AIC's application for judicial review coupled with a motion for an injunction with respect to the transfers of detainees to Afghan authorities, the Canadian Forces signed an exchange of letters with the Afghan Independent Human Rights Commission (AIHRC) emphasizing the role of the AIHRC in monitoring detainees.
On 3 May 2007, one day before AIC's motion for an injunction was scheduled to be heard, Canada and Afghanistan concluded a second arrangement (supplementing the first one) requiring, among other things,
(1) that transferred detainees be held in a limited number of detention facilities,
(2) that Canadian approval be given before further transferring detainees to a third country, and
(3) that allegations of abuse / mistreatment be investigated by Afghan authorities. As a result of that second arrangement, the injunction motion was adjourned.

AIC subsequently developed concerns with respect to the efficacy and sufficiency of the protections afforded to detainees under the second arrangement and in November 2007 renewed their injunction motion. On 22 January 2008, two days before the hearing of the motion, the Canadian Forces advised AIC that they had suspended detainee transfers on 6 November 2007.

Amnesty International Canada et al v. Attorney General of Canada et al Federal Court of Canada – 7 February 2008

The day of the hearing, BGen Deschamps[2] testified that the suspension of transfers was temporary in nature, and that the Canadian Forces remained committed to the ISAF policy of transferring detainees to the Afghan authorities[3].

The Court found that the evidence adduced by the AIC was very troubling and created real and serious concerns as to the efficacy of the current detainee safeguards[4]. The Court reports that eight complaints of prisoner abuse were received by Canadian personnel conducting site visits in Afghan detention facilities between May 3rd and November 5th, 2007. These complaints were allegedly investigated by Afghan authorities and found to be without merit. Canada, however, has no independent capacity to investigate allegations of mistreatment of detainees in Afghan custody, as to do so would encroach on Afghan sovereignty.

[2] BGen Deschamps is the Canadian Expeditionary Forces Command Chief of Staff. He is responsible for overseeing operations for the Canadian Forces deployed outside of Canada.

[3] It is indeed the avowed intention of the Canadian Forces to resume detainee transfers as soon as satisfied that it can do so in accordance with its international obligations.

[4] E.g. deficiencies in record keeping, missing detainees, denial of access to Afghan detention facilities, complaints of mistreatment, the need to rely on Afghan investigations of allegations of mistreatment, Afghanistan's human rights record, etc.

The "smoking gun" - clear evidence of abuse

On November 5th, 2007, while conducting a site visit at the National Directorate of Security detention facility in Kandahar City, Canadian personnel met a detainee who claimed that he had been beaten with electrical wires and a rubber hose while he was interrogated. The detainee also stated where the instruments that had been used to beat him had been concealed. The Canadian personnel then located a large piece of electrical wire and a rubber hose. Moreover, the large bruise that had been observed on the detainee's back was consistent with the beating described by the detainee. The decision to suspend detainee transfers was taken as a consequence of the receipt of this particular complaint.

The Court stated that as a result of these concerns, the Canadian Forces will undoubtedly have to give very careful consideration as to whether it is indeed possible to resume detainee transfers in the future without exposing detainees to a substantial risk of torture. The Canadian Forces have indicated that it will not resume transfers unless it is satisfied that it can do so in accordance with its international obligations.

Reference to General Ramms

It is particularly interesting to note that in the Court's reasons not to make any order as to costs, Madam Justice Mactavish refers to General Ramms' interview with Deutsche Welle on 14 November 2007. She says that "General Ramms discussed the state of NATO's knowledge of detainee mistreatment at the hands of Afghan authorities[5]. She then adds that AIC were in fact, or should have been, aware of the suspension of detainee transfers by the end of November 2007 at the very latest since a report of General Ramms' interview with Deutsche Welle was indeed produced by AIC as an exhibit dated 29 November 2007.

[5] Madam Justice Mactavish then quotes General Ramms' comment to the effect that "Canadian troops in Kandahar province stopped handing over prisoners until their safety and human rights could be guaranteed."

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MEETING THE CHALLENGE OF EXPORT CONTROL IN NATO PROCUREMENT

by Mr. Vincent Roobaert (NC3A)*

Introduction

Given NATO's activities, export control rules and regulations are an important factor to take into account when procuring goods and services for NATO and its members. When such procurement involves companies located in the various NATO member States, as is usually the case for large scale projects, compliance with export control rules may be challenging. Based on NC3A's experience in relation to export control, this article aims at explaining some of the challenges faced when procuring goods and services for NATO and its members States and at providing some tips when dealing with goods or services subject to export control rules. A quick introduction to export control rules is first provided as background.

A brief overview of export control

Export controls can broadly be defined as a set of rules and regulations, whether legally binding or not, to control the export of military and dual use technologies and, where relevant, prohibiting export to recipients, whether States and non-state actors (e.g., companies) that raise security concerns to the controlling State(s). As such, export control rules aim at preserving the strategic military advantage derived from a State's military technologies.

In recent history, the origin of modern export control rules and regulation can be traced back to the creation in 1949 of the Coordinating Committee on Multilateral Export Controls ("COCOM") to prevent Western companies and States from exporting sensitive technology to the Eastern European block[1]. As is still the case with current export control systems, the control carried out by COCOM was based on three lists of items (the so-called "list of controlled goods"): the international munitions list, the international atomic energy list and the international industrial lists. The latter covered goods that could have both civilian and military applications (the so-called "dual-use" items).

Today, export control rules originate from four types of instruments: international treaties, decisions adopted within the framework of multilateral export control regimes, regional legislation and national legislation.

First, international treaties such as the Treaty on the Non-Proliferation of Nuclear Weapons of 1968[2] ("NPT"), the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction of 1972[3] ("BWC"), the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction of 1993[4] ("CWC") and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction of 1997[5] ("LC"), all contain prohibitions of transfer, whether direct or indirect, to any recipient of the goods, materials and/or weapons covered by the respective treaties. The particularity of the BWC, the CWC and the LC, however, is that they also contain a prohibition on the manufacture of said materials, equipment and/or weapons for the signatory State as well.

** This article reflects the views of the author only and does not represent the official opinion of NC3A, NATO or individual governments.*

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[1] Although often referred to as the "economic arm" of NATO, not all NATO members participated in COCOM. COCOM also included non NATO members (e.g. Japan).

[2] Full text at, among others, http://www.un.org/events/npt2005/npttreaty.html.

[3] Full text at http://www.opbw.org/.

[4] Full text at http://www.opcw.org/.

[5] Full text at http://www.icbl.org/treaty/text.

This is at variance with multilateral export control regimes whereby the controlling State retains the right to manufacture the items identified in the control list but reserves the right to control, limit or prohibit transfer and export of certain technologies to certain recipients. There are currently five multilateral export control regimes[6]: the Nuclear Suppliers Group[7] ("NSG") and the Zangger Committee[8], both dealing with nuclear technology, the Australia Group[9] ("AG") which deals with biological and chemical weapons, the Missile Technology Control Regime[10] ("MTCR") and the Wassenaar Arrangement[11] ("WA") which covers dual-use technology.

The multilateral export control regimes are informal groups of States committed to preventing proliferation. They work on the basis of consensus. Participating States may then implement the decisions of the group in their national rules and regulations. All these multilateral export control regimes work on the basis of a list of controlled items, which may be – and should be – reviewed as technology evolves. In addition to specific items, the multilateral export control regimes provide for catch-all controls, allowing the control of an item that is not mentioned on the list of controlled items when it is known that this particular item may ultimately be used for prohibited activities. All regimes provide for a periodic notification of all members of all export control licence that the participating States have denied. Depending on the regime, States may also need to comply with a "no-undercut" rule and notify other members before granting a licence for an item on the list of controlled goods. The "no-undercut" rule aims at preventing or limiting the possibility for a member of the regime to grant a licence that is identical or similar to a licence denied by another member.

A third source of export control rules stems from regional legislation such as EU Regulation (EC) No. 1334/2000 setting up a Community Regime for the Control of Export of Dual-Use Items and Technology. Finally, the fourth source of export control rule is national legislation by which a State implements and/or expands the rules found in international treaties and/or the decisions adopted within the framework of the multilateral export control regimes of which that particular State is a member. Examples of such national legislations include the US Arms Export Control Act and International Traffic in Arms Regulations[12] ("ITAR").

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[6] *For more information on these regimes, see Daniel Joyner (ed.), Non-proliferation Export Controls. Origins, Challenges, and Proposals for Strengthening, Ashgate, 2006, which was reviewed in Issue 11 of the NATO Legal Gazette.*

[7] *For more information on the NSG, including participating States and decisions, see http://www.nuclearsuppliersgroup.org/.*

[8] *For more information on the Zangger committee, its role and its members, see http://www.zanggercommittee.org/Zangger/NPT/default.htm.*

[9] *For more information on the AG, including participating States and decisions, see http://www.australiagroup.net/en/index.html.*

[10] *For more information on the MTCR, including participating States and decisions, see http://www.mtcr.info/english/index.html.*

[11] *For more information on the WA, including participating States and decisions, see http://www.wassenaar.org/*

MEETING THE CHALLENGE OF EXPORT CONTROL IN NATO PROCUREMENT

Impact on NATO procurement

Considering NATO's activities, a great share of services, equipment and systems procured and used by NATO and its members may fall under the scope of export control regulations. Indeed, although NATO member States form part of a closed group of like-minded Nations that share similar security concerns, exports of controlled technologies from one NATO State to another remain largely subjected to the requirement for export licences[13]. The primary responsibility for complying with export control rules should rest with the private contractor, which is, usually, aware of the intricacies of its national export control rules and administration. Nevertheless, it is essential for the end customer (i.e., NATO or its member Nations) to be involved early on as well in the export control process, if only for ensuring that the scope of the export authorisation granted by the licensing authority will match the scope of the project and the intended end-use of the services, systems and equipments.

Challenges raised by export control regulations in NATO procurement

It is very common for large scale NATO projects to be carried out by companies located in different NATO Member States. For example, a prime contractor located in the US may have subcontractors located in the U.K. and Germany. If the work carried out by the US prime contractor is ITAR controlled, the U.K. and German company will be limited in their use of the goods, services or technical data provided by the US company for the purpose of performing the sub-contracts. Similarly, it is possible that U.K. and German export control rules may kick in as well, depending on the work carried out by these U.K. and German companies. Hence the importance to assess early on the involvement of each company, whether they act as prime contractors or as subcontractors, to determine which export control regulations may apply and which employees of these companies shall perform the actual work and receive the information from the US contractors.

Under export control rules, identification of all companies involved in the project, in any capacity (*i.e.*, prime contractor or subcontractor) remains the rule before an export licence can be granted[14]. In certain cases, NATO has difficulties meeting this requirement. When procuring goods and services, it is not always possible to know before awarding a contract which companies will bid and participate to the subsequent contract. There are also certain risks linked to requesting export control licences after awarding a contract as there is no certainty that the licensing authority will approve the companies involved in the effort. Should they refuse a particular company, the awarded contract would then need to be terminated which results at a minimum in a delay of the underlying project.

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[13] Exceptions include the Canadian exemption found in Section 126.5 of the ITAR, which allows for the export of certain defence articles to Canada without a licence, under certain conditions and the recent Defence Trade Cooperation Treaty signed on 26 June 2007 by the US and the UK to alleviate the need for licences in certain cases. In the past, other exemptions were proposed by then US Secretary of State Albright as part of the Defence Trade Security Initiative but were opposed by the US Congress. On this last point, see, Y. Aubin and A. Idiard, op. cit., p. 346.

[14] Under certain conditions and national laws, blanket authorizations may be granted.

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Depending on the applicable national law(s), the preparation, approval and execution of ancillary agreement(s) and document(s) such as Technical Assistance Agreements ("TAA") and end-user certificates may be required for the performance of the contract or even for the company to submit its bid. This may be a lengthy process depending on the time required by the national export control authority for processing and approving the required documentation. When time is of the essence, disregarding this aspect of export control may result in unacceptable delays in performing the contract.

Once the export licence and ancillary agreements are executed, the export control rules and regulations should not be forgotten. On the contrary, there is a need for following up to satisfy the requirements imposed by these rules and the obligations or the ancillary agreements. Attention should particularly be paid to retransfer, which usually requires prior approval of the controlling authority, and disclosure of the controlled information to dual nationals. Under certain national rules, such as the ITAR, disclosure of the information to certain dual nationals may be prohibited (*e.g.*, a German/Iranian engineer of a German company) or conditioned upon the execution of a non-disclosure agreement. This may also require companies employing staff from various countries to set up Chinese walls and tightly control the information.

In the past, some of these challenges have proven extremely burdensome for NATO. Some of the requirements mentioned above, which were designed to prevent unauthorised disclosures of controlled information by private companies are clearly not adapted when the recipient is NATO. In certain cases, restrictions imposed by national authorities actually prevent NATO from completing its mission in accordance with its own rules and regulation. In the worst case, cooperation with companies from certain countries may result in preventing NATO from freely using the information and documents that it has itself generated if these have been commented upon by a private company and that the input provided falls under the activities controlled by national export control rules. Under US law for example, the incorporation of ITAR controlled equipments or services into NATO owned equipments, services and documents entails that the end result becomes ITAR controlled. Although this may not raise issues in certain cases, it is problematic when NATO generated documents modified with the input of a US company need to be further circulated to other NATO nations or industry and/or used for downstream procurement. In such a case indeed the whole document becomes ITAR controlled and further disclosure requires the prior approval of the US.

The above issues probably stem from a lack of understanding of NATO's structure and existence as a legal entity, different from that of the member States and from a lack of knowledge of NATO rules and regulations in relation to procurement. One can therefore only wish that NATO member States would extend to NATO some of the more favourable export control regime that they have put in place with some of their closest allies (such as the agreements between the US and Canada and the US and the UK). Both NATO and its member States would benefit from a more flexible export control regime while the security risk would be limited as the information would remain within the borders of the NATO member States.

MEETING THE CHALLENGE OF EXPORT CONTROL IN NATO PROCUREMENT

Some Final tips for the Export Control Amateur

Finally, when handling an export control issue, we would recommend the following:

- have a clear understanding on the envisaged use of the services and equipment and their potential mid-term future use;
- know who will be involved in the project: NATO agencies, governments, private companies;
- incorporate the timing for reviewing the export control documentation and having them approved/reviewed by the relevant authorities in your project plan;
- ensure that you review the export control documentation and ancillary agreements such as TAA's before they are submitted for approval to the export control authorities. Subsequent amendments to the documents will require new approval from the export control authorities;
- set up and regularly update a list of all dual nationals in your organizations; and
- insert appropriate wording to ensure that your organization remains free to use the information that it has generated.

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

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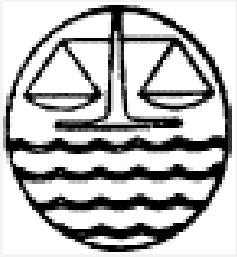
Part 2 – The Exemptions under Other Treaties and Customary International Law

In the previous part of this paper published in Issue # 12 (March 14) , I discussed the exemptions to the exclusivity of jurisdiction of the flag State over its ships when they are on the High Seas under the United Nations Convention on the Law of the Sea (UNCLOS). In this part I will briefly outline the exemptions which may exist under customary international law[1], outside those codified by UNCLOS before moving on to the issue of at what level consent can be given to ensure that a boarding on the high seas complies with international law. I should also state from the outset that these exemptions are less clear than those in UNCLOS and therefore it is more difficult to encapsulate all views.



Introduction

While UNCLOS itself, following on from the Law of the Sea Convention 1958, codified much of the customary international law of the sea, arguably it did not encapsulate all previous law in this area. Consequently there are some exemptions to the flag State exclusive jurisdiction on the high seas that may continue to exist despite UNCLOS.

Right of Reconnaissance

Perhaps the most common rule under pre-existing customary international law (as evidenced by the United States position)[2], was a right of "Reconnaissance"; this gave a warship the right to approach a vessel on the high seas and request her to identify herself. However, this right was always strictly limited and consequently there is no duty placed upon any vessel so "hailed" to respond at all. This right should not be confused with a warship's right of visit in certain circumstances under UNCLOS.[3]

Constructive Presence

A corollary of hot pursuit is the principle of constructive presence. This principle allows a foreign vessel to be treated as if it were actually located at the same place as any other craft with which it is cooperatively engaged in the violation of the law.
The principle is most commonly used in cases involving mother ships which use contact boats to smuggle contraband into a coastal State's territorial waters, i.e. if boats from one ship were committing criminal acts within an area over which the coastal State has jurisdiction, that State would have jurisdiction over the mother ship as if she too were located in the territorial sea.[4]

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[1] *Article 38 of the Statute of the International Court of Justice states that "the Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply… international custom, as evidence of a general practice accepted as law" alongside treaties and general principles of law.*

[2] *"In respect of ships of war… there is no reason why they may not approach any vessels described at sea, for the purpose of ascertaining their real characters. Such a right seems indispensable for the fair and discreet exercise of their authority; and the use of it cannot be justly deemed indicative of any design to insult or injure those they approach, or to impede them in their lawful commerce." The Marianna Flora 24 U.S. (11 Wheat.) 1, 43-44 (1826).*

[3] *Article 110 UNCLOS*

[4] *R v Mills (1995)*

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

A vessel's right of individual self defence

Customary international law has long allowed States to take action to defend themselves from an attack and indeed this right has been preserved in the UN Charter.[5] Similarly, a right of self defence can be found in the legal systems of the majority of States and one can safely assume that all States have enacted laws which not only permit an individual to take measures to defend themselves and possibly others from an unlawful attack but regulate the type and quantity of force that can be used.[6] The extent of the actions that one can take to defend oneself or another will vary considerably between States[7] but the principle is, at least, clearly established.

Therefore it would appear that ships have a right to defend themselves, in accordance with the laws of their flag State on the high seas. Thus, if a ship from one flag State (A) is attacked by a ship from another flag State (B) then the former can take action against to defend itself from the latter. At the risk of over-complication, the actions of the ship in defending itself involve an exercise in enforcement jurisdiction against the other vessel; A is enforcing its rights derived under A's law (i.e. its right to self defence) against B and the effect of that is being felt by B and thus infringes the exclusivity of B's flag State jurisdiction.

A vessel's right to defend another

Let us now introduce a further vessel (C), a warship which is of a different flag State altogether. C has seen B attack A and, ignoring for one moment the myriad factors that will need consideration[8], believes that such an attack is unlawful and A has requested its assistance. Arguably it too, utilizing the widely held principle of defence of another and/or under the duty to render assistance[9], could take action against B.

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[5] Article 51.

[6] In English law, the basic principles of self-defence are set out in Palmer v R, [1971] A.C 814 :"It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but only do, what is reasonably necessary." The common law approach as expressed in that case and other authorities, is also relevant to the application of section 3 Criminal Law Act 1967: "A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large."

[7] Contrast the above statement as to the law with article 9.42 of the Texas Penal Code which allows a householder to use deadly force against a burglar at night in order to protect their property (an action which would lead to a conviction for murder in the UK (see R v Martin [2002] 1 Cr. App. R.27; Martin had shot two people engaged in burgling his home, killing one and wounding the other. At trial he unsuccessfully raised the defence of self defence and was convicted of murder).

[8] For example, whether the incident is taking place within an armed conflict, whether B is lawfully attacking A etc…

[9] Article 98 UNCLOS states that "Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers: (a) to render assistance to any person found at sea in danger of being lost; (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him…" It is debatable whether that duty would be complied with if a modern and large warship, with overwhelming firepower, did not go to the assistance of, say, a fishing vessel that was being attacked by another fishing vessel, there being in that case no serious danger to the warship or its ship's company.

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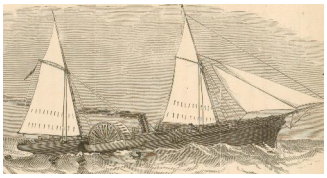
This may go further than what A could do (presuming A to be a merchantman) and could involve the seizure and arrest of B. What would happen then (i.e. arrest followed by trial) would largely depend on the reasons for B's attack in the first place (was it a piracy incident for instance?) and the reaction of B's flag State not to mention A's. But it involves more than a mild exercise of enforcement jurisdiction of one State over another State's vessel.

The wider concept of self-defence

The above is relatively straightforward (A physically attacks B on the high seas), but opinion is divided as to whether the right of self defence can be claimed in the absence of an actual armed attack on a State or its ships at sea. Let me explain by way of a couple of very brief examples where different conclusions have been drawn.



The Virginius

In 1873 Spain seized the US flagged ship *Virginius* while it was on the high seas; this was done on the pretext that she was carrying both men and arms to the insurrectionists in Cuba. The Spanish confiscated the arms and executed the men; they justified their actions on the grounds of self defence; the UK but not the US, accepted that justification. Just under a century later, the French during the Algerian emergency (1956 to 62) argued (in the *Duizar*[10] case) that they were justified in boarding and searching ships for arms bound for rebels in Algeria on the grounds of self defence (i.e. of the territory of Algeria, then French).

Some two decades later, during the Falklands War in 1982, the UK government reversed its previous approach of 1873 and deemed that the concept of self defence could not allow them to board and search vessels belonging to another State on the high seas for weapons being carried to forces fighting against them; such that the UK did not intercept a French ship on the high seas which was supplying arms to Argentina.

UNCLOS itself is silent on the matter, as was its predecessor (The High Seas Convention 1958). However, that is not to say that silence should imply that such a right doesn't exist. In fact it should come as no surprise that such a right is not encapsulated in that Treaty as it would obviously put those States who maintain large naval forces at an advantage over those that don't.
However, what appears clear is that, while there is no doubt that some sort of right of self defence to acts which don't amount to an armed attack exists, opinion is so divided on the issue that the exercise and extent of that right will be very much facts specific.

Prevention of Serious Crimes at Sea

The high seas are not immune from crime. Indeed there are many offences committed on the high seas whose effects are felt far and wide and which, arguably, could have such a negative effect on a State that it would feel that it had no option but to take action on the high seas regardless of the flag State of the vessel concerned. However, only a small number (e.g. piracy and, the rather arcane offence of, unauthorized broadcasting) actually made were codified in UNCLOS, so where does that leave the rest? I should start by saying that I am dealing here with serious crimes, e.g. murder, hijacking and large scale drugs trafficking….

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[10] *During the emergency, France had instigated a course of action of boarding and searching ships on the high seas. This was a large scale operation with over 1300 ships boarded and searched in the first year alone. The policy was challenged in the French administrative court but unfortunately the point was not addressed as the court believed that they had no jurisdiction to do so, Ignazio Messina et Cie v L'Etat (Ministre des armees marines), Adm Tribunal of Paris, 90 JDI 1192 (1965), 70 RGDIP 1056 (1966)*

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The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA) 1988 was the international community's first concrete attempt collectively to address this very issue. Its main purpose is to ensure that appropriate action is taken against persons committing unlawful acts against ships. These include the seizure of ships by force; acts of violence against persons on board ships; and the placing of devices on board a ship which are likely to destroy or damage it.[11] Article 8 covers the responsibilities and roles of the master of the ship, flag State and receiving State in delivering to the authorities of any State Party any person believed to have committed an offence under the Convention. Indeed if one stopped reading at that point it would seem that great inroads had been made on the exclusive jurisdiction of the flag State. However, Article 9 makes it clear that that is not the case and that the "status quo" has not been changed.[12]

The 2005 Protocol in addition to SUA[13] goes a little further and in Article 8b is notes that co-operation between flag States is expected and details the procedures to be followed if a State Party desires to board a ship flying the flag of a State Party when the requesting Party has reasonable grounds to suspect that the ship or a person on board the ship is, has been, or is about to be involved in, the commission of an offence under the Convention. However, the consent of the flag State is still required before such a boarding can be carried out.[14] That said, it does allow for a mechanism where consent may be implied if the State wishing to board receives no response from the flag State within four hours,[15] but the flag State still must acknowledge the request before the clock starts ticking. So no change then? Well no, arguably what the 2005 Protocol has done is to begin to create a presumption in favour of boarding and a legitimate expectation that any such request will be responded to positively by the flag State. In this respect the 2005 Protocol builds upon the groundwork already laid by the US led Proliferation Security Initiative (PSI); created in 2003 to combat the traffic in weapons of mass destruction.

Unlike the 2005 Protocol, the PSI provides a framework for bilateral agreements between the United States and others which presumes that consent would be given to a request for boarding if no reply has been received within 2 hours, half the time in the 2005 Protocol. Given that the States that the US has made such agreements with make up much of world registered shipping,[16] it is possibly not too far a jump to make from 2 hours to none. However, at present that may be a step too far, since it would dangerously erode the freedom of the high seas.

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[11] *Article 3 SUA 1988*
http://www.imo.org/Conventions/mainframe.asp?topic_id=259&doc_id=686

[12] *"Nothing in this Convention shall affect in any way the rules of international law pertaining to the competence of flag States to exercise investigative or enforcement jurisdiction on board ships not flying their flag". Article 9 SUA.*

[13] *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation.*

[14] *Article 8bis(5)(c)(iv) Protocol of 2005.*

[15] *Article 8bis(5)(d) Protocol of 2005.*

[16] *I.e. Panama, Liberia and the Marshall Islands.*

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Drug trafficking

The drafters of UNCLOS did not avoid the topic of drugs trafficking completely and indeed a provision addressing it can be found in that Convention,[17] but it is fairly anodyne, making no provision for a right of visit on reasonable suspicion analogous with unauthorized broadcasting. The UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) was a step forward but does little more in respect of boardings by warships of vessels flying another State's flag on the high seas than restate the accepted practice that consent is required from the flag State,[18] although like in SUA there is an expectation that consent will be given.[19] Pursuant to the international community's awareness of and cooperation in combating large scale drug trafficking, a number of bilateral "shiprider" agreements have been fashioned which allow for law enforcement agencies of one State to embark upon vessels of another State in order to enforce their State's law and rights over their flagged vessels or territorial sea from that other State's ship.[20] One argument, analogous to self defence, is that the threat posed by drugs trafficking to a State is so damaging that it justifies a conclusion that it amounts to an attack which would allow that State to take action in self defence by, say, interdicting vessels transporting drugs to it on the high seas. However, given the wide range of diverging opinion and the range of issues that would have to be addressed, examining that argument shall be left for another time.

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[17] *Article 108 UNCLOS:*
"1. All States shall cooperate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international conventions.
2. Any State which has reasonable grounds for believing that a ship flying its flag is engaged in illicit traffic in narcotic drugs or psychotropic substances may request the cooperation of other States to suppress such traffic."

[18] *Article 17 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) "(3) A Party which has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law, and flying the flag or displaying marks of registry of another Party is engaged in illicit traffic may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures in regard to that vessel. (4) In accordance with paragraph 3 or in accordance with treaties in force between them or in accordance with any agreement or arrangement otherwise reached between those Parties, the flag State may authorize the requesting State to, inter aria: a) Board the vessel; b) Search the vessel; c) If evidence of involvement in illicit traffic is found, take appropriate action with respect to the vessel, persons and cargo on board."*

[19] *Article 17(7) "For the purposes of paragraphs 3 and 4 of this article, a Party shall respond expeditiously to a request from another Party to determine whether a vessel that is flying its flag is entitled to do so, and to requests for authorization made pursuant to paragraph 3. At the time of becoming a Party to this Convention, each Party shall designate an authority or, when necessary, authorities to receive and respond to such requests."*

[20] *For example the "Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America concerning Maritime and Aerial Operations to Suppress Illicit Trafficking by Sea in Waters of the Caribbean and Bermuda" provides for shiprider programmes whereby a party's law enforcement officials embark on another party's government vessels to conduct counter-drugs operations. It gives the procedures to be followed for counter-drugs operations to be continued in another party's territorial waters, for overflights, and for boardings in international waters.*

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Consent

Following from the above, it is clear that one State may consent to the boarding by another State over its vessels on the high seas. The question of who can give that consent is slightly more contentious and arguably that is why some of the above mentioned treaties provide for a designated point of contact who can give consent. However, what of the position of the master of the vessel, could he give his consent to a warship of a different State to board his vessel at sea? This situation doesn't appear to be provided for in any of the treaties which make much of the need for flag State consent. By consenting to a boarding without his flag State's consent, the master would arguably be waiving the rights of his flag State and the question becomes whether he has the authority to do so. Masters of merchant vessels do have a number of powers available to them and can request assistance from the coastal State when in that State's territorial seas in cases of a crime occurring on board, seemingly without reference to the flag State. One argument is that masters could do the same on the high seas. The situation is very different as no one State can exercise any form of sovereignty over the high seas unlike the territorial sea. The master has authority under the blanket of the laws of his flag State but he can not simply throw off that blanket or decide who else can join him under it. That said, this is not the position adopted by some NATO States for whom master's consent is sufficient consent in some circumstances.

United Nations Security Council Resolutions

There is one key exception to the requirement to obtain flag State consent prior to boarding. As we are all aware, navies are often the key players in enforcing any embargos established by a United Nations Security Resolution. Activities undertaken pursuant to such a Resolution can involve stopping and searching vessels which fly the flag of a different State to the searching vessel on the high seas and are, at first glance, an exception to the principle of exclusive jurisdiction of the flag State. However, this would be to ignore the special role of the Security Council given to it by all member States of the United Nations. In short, all States are considered to have accepted its authority to act and thus can presume to have given their consent to its actions. Consequently, where a mandate to board and search exists, pursuant to a United Nations Security Resolution, there is no need to obtain the consent of the flag State prior to boarding as, arguably, it is deemed to have already been given (in effect making this argument somewhat circular).

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

Future Developments

There is nothing to prevent further customary law developing in this area post UNCLOS. Certainly the drafters of UNCLOS accepted that there would be occasions during which States would allow other States to usurp their exclusivity of jurisdiction on the High Seas.[21] However, those treaties which have been drafted have largely been ones whose purpose has been to encourage signatory States to cooperate with each other in the repression of one sort of criminal behaviour or another (e.g. drug smuggling) rather than a whole scale change of approach to the freedom of the high seas and the special status accorded to the flag State in that region.

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[21] *Hence Article 110, which lays out a right of visit on the High Seas, begins "Except where acts of interference derive from powers conferred by treaty…".*

THE LINKAGE BETWEEN HUMANITARIAN LAW AND SUSTAINABLE DEVELOPMENT LAW

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Introduction

Global warming, desertification, hurricanes, tsunamis and exhaustion of natural resources: these are a few examples of contemporary themes with grave and destructive implications for present and future society. To find a solution to these challenges of the present century, politicians and scientist have introduced a new and significant paradigm - sustainable development. Is sustainable development for practitioners of International Humanitarian Law of any concern? This article supports my affirmative answer to that question and discusses the linkage between international humanitarian law, sustainable development and NATO.

Sustainable development law

In the 20th century, sustainable development became a new regime in the field of international law. Although many may think that this regime concerns only environmental law, it has a much broader reach. Sustainable development is defined in the seminal 1987 Brundtland Report of the World Commission on Environment and Development.[1] The commission defined sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[2] From the moment of its adoption, sustainable development became a broad global policy objective.[3] At the 1992 Rio Earth Summit (UN Conference on Environment and Development), the Member States agreed that protection of the environment and social and economic development are fundamental to sustainable development.[4] Ten years later the 2002 Johannesburg Declaration on Sustainable Development assumed a collective responsibility to advance and strengthen the three interdependent and mutually reinforcing pillars of sustainable development: economic and social development and environmental protection at the local, national, regional and global levels.[5]

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[1] *Named after the former Norwegian Prime-Minister Mrs. G. Harlem-Brundtland.*

[2] *Report of the World Commission on Environment and Development: "Our Common Future", 4 August 1987, UN GA Res., A/42/427 (1987), see <http://www.un.org/documents/ga/res/42/ares42-187.htm>.*

[3] *See also Article 2 of the 2001 Treaty of Nice of the European Union: "(…) to promote economic and social progress and a high level of employment and to achieve balanced and sustainable development, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union, ultimately including a single currency in accordance with the provisions of this Treaty", see <http://ec.europa.eu/comm/Nice_treaty/index_en.htm>.*

[4] *The Rio Declaration on Environment and Development, Report of the UN Conference on Environment and Development, 3-14 June 1992, UN GA A/conf.151/26 (Vol. I). For instance, according to principle 1 of the Rio Declaration, human beings are at the centre of concerns for sustainable development and they are entitled to a healthy and productive life in harmony with nature. Principle 3 recognises the right of "peoples" to development and principle 5 stipulates that States shall cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world. See <www.un.org.documents/ga/conf151/aconf15126-1annex1.htm>.*

[5] *Principle 5 of the 2002 Johannesburg Declaration on Sustainable Development.*

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The International Law Association declared in 2002 that the UN international bill of Human Rights 1948, comprised of economic, social and cultural rights, civil and political rights and peoples' rights, is essential to the pursuance of sustainable development.[6] In order to achieve a legal basis for implementing sustainable development law the International Law Association adopted seven principles of international law relating to sustainable development[7]:

- The duty of States to ensure sustainable use of natural resources;
- The principle of equity and the eradication of poverty;
- The principle of common but differentiated responsibility;
- The principle of the precautionary approach to human health, natural resources and ecosystems;
- The principle of public participation and access to information and justice;
- The principle of good governance;
- The principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives.

While these legal developments were occurring, NATO recognised the regime of sustainable development. Also NATO's Committee on the Challenges of Modern Society proposed for a pilot study on environmental decision-making for sustainable development in Central Asia because "the goals of promoting and attaining political, economic and social stability have as a fundamental supposition that there must be clean air, water and soils if these goals are to be attained."[8] The Committee acknowledged that environmental problems can have a serious and long lasting negative influence on people's living conditions. Economic and social problems such as poverty, food insecurity, poor health conditions, and migrations can arise within and between countries.[9]

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[6] *In regard to the objective of sustainable development, the Association stated that the objective "involves a comprehensive and integrated approach to economic, social and political processes, which aims at the sustainable use of natural resources of the Earth and the protection of the environment on which nature and human life as well as social and economic development depend and which seeks to realise the right of all human beings to an adequate living standard on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom, with due regard to the needs and interests of further generations": International Law Association, Report of the 70th Conference New Delhi, London, 2002, p. 22 and p. 380 see <http://www.ila-hq.org/pdf/Sustainable%20Developmant/Sus%20Dev%20Resolution%20+%20Declaration%202002%20English.pdf>.*

[7] *International Law Association, Resolution 3/2002, New Delhi Declaration of principles of International Law relating to Sustainable Development, 6 April 2002.*

[8] *Committee on the Challenges of Modern Society, Proposal for a pilot study on environmental decision-making for sustainable development in Central Asia, AC/274-D(2000)4, REV1, 8 August 2000, p. 3. The pilot study was launched in February 2001. See also Final Report AC/24-D(2005)0002, dated 23 September 2005.*

[9] *Committee on the Challenges of Modern Society, Summary Final Report of the Pilot Study on Environment and Security in an international Context, EAPC (CCMS)D(99)8, 5 July 1999, p. 3.*

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As conflict prevention the Commission stated, "to prevent deep-rooted societal conflicts, there are a number of possible sustainable development measures that should be implemented, ranging from sustainable economic growth and poverty reduction programs to strengthening equity, democratisation and respect for human rights."[10] The International Security Assistance Force (ISAF) operations are a current example of NATO considering sustainable development.[11]

Notwithstanding the aforementioned efforts, the Declarations that have been adopted are not legally binding. Further sustainable development law cannot be seen as customary international law because there is little *opinio iuris sive neccesitatis* and less state practice. However, examples can be found in international jurisprudence concluding the fact that sustainable development law is not solely an academic tenet. For instance, the International Court of Justice accepted the tenet of sustainable development in the Babcikovo-Nagymaros case.[12] In his separate opinion, Judge Weeramantry stated furthermore that sustainable development is "part of modern international law by reason not only of its inescapable logical necessity, but also by reason of its wide and general acceptance by the global community" and "(…) there must be both development and environmental protection, and that neither of these *rights* [emphasis added] can be neglected."[13]

Additionally, the World Trade Organisation Appellate Body has declared that the preamble of the World Trade Organisation Agreement too specially refers to - the objective of sustainable development - and economic and social development and environmental protection.[14] The *Advisory Opinion of the International Court of Justice in the Nuclear Weapons case* stated that: 'States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with to principles of necessity and proportionality.[15]

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[10] *Ibid., p. 14.*

[11] *From 11-13 August 2007, the Public Diplomacy Division organized with ISAF a workshop on youth involvement in reconstruction, "Sustainable Development for Durable Security" in Kabul, Afghanistan, see Committee on Public Diplomacy, Working paper AC/52-WP(2007)0008-REV1, 2 October 2007, p. 15.*

[12] *Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia) (1997), ICJ Rep. 7, para. 140: "(…) new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such standards given proper weight, not only when States contemplate new activities, but also when continuing activities begun in the past. This need to reconcile development with protection of the environment is aptly expressed in the concept op sustainable development."*

[13] *Ibid., para 140.*

[14] *Case United States-Import prohibition of certain shrimp and shrimp products, World Trade Organisation Appellate Body (20 September 1999).*

[15] *Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, ICJ Rep. 1996, p. 242.*

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The Rome Statute of the International Criminal Court even opens under certain conditions the possibility to define serious and intentional damage to the environment as an act of war crime.[16]

The destructive (long-term) effect of warfare on the environment has also been recognized by international humanitarian law. Article 35 (3) of the 1977 Additional Protocol I to the Geneva Conventions stipulates the basic rule that "It is prohibited to employ methods or means of warfare which are intended, or may be expected to cause widespread, long-term and severe damage to the natural environment."[17]

There are three principles of international humanitarian law which are *mutatis mutandis* applicable in relation to sustainable development. In the first place, the principle of distinction which implies that at all times a distinction has to be made between civilians and combatants and between civilians and military objects.[18] Secondly, the principle of proportionality, embodied in Article 51(5)(b) of the 1977 Additional Protocol I to the Geneva Conventions: "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated is considered to be disproportionate." Lastly, the principle of humanity, which reaffirms that even if a party denounces the Convention, this "shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience."[19] In these aforementioned principles international humanitarian law meets sustainable development law.

Humanitarian law, Sustainable development and NATO

Warfare and sustainable development are a paradox. Modern warfare always has a destructive effect and is therefore incompatible with sustainable development law. Since armed conflict has a negative effect on both economic and social society and environment and natural resources, peace is a precondition for the pursuit of sustainable development.[20] This point of view is embedded in Principle 24 of the 1992 Rio Declaration on Environment and Development "warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary."

The Geneva Conventions

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[16] *Article 8(d)(2)(b)(iv) of the 1998 Statute of the International Criminal Court: "Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated."*

[17] *See also Article 55 (1) of 1977 Additional Protocol I to the Geneva Conventions: "Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damages. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population."*

[18] *E.g. Article 51 of the 1977 Additional Protocol I to the Geneva Conventions.*

[19] *E.g. Article 63 of the 1949 Geneva Convention I.*
should pursue the aim to contribute to a climate ostracising torture and those torturing.

[20] *M.C. Cordonier Segger and A. Khalfan, Sustainable Development Law. Principles, Practices and Prospects, New York: Oxford University Press 2006, p. 75.*

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During the 2006 Riga Summit the NATO Heads of State endorsed the Comprehensive Political Guidance and stated that "peace, security and development are more connected than ever."[21] The Committee on the Challenges of Modern Society concluded in its *Final Report on Environment and Security in a International Context* that 'Environmental problems can have a serious and long lasting negative influence on peoples' living conditions and can lead to economic and social problems such as poverty, food insecurity, poor health conditions, and migration, within as well as between countries.[22] Peace, development and environmental protection are interdependent and indivisible[23].

This article only refers to the environment. However the conclusion can be drawn that sustainable development has a similar aim as international humanitarian law, because international humanitarian law primarily concerns people.[24] International humanitarian law focuses on the respect for human values, the dignity of the human person, and the means and methods of warfare in order to *prevent* unnecessary harm and casualties.

This prevention of "destruction" is implemented in The Hague and Geneva Conventions and the 1977 Additional Protocols. The Conventions and related customary international law have the same ultimate goal as sustainable development: to decrease destruction in order to establish or maintain sustainable peace and (human) security for present and future generations. Without these regulations, the tenet of sustainable development cannot be achieved and therefore humanitarian law is a prerequisite for achieving sustainable development. A lack of human security and (environmental) protection in situations of international armed conflict will undermine the development of broken societies. On the other hand, taking sustainable development into consideration during times of armed conflict, the objectives of international humanitarian law are successfully achieved: unnecessary human and material casualties are decreased and conditions are better set for sustainable peace. Both legal regimes, international humanitarian law and sustainable development law are mutually interdependent. Sustainable development law is an imperative for humanitarian law and international humanitarian law has become an imperative for achieving sustainable development.

In its decision (MC 469 from 30 June 2003) the North Atlantic Military Committee has implemented *NATO Military Principles and Policies for Environmental Protection* concluding that "NATO and NATO Nations will be contributing to the needs of present and future generations through the protection of the environment and in support of sustainable development."[25] With this declaration NATO and the Sending Nations acknowledge their collective responsibility for the protection of the environment.[26]

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[21] *NATO 2006 Riga Summit, Comprehensive Political Guidance, Part 1, "The Strategic Context", under 3.*

[22] *Committee on the Challenges of Modern Society, Final Report of the Pilot Study on Environment and Security in an International Context, EAPC (CCMS)D(99)8, 5 July 1999.*

[23] *Article 25 of the Rio Declaration on Environment and Development. See also the Statement Armed Conflict and the Environment, International Union for Conservation of nature and natural Resources (IUCN)/The World Conservation Union 21 March 2003: "A sustainable future requires a robust economy, social equity and justice, and sound management of the earth's resources. None of these intimately related goals can be advanced in time of armed conflict. Indeed bringing about peace, security and stability must be our priority because they are preconditions for sustainable development."*

[24] *International Committee of the Red Cross. International Humanitarian Law and Sustainable Development. Information paper prepared by the International Committee of the Red Cross in the framework of the World Summit on Sustainable Development, Johannesburg, 26 August-4 September 2002, see <http://www.icrc.org/Web/eng/siteeng0.nsf/html/5DDDEM>.*

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Moreover, NATO Commanders and Sending Nations should be considering environmental issues at the earliest opportunity in their planning and throughout the execution and conduct of NATO-led military operations. For instance, the impact of NATO forces on environmentally sensitive areas should be taken into account when planning military activities.[27]

In 2006 the NATO Standardization Agency implemented a Standardization Agreement concerning Joint NATO Doctrine for Environmental Protection during NATO-led Military Activities.[28.] The doctrine states that environment means the surroundings in which an organisation operates, including air, water, land, natural resources, flora, fauna, humans and their interrelation hence the Commanders should ensure environmental risk management is integrated into the overall planning for military activities.[29] In light of the doctrine of command responsibility, the Standardization Agreement implemented seven environmental responsibilities[30]:

a. Demonstrate leadership and awareness in environmental protection and promote environmental awareness in personnel under their command;

b. Identify and assign clear responsibilities and resources e.g. funding, personnel and equipment to meet environmental protection objectives;

c. Consider environmental impacts in decision making;

d. Ensure compliance, as far as practicable within the confines of mission accomplishment, with applicable environmental laws and agreements;

e. Ensure careful use of all natural resources under their control;

f. Enhance relationships with neighbouring communities by addressing environmental issues; and

g. Integrate the concept of pollution prevention into all military activities through the promotion of re-use, re-cycling, material and process substitution, improving operating efficiencies and training.

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[27] *Ibid., see General Policy, p. 4, under para. 8.2.1 and 8.3.3.*

[28] *NATO Standardization Agency, Standardization Agreement, Joint NATO Doctrine for Environmental Protection during NATO led Military Activities, STANAG 7141 EP (Edition 4), NSA(JOINT)1060(2006)EP/7141, 20 September 2006.*

[29] *Ibid., p. A-1, "(…) Environmental risk management is the process of detecting, assessing and controlling risks arising from operational factors together with balancing risk with mission benefits. NATO Commanders should consider environmental protection during each phase of the military activities. The risks associated with efforts to protect the environment will be different for each phase and should therefore be considered separately prior to, during and after the military activities. Commanders should balance environmental protection against risks to the forces and mission accomplishment."*

[30] *Ibid., p. B-1.*

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Conclusion

The conclusion can be drawn that both regimes are complementary and sustainable development law should be considered by NATO planners. International humanitarian law is one of the pillars of sustainable development law. A lack of human security and (environmental) protection in situations of international armed conflict will undermine the development of rule of law, human security, human rights, environmental resources and, social, economic and political processes for present and future generations. *Ergo*, to pursue sustainable development the precondition of international humanitarian law has to be implemented. On the other site, interpreting international humanitarian law from a sustainable point of view will encourage both allies and belligerents to use force in a constructive and proportionate way. By taking the linkage between sustainable development and international humanitarian law in consideration, NATO has laid the foundation to create a solid base for peace building operations and the re-establishment or revitalisation of the economic, social and legal structures of developing societies.

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Spotlight

Dr. Benedikt

Stoiber

Legal Assistant

NATO HQ

Name: Dr. Benedikt Stoiber

Rank/Service/Nationality: German

Job title: Legal Assistant in the Private Office of the Secretary General

Primary legal focus of effort: International Law, NATO Civilian Personnel Regulations

Likes: Sports, Outdoor Activities

Dislikes: Unfriendly people

When in Regen (where I'm originally from), everyone should: Enjoy the Bavarian Forest

Best NATO experience: Internship with NATO

My one recommendation for the NATO Legal Community: Go to the NATO School in Oberammergau and see how beautiful Bavaria is.

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HAIL

&

FAREWELL

Hail

ISAF : LtCOL Paul Hockley (GBR A) joined in March 2008

ISAF : LCDR David O'Dowd (USA N) joined in March 2008

Farewell

ISAF : WGCDR Stephan Kell (GBR AF) left in March 2008

ISAF : LCDR Zoe Kugeares (USA N) left in March 2008

New Points of Contact

CJOS COE (Combined and Joint Operations from the Sea Centre of Excellence) : CDR David Wilson (USA N) – Legal Advisor wilsondg@SECONDFLT.NAVY.MIL

JCBRN Defence COE (Joint Chemical, Biological, Radiation and Nuclear Defence Centre of Excellence) : Mr. Zdenek Hybl (CZE) – Legal Advisor - z.hybl@seznam.cz

It is the mark of an educated mind to be able to entertain a thought without accepting it

Aristotle

GENERAL INTEREST/NATO IN THE NEWS

- Bucharest Summit Declaration Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Bucharest on 3 April 2008

  http://www.nato.int/docu/pr/2008/p08-049e.html

- Joint Statement - Meeting of the NATO-Ukraine Commission at the level of Heads of State and Government held in Bucharest on 4 April 2008

  http://www.nato.int/docu/pr/2008/p08-051e.html

- Chairman's Statement - Meeting of the NATO-Russia Council at the level of Heads of State and Government held in Bucharest on 4 April 2008

  http://www.nato.int/docu/pr/2008/p08-050e.html

- NATO Expansion : A model for stability or a grab for power ?

  http://www.dw-world.de/dw/article/0,2144,3283800,00.html

- Article by William Post, "Another name for NATO"

  http://www.clingendael.nl/cdsp/publications/?id=6995

- Talk by Hans Rosling – Debunking third-world myths with the best stats you've ever seen.

  http://www.ted.com/index.php/talks/view/id/92

- Secretary General's speech at the ICI (Istanbul Cooperation Initiative) Ambassadorial Conference in Bahrein on 24 April 2008

  http://www.nato.int/docu/speech/2008/s080424a.html

- Job Opening : Full-time Faculty Member in International Law, and Head, Programme on Security and Law at the Geneva Centre for Security Policy (GCSP)

  http://www.jobs.ac.uk/jobs/KG708/Full-time_Faculty_Member_in_International_Law_and_Head_Programme_on_Security_and_Law/

UPCOMING EVENTS

- The **NATO Legal Advisors Course** will be held at the NATO School in Oberammergau from May 19 to 23, 2008. The second course is scheduled from October 6 to 10, 2008

- Preceding the NATO Legal Advisors Course, the HQ SACT and SHAPE Legal Advisors have invited the legal community of NATO and partner nations 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.
  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.

  In attachment to the email forwarding this Gazette, you can find additional documentation concerning the NATO Legal Training Conference.

  For all questions, please contact CDR Jaimie Orr, USA -N, HQ SACT Deputy Legal Advisor, at orr@act.nato.int.

- HQ ARRC (The Allied Rapid Reaction Corps will be hosting **Exercise Arrcade Brief** 2008 on 23 – 25 June 2008. The title of this conference is "The Evolving Impact of Human Rights Law on Operations." For additional information, please contact LTC Darren Stewart or Maj Natalie Robinson (arrc.legal@bfgnet.de - +49-2161-565-5666)

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

May				June				July			Aug	Sep	Oct		
05-09	12-16	19-23	26-30	2-6	9-13	16-20	23-27	1-4	7-11	14-18			1-3	6-10	13-17

Legal Advisor's course
Operational Law course
Legal Training Conference
Exercise Arrcade Brief 08

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)