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SPECIAL INTEREST ARTICLES

Introduction

Colleagues, Fellow Legal Professionals, and Persons interested in international law and NATO,

Our 14th issue of the NATO Legal Gazette contains five timely special articles by legal advisors and scholars from the United Kingdom, Italy, Spain, and the United States. In addition to our military authors, Professor Gary Solis, a retired U.S. Marine, noted author, and respected commentator on the Law of Armed Conflict, has shared with us an essay on the subject of unlawful combatants from his forthcoming book. Captain Federico Sperotto, the Legal Advisor at the Italian Army's Truppe Alpine Headquarters, who previously wrote about the British House of Lords decision in the *Al-Skeini Case* in Issue 11 of the NATO Gazette, provides a discussion of the increasingly apparent overlap between Human Rights Law and International Humanitarian Law. Lieutenant Commander Darren Reed, GBR-N, the Legal Advisor of NATO's Maritime Component Command, Northwood, describes what UN Security Council Resolution 1816, adopted on 2 June 2008 means and the challenge it presents to NATO. Mr. Andres Munoz Mosquera, the Deputy Supreme Headquarters Allied Powers Europe Legal Advisor, surveys Status of Forces agreements. Commander Jaimie Orr, the Deputy HQ Supreme Allied Command Transformation Legal Advisor offers his view on the Cluster Munitions Convention concluded on 28 May 2008.

Each of these authors is thanked and all readers of these articles who desire to discuss these topics further are invited to send in their comments for publication in a future edition of this Gazette. Authors who wish to write about other legal topics of broad interest to our community of NATO commands and organizations, Ministries of Defence of Alliance and Partner Nations, and other international organizations and non-government organizations are encouraged to send articles to me Sherrod.bumgardner@shape.nato.int or Mrs. Dominique Palmer De Greve Dominique.degreve@shape.nato.int with a brief introduction explaining its relevance to our readership.

Finally, each person who is receiving this Gazette has also received a request from our ACT SEE Legal Intern, Mr. Richard Coenraad, asking for your name, and general professional responsibilities. This request is made because the change over from Windows to Vista erased all our data files that contained this information about our readers. Because creating a network and sharing knowledge between legal personal who have an interest in NATO is a primary purpose of this Gazette, if you have not already done so, please answer Richard's inquiry so that we may better know our reading audience and publish future issues that better address your interests. Thank you,

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Unlawful Combatants

Mr. Gary Solis, Adjunct Professor of Law, Georgetown University Law Center

The term "unlawful combatant" does not appear in the Geneva Conventions[1], the Additional Protocols, or any other law of armed conflict (LOAC) treaty, convention or protocol. Yet it is a term heard often in relation to the war on terrorism.

The term 'combatant', as well as derivations such as 'unlawful combatant', 'enemy combatant', 'unprivileged combatant' and 'unprivileged belligerent', apply only in international armed conflicts – those described in common Article 2 of the 1949 Geneva Conventions. Internal armed conflicts – revolutions, civil wars, insurrections and insurgencies – are defined in common Article 3 and they employ a different vocabulary of combatancy.

A defining characteristic of unlawful combatants is that upon capture they are not entitled to prisoner of war status. "Unlawful combatant" has been defined by the ICRC's legal advisor as "describing all persons taking a direct part in hostilities without being entitled to do so and who therefore cannot be classified as prisoners of war on falling into the power of the enemy." [2] One might add to this definition that the hostilities must be international in nature, and the persons taking a direct part be civilians. LOAC publicists and academics also refer to such individuals as "unprivileged belligerents." Those few who contend that there is no such status in LOAC as unlawful combatant disregard a large body of scholarship and State practice.

Rambo
(source : www.johnramboblog.blogspot.com)

The origin of the term "unprivileged belligerents" is often ascribed to a 1951 Richard Baxter article[3], although it has been used at least since the beginning of the 19th century in legal literature and case law. The belligerent Baxter describes the combatant's privilege[4] -- the authority to kill or wound enemy combatants and disable or destroy other enemy military objectives -- and the privileges of prisoner of war status. While "unprivileged belligerent" is as valid a characterization as is "unlawful combatant" the more familiar term, "unlawful combatant" will be used here.

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[1] *For the text of the four 1949 Geneva Conventions and their two 1979 Additional Protocols see* http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/genevaconventions

[2] *Knut Dörmann, "The Legal Situation of 'Unlawful/Unprivileged Combatants'," 85 (No. 849) Int'l Red Cross R. (2003), 45. In U.S. domestic law, in the Military Commissions Act of 2006, an unlawful combatant is defined as a person who has engaged in, or purposefully and materially supported another in engaging in, hostilities against the United States and its allies, and who does not qualify as a lawful combatant, or an individual who has been deemed an unlawful enemy combatant by a Combatant Status Review Tribunal or any other competent tribunal. Military Commissions Act of 2007, 10 USC 47(A), § 948a(1).*

[3] *Major Richard R. Baxter, "So-Called 'Unprivileged Belligerency'," 28 BYIL (1951) 335, 323-245. In his article, Baxter uses the term "unlawful combatancy."*

[4] *"The combatant's privilege, and its corollary statuses of privileged and unprivileged (or 'unlawful') combatants, is a hoary and formerly esoteric doctrine of jus in bello that has achieved public fame in the years since 9/11. It is an international law immunity that places some violent actions and actors substantially outside the purview of 'normal' criminal law and human rights law. Those who benefit from the combatants' privilege cannot be prosecuted for mere participation in armed conflict and are entitled to prisoner of war ('POW') status. Nathaniel Berman, Privileging Combat? Contemporary Conflict and the Legal Construction of War, 43 Col. J. Trans. L. 1 (2004), pages 3-4.*

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> "The…civilians who carry out belligerent acts that might well be conducted lawfully by combatants [are unlawful belligerents]….Civilians who engage in combat lose their protected status and may become lawful targets for so long as they continue to fight. They do not enjoy immunity under the law of war for their violent conduct and can be tried and punished under civil law for their belligerent acts. However, they do not lose their protection as civilians under the GC if they are captured. "[5]

Civilian unlawful combatants may band together to form unlawful combatant organizations. During the U.S.-Vietnam War, an often-heard phrase regarding the Viet Cong, a civilian grouping of clandestine fighters, was "Farmer by day, fighter by night." (When did they sleep?) "A person who engages in military raids by night, while purporting to be an innocent civilian by day, is neither a civilian nor a lawful combatant.

Alexander the Great
(source :www.mahinth.blogspot.com)

He is an unlawful combatant. He is a combatant in the sense that he can be lawfully targeted by the enemy, but he cannot claim the privileges appertaining to lawful combatancy. Nor does he enjoy the benefits of civilian status…"[6] This does not suggest that an unlawful combatant is outside the law of armed conflict. At a minimum, captured unlawful combatants are entitled to the basic humanitarian protections of common Article 3, Geneva Convention IV, relating to civilians, and Article 75 of Additional Protocol I.

Alexander the Great, in his central Asian operations (329-327 B.C.) battled Sogdianan guerrillas. Throughout France's invasion of Spain during the Peninsular War (1807-1808), Napoleon Bonaparte's invading army was beset by local insurgents, the term "guerrilla" originating here. In the mid-nineteenth century, the insurgent fighter, Giuseppe Garibaldi, was admired throughout Europe. But, in 1863, Lieber wrote of insurgents:

> "Men, or squads of men, who commit hostilities, whether by fighting(…)or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers – such men, or squads of men(…)if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates."[7]

We no longer summarily execute unlawful combatants, of course, but the point remains that unlawful combatants are almost as old as warfare itself, even if the title is not.

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[5] *Jennifer Elsea, Treatment of "Battlefield Detainees" in the War on Terrorism, Congressional Research Service, Rpt. for Congress, (Jan. 2005), at 22.*

[6] *Yoram Dinstein, The Conduct of Hostilities Under the Law of International Armed Conflict (Cambridge: Cambridge University Press, 2004), 29.*

[7] *The Lieber Code, art. 132. Also see art. 135, describing "war rebels."*

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A century-and-a-half after Lieber wrote his Code, it remains true that unlawful combatants are not entitled to the privileges and protections of prisoner of war status. There is, however, no law or rule prohibiting a State from according prisoner of war status to dissidents in an internal armed conflict, or even to unlawful combatants in an international armed conflict. The U.S., for example, has given limited prisoner of war status to enemy captives in the Civil War, the Philippine War, and the Vietnam War.

Unlawful combatants should not be confused with "unlawful enemy combatants," a purported battlefield status in the war on terrorism. Neither unlawful combatants nor unlawful enemy combatants merit prisoner of war status upon capture, but on today's battlefields the two are different categories of fighter.

The US Army's counterinsurgency field manual says of unlawful combatants, "The contest of internal war is not 'fair'; many of the 'rules' favor insurgents. That is why insurgency has been a common approach used by the weak against the strong." [8] This disparity of battlefield forces is why the military forces of many nations will be pitted against insurgencies in non-international conflicts and, in international conflicts, unlawful combatants, for years to come. The essential legal wrongfulness of the unlawful combatant is reflected in 1977 Additional Protocol I, article 48. "In order to ensure respect for and protection of the civilian population…the Parties to the conflict shall at all times distinguish between the civilian population and combatants…." LOAC seeks to minimize the calamities of war and maximize protection of its victims. Unlawful combatants, fighters without uniform or distinguishing sign, violate the bedrock concept of warfare, distinction. When the distinction requirement is disregarded, opposing combatants cannot discern fighters from civilians, opposing shooters from friendly shooters. This erodes the lawful combatant's presumption that civilians he encounters are noncombatants who present no danger. If combatants were free to melt away amid the civilian population, every civilian would suffer the results of being suspected as a combatant.

Accordingly, a sanction must be imposed on those who abuse the standing of a civilian while he is a disguised combatant.

> "Irregulars(…)do not merely breach the formal reciprocal rules of fair play, their tactics and camouflage and disguise take advantage of the very code they breach. Irregulars are(…)free riders on the prohibitions civilized nations adhere to. Furthermore, by acquiring a hybrid identity of combatant-civilian, they also blur the more basic moral distinction between those who may and those who may not be targeted in wartime. Thus, the more fundamental vice of irregular combatants is not merely their formal lawlessness, or even unfairness, but rather the threat they pose to "civilized" conduct of war and the protections it affords to an identifiable defenseless civilian population." [9]

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[8] *The U.S. Army-Marine Corps Counterinsurgency Field Manual (U.S. Army Field Manual No. 3-24; Marine Corps Warfighting Publication No. 3-33.5) (Chicago: University of Chicago Press, 2007), 4. Congress, (Jan. 2005), at 22.*

[9] *Tamar Meisels, "Combatants – Lawful and Unlawful," 26-1 L. & Phil. 31-65, 55-56 (2007).*

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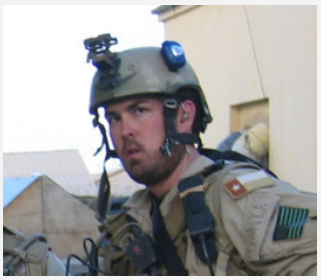
U.S. Navy SEAL and Navy Cross holder, Marcus Luttrell, describing recent conflict in Afghanistan, takes a pessimistic view of the requirement for distinction: "The truth is, in this kind of terrorist/insurgent warfare, no one can tell who's a civilian and who's not. So what's the point of framing rules that cannot be comprehensively carried out by anyone? Rules that are unworkable, because half the time no one knows who the goddamned enemy is, and by the time you find out, it might be too late to save your own life." [10] But without the rules Petty Officer Luttrell decries, a combat zone would spiral into chaos, an old west without a sheriff, shoot first and ask no questions at all, tactics that place a premium on situational awareness that is maddeningly elusive to invading forces seeking to progress to orderly occupation described in Geneva Convention IV. [11]



US Navy Seal Marcus Luttrell
(source:www.navyseals.com)

Geneva Convention III, relating to prisoners of war in international armed conflicts, provides basic guidance as to which fighters are, and are not, lawful combatants when it defines who is, and is not, entitled to prisoner of war status. Article 4A.(2) describes "members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied…" i.e., guerrilla or resistance groups who are entitled to prisoner of war status. The same Article goes on to require the four familiar conditions[12] for lawful combatancy and, if captured, prisoner of war status. These conditions for individuals who are not members of the regular army may be traced back through 1907 Hague Regulation IV, to the 1871 Brussels declaration.

Although not explicitly stated in Article 4A., the same four conditions apply to members of an army of a Party to the conflict, as well.

Note that being an unlawful combatant is not in itself a war crime; the unlawful combatant is not a war criminal merely for being such. Although not all agree, there is a consensus that unlawful combants are protected persons (Geneva Convention IV, Article 4), entitled to basic humanitarian treatment.

The LOAC price of being an unlawful combatant is that he forfeits the immunity of a lawful combatant – the combatant's privilege and prisoner of war status – and he becomes a lawful target and may be criminally charged for the direct participation in hostilities that made him an unlawful combatant. Subsequent judicial proceedings may be conducted before either military or domestic courts.[13]

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[10] *Marcus Luttrell, Lone Survivor (NY: Little Brown, 2007), 169.*

[11] *Capt. Travis Patriquin, 32, 2nd Battalion, 3rd Field Artillery Regiment, 1st Brigade Combat Team, 1st Armored Division, who was killed by a roadside bomb in Ramadi, Iraq, on December 6th, 2006, prepared an insightful presentation on the power of cultural structures to distinguish the various flavors of unlawful combatants in Anbar Province, Iraq. See:* http://www.geardo.com/docs/how_to_win_in_anbar.pdf

[12] *(a) that of being commanded by a person responsible for his subordinates;*
(b) that of having a fixed distinctive sign recognizable at a distance;
(c) that of carrying arms openly;
(d) that of conducting their operations in accordance with the laws and customs of war.
http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/genevaconventions

[13] *A problem in the conflicts in Iraq and Afghanistan is that the large number of unlawful combatants being apprehended in Iraq and Afghanistan makes it impossible to deal with the problem through domestic criminal proceedings. Other issues, such as a sometime lack of extraterritorial jurisdiction and chain of custody problems, make the feasibility of trial of unlawful combatants in domestic courts questionable.*

Contextual Application of Human Rights and International Humanitarian Law Instruments during Armed Conflicts

Capt Federico Sperotto – TA (Truppe Alpine) HQ

The International Court of Justice (I.C.J.) dealt with the issue of the applicability of human rights treaties in armed conflicts in its advice on the use of nuclear weapons of July 8th, 1996. Referring to the International Covenant of Civil and Political Rights, the Court stated that "whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself." [1] International humanitarian law is a *lex specialis* to human rights law. In the opinion of the Supreme Court of Israel "humanitatian law is the lex specialis which applies in the case of an armed conflict. When there is a gap in that law, it can be supplemented by Human Rights Law. [2]

In the opinion of the International Criminal Tribunal for the Former Yugoslavia (I.C.T.Y.) international humanitarian law and human rights are truly interdependent. Because of their resemblance, in terms of goals, values and terminology, the recourse to human rights law is a welcome and needed assistance to identify or spell out some specific elements of customary international law in the field of humanitarian law.[3] The Appeal Chamber of the I.C.T.Y. noted in fact that the traditional terms of art used in the past, 'war' and 'law of warfare', were largely replaced by two broader notions:

(i) that of 'armed conflict', essentially introduced by the 1949 Geneva Conventions; and

(ii) the correlative notion of 'international law of armed conflict', or the more recent and comprehensive notion of 'international humanitarian law', which has emerged *as a result of the influence of human rights doctrines on the law of armed conflict* [emphasis added]. [4]

According to the Inter-American Commission on Human Rights, during situations of internal armed conflict, these two branches of international law mostly converge and reinforce each other. The Commission explained that the general rules contained in international instruments relating to human rights apply to non-international armed conflicts as well as to the more specific rules of humanitarian law. Standards and relevant rules of humanitarian law are sources of authoritative guidance in claims alleging violations of the American Convention in combat situations.[5]

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[1] *International Court of Justice (I.C.J.) Legitimacy of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996, para. 25. See also Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory, ICJ Advisory Opinion, 9 July 2004, para. 43.*

[2] *The Israel Supreme High Court Judgment 769/02 (The Public Committee against Torture in Israelv. The Government of Israel)- December 14, 2006, para.18.*

[3] *International Criminal Tribunal for the Former Yugoslavia (I.C.T.Y.), Prosecutor v. Kunarac et al. IT-96-23 and IT-96-23/1 "Foca", 22 February 2001, para. 467.*

[4] *I.C.T.Y., Prosecutor v. Dusko Tadic, Case No. IT-94-1-AR72 Decision on Defense Motion for Interlocutory Appeal on Jurisdiction (Trial Chamber) 2 Oct. 1995, para. 87.*

[5] *Inter-American Commission on Human Rights (Inter-Am.Com.H.R.) Case 11.137, Juan Carlos Abella v. Argentina 1/ November 18, 1997, paras. 160-162.*

Contextual Application of Human Rights and International Humanitarian Law Instruments during Armed Conflicts

The applicability of the European Convention on Human Rights (1950) during armed conflicts, mainly in internal ones, is undisputed. In a survey of cases examined in 2005, the European Court of Human Rights in Strasbourg even observed that the action of the military and security forces in responding to *domestic conflict* does not fall outside the scope of the European Convention but come under the scrutiny of the Court.[6] Two other arguments support this conclusion. The first is obviously the literal formulation of Article 15 of the European Convention. The second descends from the terminological and conceptual vicinity between the language used by the Court and the formulations laid down in the law of war instruments.

European Court of Human Rights
(source: www.ipfw.edu)

Concerning the right to life, in its 2nd paragraph Article 15 reads as follows: "No derogation from Article 2, except in respect of deaths resulting from *lawful acts of war* … shall be made under this provision [emphasis added]". Everything depends on the concept of *lawful acts of war*.

The paucity of precedents on this issue makes inferential reasoning necessary. An act of war is lawful if it is consistent with the standards set forth in the instruments of international humanitarian law, or the law of armed conflict, namely the Geneva Conventions of 1949 and their Additional Protocols. Note that in its 1st paragraph Article 15 expressly provides that measures derogating to the European Convention cannot be inconsistent with other obligations under international law.

The European Court's approach to large-scale armed struggle is quite similar to the view adopted by the Human Rights Committee.[7] While the Committee sustained that during armed conflict international humanitarian law helps, in addition to the provisions of the Covenant, to prevent the abuse of a State's emergency powers,[8] the Court, in its judgements on Chechen cases[9] relating to a full-scale armed conflict, did not reserve any room for the rules of international humanitarian law.

It could be argued that the Court considers the system of the Convention as a *self-contained regime*, i.e. an autonomous system decoupled from international law, a regionally-limited auto-referential system with its own primary and secondary specific rules.[10]

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[6] *Eur.Ct.H.R., Short Survey of Cases Examined by the Court in 2005, p. 5.*

[7] *United Nations, Human Rights Committee (UN H.R.C.), CPR/C/21/Rev.1/Add.11, General Comment no. 29, para. 4.*

[8] *Ibid., para. 3 and 10.*

[9] *In February 2005 the European Court of Human Rights decided the first cases concerning violations of human rights committed during the conflict in Chechnya, between 1999 and 2000. See European Court of Human Rughts (Eur.Ct.H.R.), Isayeva, Yuzupova and Bazayeva v. Russia - 57947/00; 57948/00; 57949/00 [2005] ECHR 129 (24 February 2005). ECtHR, Isayeva v. Russia - 57950/00 [2005] ECHR 128 (24 February 2005).*

[10] *SIMMA Bruno, PULKOWSKI Dirk, Of Planets and the Universe: Self-contained Regimes in International Law, EUR. J. INT'L LAW, 2006, Vol. 17, no. 3, p. 492.*

Or, more simply, that the Court wants to avoid any criticism for operating an arbitrary interpolation of rules from different regimes. However, the Court has made relevant efforts in adapting principles arisen from decisions on incidents which occurred during law enforcement operations to wide-scale armed conflicts. Those principles can be summarized as follows: where potentially lethal force was used in pursuit of a permitted goal, the force had to be strictly proportionate to the achievement of that goal. Operations involving potential use of lethal force had to be planned and controlled by the authorities so as to minimise the risk to life. Authorities had to take all feasible precautions in the choice of means and methods with care being taken to avoid and in any event minimise incidental loss of civilian life.[11]

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[11] *Eur.Ct.H.R., Chamber judgments in six applications against Russia, Press Release, 088, 24 February 2005.*

Piracy off Somalia; United Nations Security Council Resolution 1816

Lt Cdr Darren Reed GBR N – Legal Advisor MCC Northwood

Say the word piracy to the mythical man on the Clapham omnibus[1] and he will immediately think of a malevolent looking man with an eye-patch (and possibly a wooden leg), a parrot on his shoulder and a funny old fashioned hat. He will also believe that such individuals have been consigned to the dustbins of history and that piracy is a thing of the past. Unfortunately, the truth is somewhat different and pirates, like buses in a London borough, are still very much with us. One place where they have been particularly prevalent of late is off the coast of Somalia. A number of high profile piratical acts in this region have aroused the international community's collective interest, the result of which is United Nations Security Council Resolution 1816, adopted on 2 June 2008, which, in part, addresses this problem. In this short article Lieutenant Commander Darren Reed of MCC Northwood, outlines the current difficulties in combating piracy in the region and how the Resolution may overcome them.

Introduction

Following concerns regarding the number and types of incidents of piracy occurring in the vicinity of Somalian territorial seas and the inability of the Somali government to take effective action against pirates based within their territory and/or territorial seas, France and the United States proposed a UN Security Council Resolution, which would give States other than Somalia, a freer hand in combating piracy in this area. After much discussion Resolution 1816(2008) was adopted by the Security Council on 2 June 2008.

Constraints of the Current Law

International law allows States a considerable degree of latitude when it comes to dealing with pirates.[2] Piracy[3] is a crime of universal jurisdiction[4] and not only are warships of any State allowed to seize and arrest any pirate ship / pirates they encounter on the high seas,[5] but there is also a positive obligation on the State to cooperate to repress piracy.[6]

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[1] The hypothetical reasonable man against whom a defendant's standard of care is measured against when deciding whether the defendant has breached his duty of care in the English law tort of negligence (see Hall v Brooklands Auto Racing Club (1933) 1 KB 205).

[2] Compared to crimes which are equally heinous, if not more so (e.g. hijacking).

[3] 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)."*

[4] 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.

[5] Article 105 UNCLOS.

[6] "All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State" – Article 100 UNCLOS.

Piracy off Somalia; United Nations Security Council Resolution 1816

However, any action taken against pirates must be constrained to the high seas,[7] i.e. outside the territorial seas of any other coastal State. There was an expectation by the drafters of the United Nations Convention on the Law of the Seas (UNCLOS) 1982 that coastal States would be active in policing their own territorial seas.[8] As we have recently seen, the Somali government has found it difficult to police effectively its own territorial seas and consequently that area has proven and is proving to be a place of refugee for pirates being pursued by non-Somalian warships. This is due to the fact that there is no right under current international law, analogous to hot pursuit,[9] that allows a warship to pursue a pirate vessel from the high seas into the territorial seas of another State. Currently, if a warship wished to do just that, it would have to gain the consent of the coastal State. 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 law.[10]

<u>The Resolution – additional powers</u>

The Resolution contains expressions of the Security Council's concern regarding the threat of armed robbery and piracy occurring off the Somali coast; the most pertinent aspects of it are detailed below.

"Acting under Chapter VII of the Charter of the United Nations…"

Chapter VII of the United Nations Charter sets out the UN Security Council's powers to maintain peace. It allows the Council to "determine the existence of any threat to the peace, breach of the peace, or act of aggression" and to take action, which includes the use of armed force, to "restore international peace and security".

"Decides that for a period of six months from the date of this resolution, States cooperating with the Transitional Federal Government (TFG) in the fight against piracy and armed robbery at sea off the coast of Somalia, for which advance notification has been provided by the TFG to the Secretary General…"

This would tend to suggest that those States who wish to take advantage of the powers given under this Resolution must first have communicated their desire to assist the TFG to the TFG, who will then inform the Secretary General. The time period runs from 2 Jun 08 to 2 Dec 08; but there is a mechanism whereby this may be extended.

"…may:

> *(a) Enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law;"*

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[7] *Defined negatively as "all parts of the sea which are not included in the economic exclusion zone, in the territorial sea or in the internal waters of any State, or in the archipelagic waters of an archipelagic State." – Article 86 UNCLOS.*

[8] *Although not couched in terms of maritime law enforcement, the obligation on the coastal State to "promote the establishment, operation and maintenance of an adequate search and rescue service regarding safety on and over the sea" (as laid down at Article 98(2) UNCLOS) arguably presupposes some level of control.*

[9] *In short this doctrine allows a coastal State to pursue a vessel, which has transgressed that State's laws, from that State's territorial seas onto the high seas – see Article 111 UNCLOS.*

[10] *As it would be an activity not having a direct bearing on passage – Article 19(2)(l) UNCLOS.*

Piracy off Somalia; United Nations Security Council Resolution 1816

This would allow pursuit of pirates from the high seas into Somali territorial seas. It would also allow a State, cooperating with the TFG in this regard, to take action against an act which would amount to piracy if it were occurring on the high seas and also an act of armed robbery (i.e. theft + violence) taking place in Somali territorial seas which does not fall within the strict definition of piracy.[11] Unfortunately armed robbery is not defined and therefore how that is interpreted may depend on each State's national law.[12]

"and

(b) Use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery;"


(source : www.cnn.com)

This would allow the following to take place in Somali territorial seas against those suspected of piracy and/or armed robbery:

a. pursuit of suspected pirates from the high seas into Somali territorial seas without requiring the consent of Somalia prior to doing so;

b. arrest by warships of suspected pirates within Somali territorial seas;

c. prosecution of suspected pirates by the State of the warship conducting the arrest, even if that arrest is made within Somali territorial seas;

d. warships conducting anti piracy patrols within Somali territorial seas, which would include:

(i) hailing;
(ii) boarding;
(iii) searching; and
(iv) seizure of those suspected of committing piracy and/or armed robbery.

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[11] *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)."

[12] *For example, the UK law on robbery is detailed at s8(1) Theft Act 1968 "A person is guilty of robbery if he steals, and immediately before or at the time of doing so, he uses force on any person or puts or seeks to put any person in fear of being then and there subject to force". There is no separate offence of "armed robbery" as such but the fact that someone is armed when committing robbery will be a significant aggravating factor in sentencing.*

Piracy off Somalia; United Nations Security Council Resolution 1816

The authorization to use "all necessary means…" allows States to use force to conduct the above actions authorized by the Resolution. The preceding phrase "*in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law*" limits the force used to that which could be used to repress piracy on the high seas. The international law pertinent to piracy is contained with UNCLOS. Although UNCLOS itself does not contain express provisions on the use of force in repressing piracy, other international law, which is applicable by virtue of Article 293, requires that the use of force must be avoided as far as possible but, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea as they do in other areas of international law.

The basic principle concerning the use of force in the arrest of a ship at sea has been reaffirmed by the Straddling and Highly Migratory Fish Stocks Agreement[13] made pursuant to UNCLOS, which states at Article 22(1)(f) that the inspecting State shall ensure that its duly authorised inspectors:

> "avoid the use of force except when and to the degree necessary to ensure the safety of the inspectors and where the inspectors are obstructed in the execution of their duties. The degree of force shall not exceed that reasonably required in the circumstances."
>
> *"Requests that cooperating states take appropriate steps to ensure that the activities they undertake pursuant to the authorization … do not have the practical effect of denying or impairing the right of innocent passage to the ships of any third State."*

This would tend to suggest that any action taken should not involve the impairment of innocent passage generally within Somali territorial seas, i.e. the actions taken must not be of such a magnitude that ships tend to avoid passage through Somali territorial seas for this reason.

> *"Affirms that the authorization provided in this resolution applies only with respect to the situation in Somalia…"*

This Resolution does not indicate that customary international law is moving in the direction of a diminution of a coastal State's jurisdiction over its territorial sea.

> *"Requests States cooperating with the TFG to inform the Security Council within 3 months of the progress of actions undertaken in the exercise of the authority [detailed above] …"*

Thus there is a reporting burden also upon those States which utilize the authorization given by this Resolution.

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[13] *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks 1995.*

Piracy off Somalia; United Nations Security Council Resolution 1816

Jurisdiction

The issue of who would prosecute if "armed robbers" were arrested by a warship of a State other than Somalia is slightly more difficult. Unlike piracy, which must occur on the high seas in order to fall within that definition, piratical acts/armed robbery in the territorial seas of another coastal State may not be justiciable in the State whose warship has conducted the arrest.[14] Additionally, there may, in fact, be no power of arrest given to the warship by its State in the first place.

International Human Rights Law

The Resolution itself refers to the applicability of international human rights law.

> *"Calls upon all States(…) to cooperate in (…) prosecution of persons responsible for acts of piracy and armed robbery(…) consistent with applicable international law including international human rights law"*

Given that it may not be possible to try the suspected "armed robbers" in the domestic courts of the State whose ship has made the arrest, the only available option, in order for them to be brought before a court, may be to hand those suspects over to the Somali authorities. Noting the explicit reference to international human rights law, of which the European Convention on Human Rights is a part, this may prove difficult for some European States.[15]

Example Scenarios

Given the complexity of the following, I think it best to explain the effects of this Resolution by way of a number of worked examples. Each of the following examples below involve 3 ships, which are located on the high seas adjacent to Somali territorial seas:

A is a warship of a State which is cooperating with the TFG to suppress piracy.
B is a warship of a State which is yet to cooperate with the TFG.
C is a merchant vessel of a State which is cooperating with the TFG.

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[14] *For example; the primary basis of English criminal jurisdiction is territorial, it being the function of the English criminal courts to maintain the Queen's peace within her realm. Accordingly, there is a well established presumption in construing a statute creating an offence that, in the absence of clear words to the contrary, it is not intended to make conduct taking place outside the territorial jurisdiction of the Crown an offence triable in an English court. The Crown Court has jurisdiction over offences committed within the Admiralty of England; this jurisdiction covers offences committed within UK territorial seas, offences committed on British ships anywhere on the high seas and offences committed on foreign ships within the territorial waters of Her Majesty's Dominions. Therefore there would be considerable difficulty in bringing a foreign national who committed armed robbery in Somali territorial seas to justice in the UK courts.*

[15] *To explain by way of a hypothetical example; a warship of State A, patrolling in Somali territorial seas pursuant to this draft Resolution, arrests suspected armed robbers. State A's laws in respect of armed robbery only extend to the land mass and territorial seas of State A, therefore the suspects have not offended the laws of State A and cannot be tried by State A. However, the suspects are likely to be in contravention of the Somali penal code and therefore could reasonably be brought to justice in the Somali courts. However, State A is a signatory to the European Convention on Human Rights and fears that, if handed over, the suspects will not get a fair trail (as is a right under Article 6) and/or be subject to inhuman* or degrading treatment or punishment (as is a right under Article 3). *Consequently, the warship doesn't disembark them in Somalia but holds them on board, with the difficult question of what it now does with them remaining unanswered.*

Piracy off Somalia; United Nations Security Council Resolution 1816

Scenario 1

On the high seas, a number of small craft are seen chasing, surrounding and then boarding a merchant vessel, which sends out a brief distress call that it is being "hijacked". There are, arguably, reasonable grounds for suspecting that an act of piracy is taking place and therefore, under existing international law, A and B, but not C[16], could take action.

Scenario 2

The same as scenario 1, but on sighting A and B approaching, the small craft and the merchant vessel which they have overrun, enter Somali territorial seas. In this case, A can continue the pursuit and has all the powers to act as if they were still on the high seas, whereas B would have to cease pursuing the vessel, until such time as consent was given by the TFG to enter Somali territorial seas.

Scenario 3

As scenario 1, except instead of entering Somali territorial waters, the small craft and merchant vessel which they have overrun enter Kenyan territorial seas. In this case, both A and B would have to cease their pursuit until consent was given by Kenya to enter its territorial seas and continue to take action.

Scenario 4

Once again, as scenario 1 except this time the incident is occurring within Somali territorial seas. In this case, A, acting under the Resolution, could take action but B could not and neither could C.

Scenario 5

A, B and C receive a radio message from a merchantman in Somali territorial seas. It states that a number of its passengers have produced guns and are robbing the other passengers and the crew. This act does not fall within the definition of piracy but is arguably "armed robbery". Once again only A could take action.

Scenario 6

As Scenario 5, except that the merchantman is on the high seas. In this case the criminal act is not covered by the Resolution nor does international law allow (with the exception of perhaps extended self defence[17]) A or B to take action against the "robbers" while they are on that merchantman without the consent of the flag State.[18]

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[16] Only a warship has a right of visit in respect of a ship where there is a reasonable suspicion that it is engaged in piracy. (Article 110(1) UNCLOS) and seizure on account of piracy can only be carried out by warships or other ships "clearly marked and identified as being in Government service and authorised to that effect" (UNCLOS 107) e.g. Coast Guard cutters.

[17] See "The Exercise of Enforcement Jurisdiction on the High Seas: Exemptions to Exclusive Jurisdiction of the Flag State - Part 2 – The Exemptions under Other Treaties and Customary International Law" by Lt Cdr Darren Reed, published in the NATO Legal Gazette Issue 13.

[18] This scenario is worthy of a paper in its own right as the reaction of ships A and B will depend very much on their own State's approach to this issue.

Piracy off Somalia; United Nations Security Council Resolution 1816

The challenge to NATO

All State members of the North Atlantic Treaty have either ratified UNCLOS or view the articles in respect of piracy as statements of pre-existing customary international law. Therefore some could argue that NATO nations should cooperate within the pre-existing structures of the Alliance to repress piracy, and would be failing in their duty to "cooperate to the fullest possible extent"[1] if they were not to do so. While this was not really an issue during the cold war and immediately thereafter, the increasing tendency to deploy Standing NATO Maritime Groups out of area may well place them in regions where piratical activity is occurring. If a merchant ship is taken by pirates when there are NATO naval forces in the area and an SNMG, or a unit thereof, fails to take effective and collective action, then the public relations repercussions for the Alliance may be extremely negative. The Resolution does not increase this risk but, arguably, it would increase the political and public impact of a failure to act. Therefore the pressure on NATO to produce and make public an anti-piracy policy, which goes somewhat beyond the present one, may be even greater.

Conclusion

The Resolution represents a step forward in the battle against piracy within the area immediately adjacent to Somali territorial seas. Additionally it symbolizes a break with the principle that a coastal State has the exclusive right to police its territorial seas to an almost similar extent as it does over its land territory and, if adopted, may set a precedent as to how the international community will react to a similar situation where a State is unable or unwilling to control its own seas, either to repress criminal activity or to ensure the safety of those conducting innocent passage sort within them.

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TO "NATO SOFA" OR NOT TO "NATO SOFA"

Mr. Andres Munoz-Mosquera - SHAPE

Any Status of Forces Agreement (SOFA) tries to solve the juridical questions raised by the presence of a visiting force in the territory of a receiving state and find the balance between the law of the flag of that visiting force and the receiving state legislation. For this purpose a SOFA should combine the principle of immunity of the visiting force and the principles of territorial sovereignty of the receiving state. In the particular case of the NATO SOFA one of the elements of its equation is that the North Atlantic Treaty (NAT) was conceived as "a long-term arrangement for collective self-defence."[1] Thus NATO states have understood that a visiting force from other NATO states may be stationed in their territories during peacetime for extended periods of time. This has crafted the implementation and understanding of the NATO SOFA throughout the NATO history.

The Treaty of Friendship, Mutual Assistance and Cooperation (Warsaw Pact/WP) had the same principles of collective defence as the NAT (Article 51 of the United Nations Charter). The presence of Soviet troops in the territory of the WP states was also solved via SOFAs. While the NATO SOFA was agreed among the participating nations and worded to encompass juridical needs of sending and receiving states, the WP SOFAs were imposed by the USSR to place its forces, as the only sending state of the WP, on a solid and permanent legal basis undisputable by the receiving state. Further, while the NATO SOFA avails itself of a multilateral nature, the WP SOFAs were bilateral and imposed by the USSR. The essential principle in international law of a relationship *inter pares* between subject of international law was respected[2] by the negotiators of the NATO SOFA and underestimated by those of the WP SOFAs.[3]

Dieter Fleck stated that depending on the different political and military scenes a visiting force may require different case-specific agreements. However, "a few common principles are valid". Since 1951 the NATO SOFA has served its participants very well and although it is in part senile, the core, what Fleck calls "few common principles", seem to be protected by some elixir of youth of such a strength that others have imported it into their own practice.[4] Among those, NATO itself offered the Partnership for Peace SOFA (PfP SOFA) in 1995. With the PfP SOFA, NATO partners enjoy rights and obligations set up in the NATO SOFA and apply the NATO SOFA provisions in their common activities with NATO promoting interoperability. Thus the NATO SOFA and PfP SOFA define the *ius in praesentia* of NATO and PfP visiting forces.

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[1] *Peter Rowe, Historical Developments Influencing the Present Law of Visiting Forces. The Handbook of The Law of Visiting Forces, Dieter Fleck 2001, p. 21.*

[2] *Ibid. Note that at the time the ratification of the NATO SOFA "was seen as an imperative."*

[3] *Serge Lazzaref, note 59 in Ibid. "A multilateral treaty, rather that a series of bilateral agreements would for "psychological" reasons be the only answer and would ensure "equalization" as between all sending and all receiving states."*

[4] *"Despite its age and reputation, the NATO SOFA still serves as a model for other SOFAs and will – so i believe – for SOFAs to come". Mette Prassé Hartov, "NATO Status of Forces Agreement: Background and a Suggestion for the Scope of Application", Baltic Defence Review No. 10 Volume 2/2003, p. 49.*

TO "NATO SOFA" OR NOT TO "NATO SOFA"

But, what about the presence of a visiting force from programmes[5] such as the Mediterranean Dialogue and the Istanbul Cooperative Initiative or from any of the Contact Countries[6]? What should be the way to codify the status of forces when in the territory of another partner, especially now that the Alliance and its partners are willing to increase their cooperation as a result of the participation of those states in current NATO-led operations?

NATO has already gone that way with PfP nations through exercises that have demonstrated the most effective means of building Partner interoperability with NATO. The PfP SOFA "provides a [legal] framework for addressing issues related to the presence of personnel from a PfP country in another. All the NATO Allies and nineteen Partners have signed the PfP SOFA."[7] And what do they do? The main use of PfP funds is for Partner nations to participate in NATO/PfP and ISO[8] PfP exercises, both types which focus on operations such as peace support, search and rescue, communications, humanitarian assistance, and force protection. Is this the kind of activities with which NATO intends to develop interoperability with MD/ICI nations and Contact Countries? Is there among the MD/ICI nations a political will to consent and cooperate with NATO members and among themselves? If not, why did they join the programmes? Is it not the same with Contact Countries? With the understanding that some political sensibilities exist, Collective Defense is an uppermost concern in these countries. It is already a factor that is ever present in the daily life of most of those countries. Since NATO activities have become global-wise, NATO members have the duty to bring nations interested in collective Security and Defense into the NATO sphere. There are political mechanisms but nothing is better than knowing each other, than working together, and that is what is currently happening. However, there is a next step to be taken: provide a permanent legal framework and flee from *ad hoc* solutions.

If the NATO SOFA and the PfP SOFA, as one body, are "intended to support" cooperation among the parties, the status of forces applies no matter what type of activity or number of members of the force or the civilian component participate, as long as they are "activities that are conducted in the spirit of NATO and PfP…aimed at developing and tightening the relations between both the Allies and Partners…a narrow approach will limit the cooperation."[9]

What is the difference for PfP countries when compared to MD/ICI and Contact Countries? More than 95% of these nations have signed Security Agreements with NATO and are accredited by the NATO Office of Security. Many of these nations already participate in NATO-led operations and share knowledge in NATO-led exercises. What is the impediment to launch a SOFA for those countries? Is it the doubt between offering them a PfP SOFA-like agreement or WP-like SOFA, i.e., bilateral agreements?

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[5] NATO Handbook. "The Mediterranean Dialogue is an integral part of the Alliance's cooperative approach to security".

[6] http://www.nato.int/issues/contact_countries/index.html#_ftn1 "The Allies established a set of general guidelines on relations with Contact Countries in 1998. The guidelines do not allow for a formal institutionalisation of relations, but reflect the Allies' desire to increase cooperation. Following extensive debate, the term Contact Countries was agreed by the Allies in 2004".

[7] http://www.pims.org/ PIMS - Partnership for Peace (PfP) Information Management System.

[8] ISO: In support of.

[9] Paraphrasing Mette Prassé Hartov, Op. Cit., p. 58-59

TO "NATO SOFA" OR NOT TO "NATO SOFA"

What should be better? From the negotiations point of view, a PfP SOFA-like initiative would be simple as the terms of the NATO SOFA would be incorporated by reference, together with almost 60 years of NATO SOFA practice that would also become part of the legal manners of MD/ICI nations and Contact Countries. This would certainly save time, leaving to the NATO members only to decide when to launch the initiative and to the non-NATO nations the decision to join or not. Besides, the perspective of Lazareff´s "equalization" would inundate all sending and all receiving states overwhelming any possible aggravation. Am I suggesting a SOFA for all non-NATO countries engage in North Atlantic Council approved cooperation of partnership programmes? Yes. Is it any better? Is there any risk? Definitely, no. The NATO SOFA make may be debatable but its practicality not.

What would be the scenario of bilateral agreements with each of the MD/ICI nations and the Contact Countries? For those who daily engage in international agreements, in all different categories, negotiations processes are long-lasting even in case of existing templates. Bilateral negotiations always introduce a flavour of the parties, in case of a round of bilateral SOFAs, each nation might incorporate its idiosyncrasy in the understanding of "limited territorial sovereignty" or "concurrent jurisdiction"[10] or even being tempted of incorporating by reference European Union directives. Thus, time and diversity would kill both uniformity in treatment and the principle of reciprocity that should govern the status of a force and the civilian component when abroad.

I want to conclude this article that intends to support the conclusion of a PfP SOFA-like with MD/ICI nations and Contact Countries by quoting Lazareff "A political equilibrium is the basic condition for the setting up of a real system of concurrent jurisdiction. This equilibrium is more difficult to obtain in a bilateral agreement that in multi-lateral agreements. In the latter, each signatory State is at the same time a creditor and a debtor of every other member State of the Alliance".

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[10] *"[...] bilateral agreements [...] shows that negotiations are always very difficult on the problem of jurisdiction […] The concurrent jurisdiction agreements between the United States and other States can be classified into two categories; in some cases the concurrent jurisdiction is not only legal but also a factual system; in other cases it is only a legal appearance" Serge Lazareff, Status of Military Forces under Current International Law, Sijthoff/Leyden 1971, p. 43.*

Draft Convention for Cluster Munitions

CDR James Orr – HQ SACT

This brief note is intended to provide readers with one perspective on the legal implications the proposed ban on cluster munitions may have on NATO training and operations.

Background

Recognizing growing concerns for the adverse and unacceptable humanitarian consequences caused by the use of certain types of cluster munitions, the Norwegian government initiated discussions on development of a binding legal instrument that would prohibit cluster munitions that cause unacceptable harm to civilians. A draft Convention was developed through a series of meetings, most recently in Dublin, culminating on 28 May 2008. [1]

The draft cluster munitions convention includes the following provision:

Each State Party undertakes never under any circumstances to:

(a) Use cluster munitions;
(b) Develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, cluster munitions;
(c) Assist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention.

Concern has been expressed, most notably from the United States, that the language of paragraph (c) will unduly affect interoperability, preventing nations that become parties to the convention from operating or training with nations that do not.

Past practice, as well as language recently inserted into the draft convention, suggests that potential adverse effects on interoperability in training and operations can be mitigated.

Discussion

NATO does not presently use cluster munitions in any of its operations. Cluster munitions use in ISAF has been regulated by special restricting instructions; specific authorization must be obtained in situations when their use is deemed necessary. The types of engagements being conducted presently in ISAF do not call for the use of cluster munitions. However, depending on national interpretations the entry into force of the convention could affect current operations from an interoperability perspective. The impact on future NATO operations is far more difficult to assess, since concepts of operations are understandably not defined.

The USA has been concerned that the draft convention could endanger their ability to operate and to cooperate with other militaries and other governments around the world. The USA has asserted that the current draft of the convention under consideration would arguably criminalize cooperation of countries who sign the convention with militaries of governments who do not sign the convention and who still use cluster munitions.

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[1] *Diplomatic Conference for the Adoption of a Convention on Cluster Munition, CCM/77, 30 May 2008.*

Draft Convention for Cluster Munitions

The USA position has been that it strongly supports negotiations on cluster munitions within the framework of the Convention on Conventional Weapons, emphasizing that all of the nations that produce cluster munitions are represented in the CCW. The USA asserts that cluster munitions have demonstrated military utility, and that their elimination from U.S. stockpiles would put the lives of its soldiers and those of its coalition partners at risk. Moreover, the USA asserts that cluster munitions can often result in less collateral damage than unitary weapons, such as a larger bomb or larger artillery shell would cause, if used for the same mission.

The response of the treaty proponents has been that concerns over Article 1(c) unduly inhibiting joint operations are overstated:

(a) states parties to other similar treaties have clarified and interpreted similar and in some cases identical language in those treaties through national declarations and laws, permitting continued cooperation with non-party states; and
(b) states parties to other treaties on a wide range of issues have developed practical methods ("work-arounds") to deal with having different legal obligations than their allies.

These factors, it is asserted, provide precedent to believe that similar approaches would be employed by nations that sign the cluster munitions convention, allowing interoperability in training and operations with nations that do not become parties to the convention.

It is being asserted that action taken by the parties at the negotiations in Dublin should further provide assurances to both party and non-party nations that the effects on interoperability can be mitigated.

The revised draft treaty text now contains language in Article 21, allowing treaty signatories to "engage in military cooperation and operations with States not parties to this Convention that might engage in activities prohibited to a State party."

The negotiating states had insisted that the provision was needed for situations where the US might use cluster munitions against the wishes of its allies. Critics of this language assert that the added wording is vague enough so as to allow states to actually assist non-party states in operations where the non-party would use cluster munitions.

No official assessment from the concerned nations has yet been provided. Nevertheless, it would appear that the combination of past state practice with regard to similar language in other treaties, and the addition of the new paragraph expressly authorizing states party the ability to cooperate in operations with non-party states, should mitigate the extent to which the convention, if ultimately adopted by NATO nations, would interfere with training and operations.

Negotiations and other state action providing interpretations and reservations to the convention draft are expected to continue over the coming months, and a final assessment of the impact of the convention on Alliance training, operations and other aspects of interoperability will need to await those developments.

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2008 NATO LEGAL CONFERENCE

The third annual NATO Legal Conference was held at the Military Museum in Istanbul from April 21 to 25, 2008. The on-site host was NRDC-T (NATO Rapid Deployable Corps Turkey).

The themes of this year's conference were "legal interoperability" and "command responsibility". Distinguished speakers included General Bantz J. Craddock, SACEUR, MGEN Stanislaw Nowakowicz, Deputy Commander of NRDC-T, MGEN(R) Anthony P.V. Rogers, BGEN Kasim Erdem, NRDC-T Chief of Staff, Mr. Serge Brammertz, ICTY Prosecutor, and Mrs. Mona Rishmawi, LEGAD of the UN OHCHR.

The list of attendees comprised legal professionals from NATO Legal offices and Ministries of Defence; it has been broadened to encompass legal representatives of non-NATO troop contributing nations in ISAF and KFOR, of the EU and of future member countries. 80 professionals participated in this year's conference.

The Conference Report will be the subject of a special edition of the Gazette which will be published before the end of June.

(1st Row from Left to Right : Mr. Thomas A. Randall, SHAPE LEGAD – MGEN Stanislaw Nowakowicz, DCOM NRDC-T - GEN Bantz J. Craddock, SACEUR – BGEN Kasim Erdem, COS NRDC-T – Mr. Serge Brammertz, ICTY Prosecutor
2nd Row from Left to Right : COL Paul Van Maldeghem, IMS LEGAD, Mr, Stephen A. Rose, HQ SACT LEGAD - Mrs. Mona Rishmawi, LEGAD UN OHCHR - MGEN (Ret) Anthony P.V. Rogers – Mr. Ulf-Peter Häussler, Joint Command Special Operations (Germany) – Mr. Baldwin De Vidts, LEGAD to SecGen)

FIRST NATO LEGAL TRAINING CONFERENCE HELD AT THE NATO SCHOOL FROM MAY 14 to 16, 2008

From 14-16 May 2008 the first NATO Legal Training Conference took place at the NATO School in Oberammergau surrounded by the Bavarian mountains. Purpose of the conference was to share current programs and best practices learned from national training and education of military legal advisors on legal issues connected with NATO operations and develop collaborative and complementary instructions. Nineteen legal representatives from several Ministries of Defense and national armed forces, NATO agencies and (academic) institutions were asked in a *gemütlichen* atmosphere to provide a presentation relating to the legal training they provide to the legal advisors and military in their home country.

The participants of the Conference concluded that the first NATO Legal Training Conference was useful and that the Conference should become an annual event. The Conference should, as did this one, be tied to the fall offering of the NATO Legal Adviser's Course to allow participants to attend both on the same travel orders. In addition, it was recommended that a call for proposed topics and presentations be made at least 6 months in advance so that institutions and Ministries of Defence can submit matters for consideration and discussion.

The NATO School

In addition, the following recommendations for increased collaboration between the NATO Legal Community and others involved in legal training for military units and personnel were submitted for further consideration:

- Distributing a phone list with NATO legal advisors' names and their specialization, as this would help the nations' legal advisors to determine who to contact for a specific question.
- Increased collaboration between NATO and member states' institutions and universities in order to facilitate the provision of basic and advanced legal training for legal advisors, legal training officers, and troops.
- Development of a basic tactical level course for non-legal officers should be developed. This could be accomplished by NATO members and partners and could be used as an initial and basic reference for the nation's own regulation and training, e.g. detention and Rules of Engagement. Next, an advanced civilian deployment training could be developed. It is NATO's responsibility to create a common understanding within the nations.
- Real life deployment training and exercises should be reflected in legal training. Increased collaboration between national, multinational, and NATO training organizations can help share lessons learned , training materials, and training scenarios to help improve the quality of all training provided.

  Involvement with a NATO legal staff in an exercise is the best training (apart from actual deployment) that a military legal advisor can get. In operational law issues, legal advise is often asked in times of emergency and must be provided within a specific deadline (several hours); publishing a legal training calendar of upcoming NATO exercises (at least a year in advance, to allow for national legal offices to budget for their personnel to participate) with an official invitation for national legal advisors to participate submitted through the National Liaison representatives at HQ SACT would be desirable.

FIRST NATO LEGAL TRAINING CONFERENCE HELD AT THE NATO SCHOOL FROM MAY 14 to 16, 2008

- Continued development and expansion of the NATO Legal Gazette was universally considered important. The NATO Legal Gazette is increasingly viewed by legal staffs within the national Ministries of Defence as a very important information tool; it notifies the legal advisors of the current and upcoming training activities. Increasing the opportunities for national military legal advisors to take advantage of NATO exercises to develop their own skills.

Next year the second NATO Legal Training Conference will focus on the execution of the objectives defined in this year's training workshop. Detailed information about existing training opportunities for legal advisors and trainers will be provided.

A full conference report is being prepared and will be submitted to the Legal Advisors of HQ SACT and SHAPE for their consideration. Information on the 2009 NATO legal training Conference will be sent to the nations through the National Liaison Representatives at HQ SACT and will also be published through this Gazette.

Spotlight

Lieutenant

Colonel Gilles

Castel

Legal Adviser

HQ KFOR

Name: Gilles CASTEL

Rank/Service/Nationality: LT COL /Army/French

Job title: Chief Legal Adviser to COMKFOR

Primary legal focus of effort: International law, law of contracts, Memorandums of Understanding, Technical Agreements and law of armed conflict.

Likes: Outdoor Sports (running, swimming, walking), martial arts (Aikido) and reading.

Dislikes: Incompetent people.

When in Kosovo, everyone should: visit Decani Monastery to understand why we are here.

Best NATO experience: Regional Command Center LEGAD (RCC) in Kabul (or how to discover the reality of the Rules of Engagement).

My one recommendation for the NATO Legal Community: Enjoy the relationship with the other nations' Legal Advisers, there so much to learn from each other.

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HAIL

&

FAREWELL

Hail

ISAF : Major Sonya Vichnevetskaia (CAN AF) joined in April 2008

ISAF : CAPT Les Reardanz (USA N) joined in April 2008

HQ KFOR : CAPT Cedric Fragata joined in April 2008

Farewell

ISAF : Major Kim Maynard (CAN AF) left in April 2008

ISAF : CDR Bob Morean (USA N) left in April 2008

HQ KFOR : CAPT Virginie Lotti left in April 2008

Few things are impossible to diligence and skill. Great works are performed not by strength, but perseverance.

Samuel Johnson

GENERAL INTEREST/NATO IN THE NEWS

- NATO Member and Partner Chiefs of Defence conclude two days of discussions on a wide-range of military-related issues.

  http://www.nato.int/ims/news/2008/n080515a.html

- NATO opens new Centre of Excellence on Cyber Defence

  http://www.act.nato.int/news.asp?storyid=252

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

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

- Bulgarian Foreign Minister stresses importance of keeping NATO Force in Kosovo

  http://news.xinhuanet.com/english/2008-05/24/content_8240512.htm

- International Law Blog

  http://lawprofessors.typepad.com/international_law/

- For legal professionals : antidotes to stress

  http://louisiana.thecompletelawyer.com/volume4/issue3/index.php

- Speech by NATO Secretary General at the Security and Defence Agenda on the next decade of NATO

  http://ls.kuleuven.be/cgi-bin/wa?A2=ind0806&L=natodata&T=0&F=&S=&P=482

- Dr. Antoine Buyse of the Netherlands Institute of Human Rights (SIM), Utrecht University created a new blog on the European Convention on Human Rights and Fundamental Freedoms. Posts are on diverse topics

  http://www.echrblog.blogspot.com/

GENERAL INTEREST/NATO IN THE NEWS

- The International Human Rights Law Video Library has video holdings of interviews with leading commentators and practitioners in the field of international human rights law, as well as video clips of visits to sites throughout the world relevant to issues of human rights. The *Library* was conceived as a tool to assist people in contextualizing their understanding of international human rights issues by making available, over the internet, videotaped sequences of specific themes relevant to the international human rights law and international humanitarian law. http://www.lawvideolibrary.com/hr/index.htm

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The SHAPE, HQ SACT, and ACT/SEE Legal Offices are looking for interns. The NATO internship programme provides current and recent students with the opportunity to intern with the SHAPE international community in Mons, Belgium or HQ SACT in Norfolk, Virginia, USA. For SHAPE there are two calls for applications per year. Internship will in principle last 6 months. For HQ SACT there is one call for applications per year.

The programme objectives are :

- To provide the Organisation with access to the latest theoretical and technical knowledge that the intern can apply through practical work assignments, as well as with additional staff resources.
- To provide interns with an opportunity to gain a thorough understanding of the organisation and NATO as a whole.
- To expand understanding of NATO in Alliance countries.

The eligibility criteria are :

- Age: over 21 at the time of internship.
- Nationality: nationals of a NATO member state.
- Studies: at least two years of university study or equivalent.
- Languages: proficiency in one of the official NATO languages (English/French); desirable working knowledge of the other.

All interns will require a security clearance from their national authorities prior to working at NATO. The procedure will be initiated as soon as the candidate is selected. For more information about these two internship programs please go to : http://www.nato.int/shape/community/internship/index.htm

http://www.act.nato.int/content.asp?pageid=1220

or contact the HQ SACT or the ACT SEE Legal Office for additional information.

It is the province of knowledge to speak and it is the privilege of wisdom to listen.

Oliver Wendell Holmes

UPCOMING EVENTS

- The next **NATO Operational Law Course** will take place at the NATO School in Oberammergau from July 7 to 11, 2008. This course is now open to PfP and NATO personnel deploying or in support of deployers. Classification of the course is NATO CONFIDENTIAL REL PFP/ISAF/KFOR.

- The next **NATO Legal Advisors Course** will be held on October 6 to 10, 2008. Next year's dates for this course are 18-22 May and 28 Sept– 2 Oct 2009.

- The position of the **Assistant Legal Advisor** at the International Military Staff of NATO is still vacant. Nominations have to be submitted by nations before 1200 hrs on Wednesday July 9, 2008. For additional information, please contact COL Paul Van Maldeghem at the IMS (vanmaldeghem.paul@hq.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 10th International Course on Law of Armed Conflict** (LOAC) for Military Medical Officers will be organized from August 15 to 22, 2008 in Spiez, Switzerland. The course will be held in French and English. Additional information can be obtained by contacting the Course Secretariat of the Medical Services Inspectorate at +41-31 324 62 44 – loac.icmm@vtg.admin.ch

- Within the framework of PfP Partnership Work Programme, Switzerland organizes an **international workshop** on the role of commanders in the implementation of International Law of Armed Conflict (LOAC) and Rules of Engagement (ROE) in military field operations including Crises Response Operations (CRO). It will be held in Geneva from 14 to 18 September 2008. Registration deadline is no later than 16 June 2008. For further information please contact Mrs. Sigrid Chatton at the Geneva Centre for Security Policy – Phone +41 22 906 16 22 – s.hatton@gcsp.ch

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