

NATO Legal Gazette

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Introduction

Fellow Legal Professionals and Persons Interested in NATO,

This is our first issue since the summer (which has completely left Belgium) and includes three articles by NATO attorneys—one on the claims practice in ISAF, the third installment of Commander Reeds' maritime commentary on enforcement jurisdiction, and a review of the new book honoring Professor Yoram Dinstein. This edition of the Gazette is longer than usual because it includes a report of the 2008 NATO Legal Conference and two of the presentations given there that may be of interest to our audience: one by Major General A.P.V. Rogers on command responsibility and one by Ms. Ms. Jurić Matejčić of the Croatian Ministry of Defence on legal interoperability.

Also included are snapshots of some of the legal professionals working in the 32 NATO legal offices located in 19 different countries, links to recent articles of interest to the NATO legal audience, and a list of upcoming events such as the *Workshop on the Law of Armed Conflict and Human Rights in International Peace Support Operations* that will be conducted on 3 – 5 December 2008 at the NATO School, Oberammergau, in co-operation with the International Institute of Humanitarian Law.

For future planning, HQ EUROCORPS will be sponsoring the 2009 NATO Legal Conference, 8-12 June, in Strasbourg, France. More details concerning the program and accommodations are forthcoming.



(source : www.trekearth.com/France/photo868841.htm)

Finally, articles of general international law or practical legal interest are requested to sustain the publication of this Gazette. Please send to Sherrod.Bumgardner@shape.nato.int with a copy to Dominique Palmer-De Greve Dominique.Degreve@shape.nato.int. for our next issue. Thanks!

ISAF Claims Process in a Nutshell

Major Sonya Vichnevetskaia (CAN AF) – Assistant Legal Adviser ISAF HQ

How much for an agricultural cow?

"You have just been involved in an accident with ISAF military personnel. We cannot stop due to force threats to both you and I. In order for you to be reimbursed for any damages, please report to the CIMIC Centre at HQ ISAF main gate every Wednesday afternoon between 14h00 and 16h00" – this is typically how a claims process begins for an Afghan national from Kabul when he gets involved in an accident with an ISAF vehicle and receives a Traffic Accident Form (RTA) from the ISAF driver.



What happens next? The claimant shows up at the front gate of ISAF HQ on Wednesday and joins a long line of his compatriots who have suffered a similar fate or are just trying to make some cash based on a fabricated story, almost impossible to prove or deny.

The investigation lies with an ISAF Claims officer who on every Wednesday is accompanied by an interpreter and representatives from Force Protection to open a claims session at 14h00.

Legal Basis for Conducting Claims at ISAF

The Military Technical Agreement (MTA) signed on 04 Jan 2002 and later modified by the Exchange of Letters between the Government of Afghanistan and the NATO Secretary General dated 05 Sep/22 Nov 2004, are the main documents establishing the framework for the ISAF presence in Afghanistan.

In accordance with Section 3, Article 10, Annex A to the MTA, *Arrangements Regarding the Status of the ISAF*, "the ISAF and its personnel will not be liable for any damages to civilian or government property caused by any activity in pursuit of the ISAF mission." This means that in general ISAF will not process the claims filed against it for the property damage. However, in accordance with ISAF HQ Standard Operating Procedure (SOP) 1151, *Claims Against ISAF*, sometimes a goodwill payment is offered if it appears that the ISAF Forces may have caused damage to privately-owned property.

The LEGAD office is the claims office for the ISAF Area of Operations. The responsibilities of the ISAF HQ Claims Officer with regards to claims include processing and monitoring all claims against or by NATO.

The main claims documents are:

- OPLAN 30302 Annex AA;
- The Military Technical Agreement and Annex A (SOFA);
- NATO SOFA;
- NATO Claims Policy for Designated Crisis Response Operation;
- ISAF SOP 1151.

ISAF Claims Process in a Nutshell

A claim may be filed against HQ ISAF, against one of ISAF Troop Contributing Nations (TCNs), between NATO/Partnership for Peace (PfP) countries or between NATO/PfP and non NATO/PfP countries. The MTA states that ISAF is not responsible for any damage caused in support of the Mission. In certain circumstances, however, claims are paid on an *ex gratia* basis as a necessary force protection measure. Claims are submitted against TCNs or against HQ ISAF. Road Traffic Accidents are the most common of all claim occurrences. These accidents remain the claims responsibility of the Nation causing the accident if the vehicle and/or individual involved are not one belonging to HQ ISAF. If, however, the responsible TCN outside HQ ISAF cannot be identified, HQ ISAF will investigate the claim and compensate the damages if it is determined that ISAF is the cause of the accident and the claimant has not operated his vehicle in a negligent manner contributing to the cause of the accident. The summary of the claims essentials includes:

- The claims officer will work with the claimant to ensure that all necessary information is received;
- Pursuant to the Military Technical Agreement (MTA), ISAF has no liability for damages caused in pursuit of its mission. All compensation payments are *Ex Gratia*;
- ISAF will pay if it is the cause of the accident and if the local national driver was not negligent;
- The claimant must prove each element of a claim on the balance of probabilities (51%);
- The lack of certain documents will not preclude settlement of a claim if the Claims Officer is satisfied that lack of documentation will not prejudice ISAF, NATO or TCNs;
- Every TCN is responsible for settling claims arising from its own acts and omissions;
- The TCN claims settlement will be within the discretion of the nation and in accordance with its national laws and regulations;
- The TCN must conduct appropriate investigation;
- Any denial of a claim should be put in writing to the claimant;
- Claims relating to contractual relations (i.e. ISAF employee) or for government property (i.e. police vehicle) are not compensable.

The difficulties with regards to claims are two-fold: communication with the subordinate Headquarters and lack of guidance from higher Headquarters. SOP 1151 was re-drafted in 2007 and some of the wording was changed. For example, it used to say that NATO would not pay for any activity arising out of operations. It now states:

"HQ ISAF will not process claims arising from combat, combat-related activity, or operational necessity, claims arising from contractual obligations, claims from the host nation for damage to or loss of property, or for death or injury to members of its armed services while such members are engaged in the performance of official duties, and unless valid reasons exist, claims presented more than six months after the claimant has, or could have, reasonably discovered the damage."

ISAF Claims Process in a Nutshell

Practical Challenges of the ISAF Claims Officer

It goes without saying that most of the claims in Kabul are caused by traffic accidents. The ideal scenario for a Claims Officer would be that the claimant gets an RTA form, the ISAF driver files an accident report with the International Military Police upon his return to the ISAF Headquarters, and the claimant further brings two estimates for the damage, vehicle ownership paper, vehicle owner ID and the Afghan police report along with the witness statement. After all documents are duly translated, the Claims Officer analyses the evidence and should it be established that ISAF vehicle was the cause of an accident, a settlement is offered to the claimant. Justice is done, hearts and minds are won, everyone is happy.

However, ideal scenarios are a very rare treat for the ISAF Claims Officer; very often the security situation does not allow the ISAF drivers to hand out the accident form or they simply chose not to do so if, in their opinion, the local national vehicle is to be blamed for an incident. If you are lucky, they will file a police report upon return to camp. However, given that the IMP stations are present in ISAF HQ, KAIA, Camp Warehouse and Camp Souter – four different Camps in Kabul that do not have a joint database of the accidents, tracing down the paperwork can become a challenge in itself.

Another difficulty encountered is that to most claimants, all foreign vehicles, be it a Coalition Forces vehicle or a Private Security company vehicle, automatically become ISAF vehicles and in the absence of a RTA form and an IMP report, it is within the Claims Officer's discretion to grant the claimant the benefit of the doubt, based on the accuracy of the description provided, witness statements, photographs and investigation with the Military Police.

The other problem is to determine how much you pay. Are the estimates provided accurate? Invaluable help on this issue comes from the interpreters and cultural advisors who can collect the information from the local markets and garages and provide you a list of price against which you can always compare the estimates. A radiator price quoted to at US \$1,500 might not raise much concern to the Claims Officer inexperienced in car parts prices like me, until this price is compared to a quote indicating that the going rate in Kabul for a radiator is only US \$500.

And what happens if the claimant is only five years old accompanied by his ten year old uncle – the oldest remaining male in the family? No identification is available; there is no legal guardian because the mother is precluded from attending public places. Flexibility and "out of the box" thinking are the only solutions to these dilemmas mostly unknown to us in well established Western legal systems.

Some Case Files

How many claims do I deny? Not many - the story has to appear to be clearly fabricated (e.g. my cow was hit by an ISAF tank – I cut off her head with a pocket knife to end her sufferings). I try to stay objective and base my judgement on facts only. The reality is more often than not, the accident did take place, but the price claimed is three times as high as it should be. Not always, but often. Cause of an accident is also a challenge. Everyone in Kabul drives offensively, including our Forces and there is no standard test to obtain your driver's license.

The paradox I discovered in Afghanistan is that the truer the tragedy, be it death or injury, the less likely people are to come forward and file a claim. And on the other hand, there is always a line of people claiming death of livestock, all of which were "top quality" pregnant females – valued a lot higher than their male counterparts. Below are two examples representing the opposite sides of the spectrum the Claims Officer has to work with.

ISAF Claims Process in a Nutshell

An eleven year old boy is hit by an ISAF armoured vehicle and as a result suffers a broken knee, a broken color-bone, and a broken elbow. The security situation does not allow the ISAF vehicle to stop. This is not the case of a dent in the bumper or a broken side-mirror, this is not even a run-over donkey – this is a true case of hearts and minds. I am happy to say that ISAF did trace the family of little Hamideullah and with the help of an Afghan police representative, I went to visit his family as opposed to them coming to visit ISAF HQ. The overwhelming Afghan hospitality was displayed – I left with pockets full of kish-mish (Afghan raisins) that the hosts insisted I take after they noticed how much I liked them; it was a rare occasion to see an Afghan house including the female quarters and it made this visit the most memorable event of my tour. The apology – which meant more than anything else to this family, the settlement of the claim - for only US \$400 - and the arrangement with a French hospital to conduct a follow-up check on the boy, hopefully helped to gain back the hearts and mind of Hamiedullah's neighbourhood.



(source : www.sfusd.k12.ca.us)

And how much should we pay for an "agricultural cow"? One of my claimants was furious when I offered a settlement of US \$300 – the going rate for a cow. His cow was "agricultural", he shouted in indignation !!! I reopened the file to reconsider, I contacted the Food Organization of the UN, I collected data from a local market and indeed I discovered there is a special breed of cows in Afghanistan, artificially inseminated and brought from Pakistan a few years ago, that produces close to forty litres of milk per day as opposed to the normal five litres. The price for this cow is US \$ 900. Proud of my broadened horizons on an agricultural level and proud of my work as an investigator, I offered the settlement – only to find out that after receiving the money, the claimant filed the same claim with the Coalition Forces Claims office. This claim was not paid the second time and he was banned from all ISAF and Coalition Forces establishments, but this incident left me with a feeling of being taken advantage of.

Words of Wisdom

My experience as the Claims Officer made me realize that the Claims system ISAF has in place is functioning; however, the process of collection of documents and arriving to an objective decision is very challenging. Perhaps, there is no magical solution for the immediate future in Afghanistan to establish a solid, universal system of identification and police reports to facilitate the investigation process. There are, however, little things that could make the difference. For example, the French contingent stamps their Traffic Accident Form with a distinctive stamp indicating that the incident was caused by French Forces. When the license plate and nationality of the car are identified on the Traffic Accident Form, the duties of the ISAF HQ Claims Officer are significantly simplified.

When the drivers come back from mission and file police reports in a timely manner, there is another source of information that helps the Claims Officer to get to the bottom of the claim. As mentioned in SOP 1151, "Because the settlement of claims increases the confidence of the local population and increases the force protection of ISAF personnel, it is important to settle just claims in a speedy, transparent and accurate manner". When the investigation and decision making is facilitated, the ultimate goal of the claims process is achieved.

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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 3 – The Effect on NATO Operations at Sea

Summary of previous two articles published in issues # 12 and 13

International law reserves exclusive jurisdiction over merchant vessels on the high seas to the flag State, i.e. the State whose flag the vessel flies. There are a number of notable exceptions to this exclusivity of jurisdiction, some contained within the United Nations Convention on the Law of the Sea 1982 (UNCLOS) and some concurrently present in customary international law and other Treaties. The exceptions contained in the former are generally available only to warships and can be summarised as hot pursuit and a right of visit if there are reasonable grounds for suspecting that the vessel is engaged in piracy; the slave trade; unauthorised broadcasting; or the vessel is without nationality or in reality, of the same nationality as the warship. Customary international law allows a warship a right of reconnaissance and permits a vessel on the high seas cooperating in a criminal enterprise with a vessel within the territorial waters to be treated as if it too were within the jurisdiction of the coastal State. Arguably it also allows some right of both self and extended self defence. Other Treaties, such as the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988 (SUA) and the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, allow for a flag State to waive its right to exclusive jurisdiction over its vessels in certain circumstances. Outside of those exemptions, UN Security Council Resolutions can authorise States, who are not the flag State, to exercise jurisdiction over vessels not flying their flag on the high seas and flag States can also consent to such action being taken, but whether the vessel's master's consent alone is sufficient is a matter of some debate.

In this article LTCDR Reed addresses what effect these exemptions have on NATO operations at sea, if any, and whether NATO can take advantage of them. It should be added at the start that the views contained in this article are those of the writer and should not be construed as reflecting the policy or the opinion of either NATO or Her Majesty's Government.



(source : www.oceanographer.navy.mil)

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

Introduction

As explained in the previous articles, UNCLOS reserves exclusive jurisdiction over ships on the High Seas to the flag State¹ with a few limited exceptions, those exceptions being either contained within UNCLOS² or in accordance with customary international law³. NATO, an international organisation, does not have its own flagged vessels and thus if it wishes to enforce collectively any kind of jurisdiction against ships on the high seas, it must depend on one of those exceptions.

Whose jurisdiction is to be enforced?

When we consider the enforcement of jurisdiction on the high seas, I think it is important to understand exactly whose jurisdiction is to be enforced. NATO is not a State and thus does not have its own jurisdiction per se; NATO has no legislative authority, there are no NATO courts⁴, nor is there any kind of NATO police force. If pirates are "arrested" by a warship in a NATO group, it will not be a NATO court that will decide their fate but rather a national one⁵. If there is no NATO jurisdiction to enforce then it is arguable that NATO cannot or should not purport to enforce any kind of jurisdiction. However, NATO, like any other international organisation, will always to a certain extent be the sum of its parts. Although there are some tasks and roles (such as trying pirates in a court of law) that only nation states will be able to perform, that limitation does not entirely preclude NATO from coordinating some of those tasks or executing others itself. The lack of its own peculiar jurisdiction should not, by itself, prevent NATO from upholding international law and norms or facilitating others to do so⁶.

Having established that NATO may act in some aspects and to some degree, notwithstanding an absence of its own jurisdiction to enforce, we need to consider the agents of enforcement. Enforcement jurisdiction is usually the preserve of a State's police force(s). Since NATO is primarily a military alliance and thus has no standing police force(s), surely, one might ask, NATO does not have the correct capabilities to take an active role in the enforcement of the law (albeit international) on the high seas?

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

² See Part 1 of this article in the NATO Legal Gazette Issue 12.

³ See Part 2 of this article in the NATO Legal Gazette Issue 13.

⁴ With the exception of the NATO Appeals Board which handles employment matters.

⁵ In all probability, a court in the arresting warship's State.

⁶ By for example passing on reports of unlawful activity, received by the NATO Shipping Centre, to coastal States for them to take action.

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

The Agents of Enforcement Jurisdiction

There is a strong argument that, in giving States other than the flag State some powers of enforcement jurisdiction over vessels⁷, UNCLOS expects maritime powers to assist to some degree in ensuring respect for certain international rules and regulations. But what sort of national agency should be used; the police, the coast guard, the navy? It is most unlikely that the police force of any coastal State would have the capacity, alone, to enforce jurisdiction on the high seas, which lie at least 12NM from the coast. Few States, with some very notable exceptions, have effective coast guards. Thus it is likely that the State agent most suitable to undertake this task, whether alone or in cooperation with other agencies (e.g. by embarking local police in a law enforcement detachment), would be the navy.

Putting aside the issue of whether a military force should ever be involved in the enforcement of law, which is beyond the remit of this article, UNCLOS itself, in referring to the rights and duties of "warships"⁸ arguably expects them to be one, if not the preferred, method of law enforcement on the high seas. That raises another question; why would a warship wish to enforce its State's jurisdiction on the high seas? Would it not be preferable to wait until the ship reaches the warship's territorial seas or indeed enters one of its ports? Alternatively why not inform the ship's flag State with the legitimate expectation that it (the flag State) would take action?

One reason for more direct and immediate action on the part of a warship or its State may be that the effects of the action which prompts the warship to react are felt in its State's territory or territorial waters even if that action takes place on the high seas many nautical miles away⁹. Additionally, in many instances the authorities and agencies of the flag State which might be capable of enforcing the law against their own vessels either do not exist in real terms (in the case of flags of convenience) or do not have adequate resources to deal with every potentially unlawful action committed by ships flying its flag on the high seas.

Consequently, on the high seas, only warships will usually have the sufficient expertise and equipment to enforce jurisdiction on the high seas. NATO may not have police force(s) but it does have two maritime Standing Groups comprised of frigates and destroyers which may be capable of carrying out enforcement-type actions in situations such as piracy.

Can NATO use the exemptions?

If therefore it is accepted that navies can enforce international law on the high seas and, indeed, in certain cases, can enforce that law against ships not flying their flag, can and should NATO assist?

It is important to bear in mind that many of the exceptions to flag State exclusivity of jurisdiction have arisen because of the recognized effect of the unlawful action on a specific coastal State. Thus, the exceptions are intended to facilitate the coastal State's protection of its legitimate interests. For example, the doctrine of hot pursuit (and the corollary of constructive presence) allows a warship of the coastal State to pursue a vessel (not flying its flag) out of territorial seas in order to make an arrest on the high seas. In that situation and in those similar, it is hard to envisage what role NATO could have.

⁷ See Part 1 of this article in the NATO Legal Gazette Issue 12.

⁸ For example, UNCLOS initially (at Article 110(1)) reserves the Right of Visit to warships and then extends their rights to other "duly authorized ships... clearly marked and identifiable as being on government service" (at 110(5)).

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

That is not to say that NATO should not be interested in what takes place on the high seas. Indeed Article 2 of the North Atlantic Treaty states:

"The Parties will contribute toward the further development of peaceful and friendly international relations by ... promoting conditions of stability and well-being."

Widespread unlawful activity on the high seas is hardly conducive to international stability and well-being. Thus curbing such activity is arguably NATO business, business which may involve a certain amount of "police action" by NATO Standing Groups. The NATO Secretary General has even stated that NATO warships could be called upon to defend the sea lanes¹⁰.

The example of Piracy

There is currently widespread piratical activity taking place in the Gulf of Aden¹¹, such that it is having a damaging effect not only on the well-being of the immediate area but also elsewhere¹². NATO has shown itself able to deal with large scale counter-insurgency operations, and, therefore dealing with, for example, pirates on the high seas off the East Coast of Africa should not be beyond its capabilities. Accordingly, while NATO need not feel constrained by a lack of capability, the question remains as to whether taking some more active role against piracy is legitimate NATO business?

One could argue that piracy in its recent guise off Somalia is one of the new challenges that NATO faces and thus countering its effects will support "security and stability" which in turn falls into line with the 1999 Strategic Concept¹³. The issues of what will happen if NATO does not deal with those pirates, the effect such failure to act would have on NATO's standing and, more pertinently, whether anyone else would decide to act instead are not strictly legal questions but rather policy ones and I will leave it to others to answer them. However, what is a legal question is whether NATO, as an organization, is legally empowered to act against piracy and, if it didn't act, would it be failing in any legal duty to do so?



(source : www.worldatlas.com)

¹⁰ "NATO warships could be called on to protect shipments of oil and gas from western Africa against the threat of attack from pirates or terrorists. (...) As far as oil and gas is concerned, I think NATO could play a role to defend the sea lanes." (NATO Secretary General, Jaap de Hoop Scheffer, Tuesday, 2 May 2006).

¹¹ "Pirates have stepped up attacks on merchant vessels in the Gulf of Aden... The surge in piracy has suddenly turned it into one of the most dangerous passages in the world for sea captains." Wall Street Journal, 9 September 2008.

¹² "The shipping organisations note that some major shipping companies are already refusing to transit the Gulf of Aden while many others are understandably considering similar steps, going on to warn that continued inaction against these violent acts could prompt ship owners to redirect their ships via the Cape of Good Hope, with severe consequences for international trade, including increased prices for delivered goods." Press release jointly issued by ITF, BIMC, International Chamber of Shipping/International Shipping Federation, INTERCARGO and INTERTANKO dated 17 September 2008.

¹³ Albeit one could argue that NATO's aims of meeting the "evolving security environment, supporting security and stability with the strength of its shared commitment to democracy and the peaceful resolution of disputes" could well be limited to the Euro-Atlantic Area and thus piracy off the Gulf of Aden may be viewed as being outside of NATO's Atlantic-centric remit. Although that area is closer than Afghanistan.

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

International law gives remarkable freedom of action to those wishing to counter piracy. UNCLOS exhorts all States to cooperate to "the fullest possible extent" in the repression of piracy on the high seas¹⁴. This creates a binding duty on States which have ratified the Convention. The question arises as to whether those States fail in that duty to cooperate if they do not empower their warships, acting either alone or in company with similarly bound States, to act against piracy when they encounter it. It is arguable that, by withholding such authority, those States would be failing in that duty. However, if those ships belonged to a NATO Standing Group, would NATO be similarly culpable for that failure of duty? Probably not, as NATO is not a party to UNCLOS and thus cannot be held liable for a breach of a duty that it does not have; neither is it NATO's job to ensure that States abide by their international obligations.

If NATO does not have a legal duty under the Convention can it derive any authority under it? Generally a Treaty does not create either obligations upon or rights in favour of a State, which is not party to it, without that State's consent¹⁵. However, one could argue that the articles of the Convention relating to piracy are evidence that the parties to it hoped that all States would cooperate in the repression of piracy and intended to confer upon all States (and certainly upon a group of States containing at least one party to the Convention) the rights to do so¹⁶. Further, one could argue that the rules concerning the repression of piracy are binding on non State parties in any event due to international custom¹⁷. NATO may not be a State but it would be difficult to argue that NATO should not abide by international law, which, put very simply, permits certain actions and forbids others. Taking action against piracy is one such permissible action. Therefore, although NATO is arguably under no independent duty to do so, it could nevertheless legally act against piracy collectively through a combination of ships from its member States in one of its Standing Groups.

Outside of piracy, the exceptions discussed, notably the right of visit and the right of reconnaissance¹⁸, are important because, as evidenced by emerging Allied doctrine on Maritime Situational Awareness¹⁹, NATO needs to know what is happening on the high seas, in order to anticipate and respond to any maritime threats. Limitations on the effectiveness of electronic surveillance means that the ability to hail and board vessels is a useful tool in NATO's armoury.

¹⁴ Article 100 UNCLOS 1982.

¹⁵ Article 34 Vienna Convention on the Law of Treaties 1969.

¹⁶ Article 36 Vienna Convention on the Law of Treaties 1969.

¹⁷ Article 38 Vienna Convention on the Law of Treaties 1969. There is an argument that those States which have not ratified UNCLOS, including the US, are nevertheless bound to observe the duty to repress piracy as this is but a statement of existing customary law. A similar duty was included in UNCLOS' predecessor, the High Seas Convention 1958 (HSC) at Article 14 "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", which was ratified by the United States Senate on 26 May 1960.

¹⁸ Many of the other exemptions rely on the consent, explicit or implied, of the Flag State. Given the difference of opinion within the Alliance as to what kind and level of consent is required (e.g. Master's or Flag State or both), I will not go into that in further detail here but will save that topic for a separate paper.

¹⁹ "NATO MSA is an enabling capability which seeks to deliver the required Information Superiority in the maritime environment to achieve a common understanding of the maritime situation in order to increase effectiveness in the planning and conduct of operations." 14 January 2008 Military Committee, NATO Concept for MSA.

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

Conclusion

A flag State has exclusive jurisdiction over vessels flying its flag on the high seas with some limited exceptions. The majority of those exceptions are most likely to be used by coastal States and not the international community. However, there is nothing to prevent international organizations such as NATO from using those exemptions if there is a will so to do. International law allows for NATO to act in such a way, whether it ought to do so is a question for the politicians.

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International Law and Armed Conflict: Exploring the Faultlines

Essays in Honor of Yoram Dinstein by Michael Schmitt and Jelena Pejic (EDS)¹

Mr. Vincent Roobaert, Assistant Legal Advisor – NC3A²

For a long time, Mr. Dinstein's books have found their place in the bookshelves of most practitioners of the law of armed conflict and the use of force. Influenced by the situation in his home country, Mr. Dinstein has offered new and challenging views on various topics in his two main fields of interest. Best known for two legal "bestsellers", namely *War, Aggression and Self-Defence* and *The Conduct of Hostilities under the Law of International Armed Conflict*, Yoram Dinstein is also the author of numerous studies in the fields of international law, international criminal justice and terrorism. Given the quality and quantity of Mr. Dinstein's work, one can assume that the editors and contributors of the book under review faced a daunting task when preparing their essays in his honour. When looking at the result, however, one can conclude that the editors have brilliantly met this challenge. Firstly, they have managed to bring together many renowned experts of international law³. Secondly, these contributors have focused on "hot" legal issues which, although they may appear controversial to some readers, nevertheless constitute quality food for thought.

Not surprisingly, the book is divided in two parts, reflecting Mr. Dinstein's two specialties, namely the use of force by States and the law of armed conflict.

The first eight essays of the book, dealing with the use of force, explore the legal implications surrounding the situations that arose out of the 9/11 attacks and the use of force in both Afghanistan and Iraq. The underlying trend in these essays is a questioning of the current relevancy of the UN charter system of collective security and the recent change of language when describing the use of force.

In the Middle Ages, the concept of just war was used by princes to legitimize the use of force against each others. Among the criteria that conditioned the legitimacy of such use was the right intention of the prince. In the first essay, Ivan Shearer goes back to the just war theory to try to find new justifications to the use of force, based on the assumption that the UN Charter does not provide sufficient flexibility. He proposes new criteria for the determination of the legality of the use of force, including just cause, right intention and reasonable prospects of success. The weaknesses of the UN system of collective security are examined further by Thomas Franck together with some means to overcome them. In a very interesting contribution, Dino Kritsiotis digs deeper in the language shift of recent years, examining how the concepts of "war", "force" and "armed conflict" have evolved in both the *ius ad bellum* and *ius in bello*, looking at, among others, the case-law of the International Court of Justice. The language surrounding self-defence has also evolved as well in the years since 9/11 to include claims to pre-emptive self-defence alongside what was known traditionally as "anticipatory" self-defence, i.e. defence against an imminent threat. In their paper, W. Michael Reisman and Andrea Armstrong clarify the terminology and examine the position of various States in relation to claims of pre-emptive self-defence. Of course, the difference between anticipatory self-defence and pre-emptive self-defence lies in assessing the imminence of the threat. This issue is raised in detail by Terry D. Gill in his essay on the temporal dimension of self-defence which reassesses the traditional criteria of self-defence set out in the Caroline case on the basis of recent cases of pre-emptive self-defence.

¹ MICHAEL SCHMITT AND JELENA PEJIC (EDS.), *International Law and Armed Conflict: Exploring the Fault lines. Essays in Honour of Yoram Dinstein*, Martinus Nijhoff Publishers, 2007, 586 pages (ISBN-13 978-90-04-15428-5).

² This review does not reflect the views of NATO, NC3A or the NATO Member States.

³ The book contains contributions from Ivan Shearer, Thomas Franck, Dino Kritsiotis, W. Michael Reisman, Andrea Armstrong, Terry D. Gill, Michael N. Schmitt, John F. Murphy, Ruth Wedgwood, Marco Sassoli, Kenneth Watkin, Bill Boothby, Charles H.B. Garraway, Jelena Pejic, Avril McDonald, Theodor Meron, Andru E. Wall, Adam Roberts, Rüdiger Wolfrum, Fania Domb and Wolff Heintschel van Heinegg.

International Law and Armed Conflict : Exploring the Faultlines

Finally, the three last essays dealing with the use of force addresses such issues as the response to terrorism, the US position on *ius ad bellum* and the military actions in Iraq.

In the area of armed conflict law as well, there has been a strong push for change since the September 11 attacks in the United States. As terrorists groups worldwide acquired very destructive capabilities (including weapons of mass destruction, as shown with the Sarin gas attacks in Japan) while disregarding the basic humanitarian principle of distinction between military and civilians, many have questioned the applicability and continued relevancy of the laws of armed conflict to today's reality. This trend has shown itself, among others, in attempts to review the traditional distinction between the rules of law governing the use of force, *i.e.* the *ius ad bellum*, with those that regulate the consequences of such use, *i.e.* the *ius in bello*. M. Sassoli, reviews the origin, the reasons for and consequences of the traditional separation as well as the contemporary attempts to review this distinction. In the next essay, K. Watkin provides a general overview of the contemporary challenges facing international humanitarian law today assessing the adequacy of the current legal framework on the basis of the change in the nature of conflicts. His essay is complemented by other parts, each dealing in detail with issues of particular relevance today, namely the law of weaponry, the concepts of combatant and unlawful enemy combatant, the status of military contractors, command responsibility and the law of occupation. Finally, the editors have included two contributions on a review of the cases before the International Court of Justice and the Israel High Court of Justice on the separation fence and a review of the concepts of neutrality and non-belligerency.

No one will dispute that the years since 1994 have been very active in the field of humanitarian law. While the end of the 90's witnessed an increase in the enforcement of humanitarian law through the creation of various special international tribunals and the international criminal court, after 9/11, the focus has shifted to a reassessment of the adequacy of the traditional law of armed conflict. When these rules were designed, the drafters focused on international armed conflicts and, to a lesser extent, to internal conflicts. They could not have envisaged that one day non State actors would acquire capabilities allowing them to cause widespread destruction anywhere in the world. However, the law regarding the use of force and the laws of armed conflict are a product of their time. They are not sacred. On the contrary, the continued relevancy and adequacy of these rules need to be regularly reassessed, as circumstances change, to ensure their continued acceptance and compliance. The contributions compiled by Michael Schmitt and Jelena Pejic provide an excellent overview of the challenges facing the law governing the use of force and the conduct of armed conflict today. For those who are experts in this field, it is recommended to read the book and it will constitute a very comprehensive starting point for the *amateur* humanitarian lawyer.

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(Source : www.brill.nl)

2008 NATO Legal Conference Report

2008 NATO LEGAL CONFERENCE 22-25 APRIL ISTANBUL MILITARY MUSEUM



(source: www.geantes.com/militarymuseum.html)

Hosted at the historic and beautiful Istanbul Military Museum by Lieutenant General Yalçın Ataman, Commander, NATO Rapid Deployment Corps-Turkey (NRDC-T), 82 Legal Advisers and legal professionals from NATO Commands, Agencies, Centres of Excellence, Partner Nations, and the NATO Force Structure gathered for the third annual NATO Legal Conference from Tuesday, 22 April until Friday, 25 April 2008. This year's conference consisted of two parts. The first two days focused on two themes: "Command Responsibility" and "Legal Interoperability." The second two days provided updates from the NATO Agencies, Military Headquarters, and the NATO School.

General John Craddock, Supreme Allied Commander, Europe, and Mr. Daryl A. Mundis, Senior Prosecutor, International Criminal Tribunal for the Former Yugoslavia (ICTY) paired to open the conference. General Craddock used three subjects: the use of force, detention, and investigations to describe the NATO Commander's dilemma of having the appearance of being in command, but lacking the legal enforcement authority possessed by a national Commander. Using the jurisprudence of ICTY, Mr. Mundis described the evidentiary challenges posed by the differences in apparent and actual control of military forces, the requirement that Commanders have "effective control"-- the material ability to prevent offences or punish criminal conduct-- and actual notice of crimes committed or pending.

As confirmed by the judgment and 20 year sentence imposed against Major General Stanislav Gali, whose Bosnian Serb Army Sarajevo Romanija Corps lay siege of Sarajevo from 1992-1994, Commanders who are put on notice of crimes committed by subordinates they control and who fail to prevent the commission of crime and punish the perpetrators, commit crimes against humanity and violations of the laws and customs of war.

A panel discussion moderated by Major General (Retired) A.P.V. Rogers, former Director of the United Kingdom Army Legal Services followed these two lectures. Providing their perspective on the topic of Command Responsibility and the presentations by General Craddock and Mr. Mundis were Ms. Mona Rishmawi, Senior Human Rights Officer for the United Nations Human Rights Commission Rule of Law and Democracy Unit, and Mr. Ulf-Peter Haeussler, Legal Adviser to the German Joint Special Operations Command. General Craddock, Mr. Mundis, and the members of the panel then took questions from the conference participants on the legal implications the doctrine of command responsibility holds for an Alliance force.

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Following the conference photograph and a dignitaries lunch with Major General Stanislaw Nowakowicz, the Deputy Commander, and Brigadier General Kasim Erdem, the Chief of Staff of NRDC-T, Mr. Baldwin De Vidts, the Legal Adviser to NATO Headquarters and the NATO Secretary General, provided an overview of developments within the Alliance arising from the recently concluded Bucharest Summit and the invitation of full membership extended to Albania and Croatia. Ms. Eneken Tikk, the Legal Adviser at the Cooperative Cyber Defence Centre of Excellence in Tallinn, Estonia, closed the afternoon session with a well-received briefing on the legal issues posed by cyber defence and a description of NATO's new cyber defence policy and concept.

Major General Rogers opened the second day's session with a thoughtful commentary on the role of the Legal Adviser, the idea of legal interoperability and a survey of the treaty obligations and recent case law underpinning the concept of command responsibility. He recommended to the conference that, "...observing and monitoring are concepts linked to accountability and, under the doctrine of command responsibility Commanders will be held accountable for failing to observe and monitor those under their command and control. Key notions for Legal Advisers, therefore, are situational awareness, networking and taking a holistic view." The full text of Major General Roger's presentation follows this article.

Mr. Thomas Randall, the Legal Adviser for the Supreme Headquarters Allied Powers Europe (SHAPE) then facilitated a panel discussion on the topic of legal interoperability. Following the same format as before, each member of the panel began with a brief opening statement to provide their views on this topic, followed by open discussion and questions from the audience. Providing their perspectives on the legal challenges attendant to operating with NATO were Mr. Gert-Jan van Hegelsom, the Legal Advisor to the Director-General of the European Union Military Staff and the Representative of the Council Legal Service to the European Union Military Committee; Ms. Marina Jurić Matejčić, Head of International Law Division, Croatian Ministry of Defence; Colonel Mary V. Perry, Chief United States Air Force Operations and International Law Division, Headquarters, United States Air Force; Mr. Stephane Kolanowski, Legal Adviser, International Committee of the Red Cross Delegation to NATO and the European Union; Lieutenant Colonel Jerry Lane, Irish Defence Forces Legal Service; and Mr. Veriga Valeriu, Legal Adviser, Albanian Ministry of Defence. Ms. Jurić Matejčić's speech follows this article.

While promotion of interoperability is a key task of NATO, a recurrent question in the discussion was whether legal differences are, at best, managed rather than resolved. Observing that advocates may persuade, but not control, one challenge offered to the Legal Advisers was to professionally understand others as much as they wish to be understood themselves. Because legal terms often are used with different meanings, the Alliance and partners need an ongoing reconciliation of terms with a realistic appreciation of the fault lines of any coalition. The day concluded with a cultural tour of famous, dynamic Istanbul organized and ably led by Major Ismail Pamuk, the NRDC-T Legal Adviser and Captain Murato Yildiz, the NRDC-T Protocol Officer.

The Thursday and Friday conference sessions featured short presentations from Legal Advisors of NATO Agencies, Military Headquarters, and the NATO School about current developments, successes, and pending challenges. Copies of the presentations provided by the Legal Advisers for the NATO Airborne Early Warning E3A Component (NAEW-E3A); NATO Communications, Information, and Satellites Services Agency (NCSA); NATO Consultation, Command and Control Agency (NC3A); Headquarters Supreme Allied Command Transformation (HQ SACT); the Joint Force Training Centre (JFTC); Allied Command Transformation Staff Element Europe (ACT-SEE); Joint Warfare Centre (JWC); NATO School and NATO Rapid Deployable Corps-Greece (NRDC-GR) will be sent to each NATO legal office along with the presentations of MGen Rogers, Mr. Daryl Mundis, Ms. Eneken Tik, and Lieutenant Colonel Jerry Lane. Anyone else interested in obtaining a copy of these presentations is invited to contact the ACT SEE legal office.

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Specific actions and projects sparked by the presentations and often lively discussions that occurred at this gathering include:

- Exercise Arcade Brief, an annual two day high-level study program conducted in June by the Allied Rapid Reaction Corps, will be used to provide an in-depth and scholarly consideration of current operational legal challenges facing the Alliance as nominated by the SHAPE Legal Advisor;
- a concise description of the law of command responsibility to be included in the next version of the draft NATO Legal Deskbook;
- greater coordination of briefings and materials used by NATO legal mobile education and training teams with other NATO training and education efforts. For instance, greater emphasis can be placed on the creation of a central briefing bank on the NATO Legal Knowledge portal at: <http://natolegad.act.nato.int/>;
- to the extent practicable, NATO and European Union texts that address similar issues, such as the use of force, should be actively collected and compared;
- a working library of NATO documents with legal effect should be identified and provided as a useful research tool for exercises and deployments;
- more specific engagement with the legal departments of the Ministries of Defence of the NATO countries to improve their awareness of NATO training and education opportunities and current NATO legal issues. As part of the outreach to nations, greater recognition should be paid to the power of shared legal traditions and history as a means of enhancing legal teaching and training methods;
- a plan is needed to address the shortfall of Legal Advisers for NATO's robust exercise program. As Colonel Geir Fagerheim, the JWC Legal Advisor observed, "Three persons cannot be in more than three places." Appreciating the demands of current operations and the extensive involvement in exercise work that NATO doctrine and practice requires of legal advisors, a means of surging legal support for the exercise program is required; and
- the NATO legal community must continue to identify and refine the basics of our practice in order to better educate and train the continuous rotation of personnel in our offices. Beyond doctrinal efforts, our community must look for means of promptly sharing knowledge and enhancing trust among our 32 offices in 19 countries.

The 2008 NATO Legal Conference concluded at mid-day on Friday, 25 April. All participants agreed the hospitality of NRDC-Turkey, the beauty of the Istanbul Military Museum as a venue, and the dedication of the NRDC Legal Adviser, Major Ismail Pamuk, and the NRDC Protocol Officer, Captain Murato Yildiz, set a high standard for this memorable and productive event.

Command Responsibility and Legal Interoperability

MGEN (Ret.) A P V Rogers¹

Legal advisers

What is the legal adviser's role?

The commander's perspective: to enable the commander legally to create the effect he wishes in order to achieve the mission².

The lawyer's perspective: the lawyer is there to enable the commander to make informed decisions, to give him options and to protect him. The lawyer is an enabler; he shapes thinking.

Who is the client?

Some, mainly academic, lawyers see international law itself as being the client. One person consulted thought the government was the client, but the majority saw the commander and the chain of command as the client in a qualified lawyer/client relationship. The lawyer would feel obliged to advise him about legal options to pursue national and shared international interests.

The situation might be different in the United Kingdom where the Ministry of Defence Legal Adviser is interposed between the services and ministers. A separation of advisory and prosecutorial functions is essential.

Yet the need for professional support and control by responsible superiors in a legal chain of command is widely accepted (see below, legal chain of command).

How does one achieve consistency of legal advice, especially in a coalition?

A difficult question made more so in a multi-national context where differing national positions will necessarily be evident.

From a national perspective, clear legal annexes in operational documentation is essential – particularly in covering issues such as the national position on the force mandate and sensitive matters including targeting and detention as two examples.

As a military legal adviser in a multi-national environment clear statements of the alliance position on legal issues would be helpful but in reality, owing to political considerations, are not always forthcoming.

The key is to understand the respective troop contributing nations' respective national positions in order to be able to advise the force commander of his/her options with respect to force employment and those issues which are likely to be friction points for alliance cohesion. There are significant benefits in national legal advisers similarly understanding the alliance context.

¹ Yorke Distinguished Visiting Fellow of the Faculty of Law and Senior Fellow of the Lauterpacht Centre for International Law, University of Cambridge; formerly Director of Army Legal Services on the United Kingdom; author of the prize-winning book, *Law on the Battlefield*, Manchester, 2nd edition, 2004. It is intended to develop these notes into a book chapter on the role of legal advisers and helpful comments from Lt Col Darren Stewart have been incorporated.

² In the context of evolving military doctrine, particularly EBAO (Effects Based Approach to Operations), the military legal adviser plays an increasingly critical role.

Command Responsibility and Legal Interoperability

Should there be a legal chain of command?

Probably yes, if only to provide a focus for those at varying levels within the operational and national chain of commands to seek advice and clarification.

The nature of the military legal advisers work demands that he/she understand the military strategic and operational context being considered by higher HQ; that professional advice and support can be obtained in direct communication, and that supervision and control is ensured.

It is facilitated if it naturally follows that military legal advisers in superior HQ are senior to those in subordinate HQ and where those in superior HQ actively take on the role of providing support through technical advice and encouragement to military legal advisers in subordinate HQ.

In the multi-national context this will be somewhat complicated by the existence of parallel multi-national and national chains of command – an understanding of the scope of responsibility of these is often woefully absent.

However, mixed views on the need for a legal chain of command have been expressed by legal advisers at a lower, for example brigade, level. Some considered that this would impede decision making because of the failure of higher legal authority to respond quickly enough, doubts about whether they had the relevant training or experience, difficulties over communications, the tendency for superiors to make broad policy decisions that do not fit the situation on the ground, and the tendency, if such a chain is in place, to refer everything to higher authority. If a pending decision is a real showstopper, for example, relates to a war crime, one would refer it anyway.

What are the tasks of the legal adviser?

- Getting to know the commander and his staff, including the political adviser, and gaining their trust. It is critical that military legal advisers not only develop working relationships with key staff they are to advise, but have an intimate understanding of the processes and operation of the HQ they are to work in so that they have clear understanding of the optimal opportunities at which to influence operations and staff activity in the provision of legal advice.

- These relationships will be tested under difficult, stressful circumstances and therefore must be able to sustain the stress of operational dynamics, including tempo so that objective, clear and pragmatic legal advice continues to be sought and listened to.

- Making contact with relevant outside bodies, including sending state and host nation officials and representatives of, e.g., the ICRC and other non-governmental organizations.

- The extent and nature of these contacts will not only depend upon the time available but also the level of HQ, as certain levels of command would not expect to have detailed dealings with non-governmental organisations.

- It is also likely to be the case that tactical level contact will invariably be with field officers who are unlikely to be identified or available for more formal contact prior to deployment.

- Becoming familiar with the mandate for and legal background to the deployment, including status of forces issues.

Command Responsibility and Legal Interoperability

What are the peculiarities of a multinational environment?

What is also vital is for those military legal advisers on multi-national operations to understand the broader alliance understanding of the mandate and legal basis for the conflict.

This will include the differing national positions, what caveats have been entered and in turn where potential friction points are. This may involve extrapolating from the caveats and conduct of particular nations' forces.

A legal adviser can have both national and international responsibilities, depending on the nature of his post.

What kind of legal backup is needed to support deployed legal advisers?

Reach-back both on a national basis and in the case of multi-national operations to those static HQ in the chain of command is essential.

This must be a formalised process and not merely 'calling in' favours and imposing on those perceived to be subject matter experts.

Without adequate reach-back a sense of isolation can result not only in considerable morale issues but lead to a dangerous dislocation in perception between the operational/tactical level and the strategic.

This applies equally to the consideration of legal issues as it does to the strictly military ones.

Whereabouts should the legal adviser be placed in the staff structure?

The structure of the HQ and the location of the legal office within it are critical to informing perceptions as to the role of the military legal adviser.

The military legal adviser must be prominent within the specialised staff working to the Commander and available across all staff functions.

Access to the Commander is essential and ideally the military legal adviser should be both part of and be located within the Command Group; next to the Political and other key advisers.

Some multi-national organisations have incorporated this as part of their doctrine e.g. NATO

Legal Interoperability

What does this mean? Rather obviously, ensuring that within a military alliance or coalition, despite different levels of ratification of international treaties and different interpretations of those treaties and of customary international law, military operations can be conducted effectively and within the law.

Command Responsibility and Legal Interoperability

This involves identifying likely problem areas, understanding the various national positions and trying to achieve a legal practice to which all can subscribe. In the event of insurmountable legal differences, procedures have to be adopted on how best to proceed³.

How can this be achieved?

First, one has to try to achieve a common understanding and interpretation of the applicable law, with irreconcilable differences identified.

Second, one has to try and anticipate problems that may arise in the practical application of that body of law. An important stage in doing so is in trying to learn lessons from past experience as well as looking ahead to anticipate legal problems that might arise in future.

Third, it is necessary to draw up an agreed plan or set of procedures that can be implemented when the anticipated problems arise. That may require agreement by troop-contributing states with procedures and even legal measures being put in place.

Fourth, the plan or procedures must be kept up-to-date in the light of changing circumstances.

An important element in all this, as identified by Andres Munoz⁴, is to develop personal contacts with legal advisers at all levels of the command. From these contacts agreements, arrangements and procedures can be developed. Contact with outside experts, for example, from international organisations, non-governmental organisations, governmental organisations, treaty organisations and others, such as universities, may be helpful in resolving potential problems.

Command Responsibility

It is important to be clear that we are talking here about a form of criminal responsibility. It is the criminal responsibility of a commander for the war crimes of his subordinates, not because he orders them but because is aware of them and fails to put a stop to them or, if already committed, fails to take action to ensure that offenders are brought to trial.

³ According to Häussler, even though it will most likely be impossible to overcome policy differences at field level, military lawyers can do their part in sorting out the worst effects thereof. To that end they should liaise regularly from the earliest possible stage onward and find ways to properly factor irresolvable difference in the planning and execution of missions, see U. Häussler in the *Military Law and Law of War Review*, 2005, vols. 3-4, p. 151.

⁴ In an email to the author dated 7 November 2007.

Command Responsibility and Legal Interoperability

Protocol I, Arts. 86(2) & 87

- The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.
- The High Contracting Parties and Parties to the conflict shall require [military] commanders with respect to members of the armed forces under their command [and other persons under their control]:
 - To prevent, suppress or report breaches;
 - Make subordinates aware of their obligations 'commensurate with their level of responsibility';
 - Initiate, where appropriate, disciplinary or penal action.

ICTY Statute, Art. 7(3)

The fact that any of the acts...was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

Celebici Case

- As long as a superior has effective control over subordinates, to the extent that he can prevent them from committing crimes or punish them after they committed the crimes, he would be held responsible for the commission of the crimes if he failed to exercise such abilities of control.
- A superior will be criminally responsible through the principle of superior responsibility only if information was available to him which would put him on notice of offences committed by subordinates.

ICC Statute, Art. 28

- A military commander or person effectively acting as a military commander shall be criminally responsible for crimes...committed by forces under his...effective command and control, or effective authority and control..., as a result of his...failure to exercise control properly over such forces, where:
 - That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
 - That military commander or person failed to take all necessary and reasonable measures within his...power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Command Responsibility and Legal Interoperability

ICC Statute, Art. 30

- ...a person has intent where, in relation to conduct, [he] means to engage in that conduct [and], in relation to a consequence, [he] means to cause that consequence or is aware that it will occur in the ordinary course of events.
- ...knowledge means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.
- ...a person shall be criminally responsible...only if the material elements are committed with intent and knowledge.

Customary Law Study, Rule 153

Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible.

Halilovic Case

The following elements must be satisfied to hold a superior responsible under Art. 7(3) of the ICTY Statutes:

- The existence of a superior-subordinate relationship;
- The superior knew or had reason to know that the criminal act was about to be or had been committed; and
- The superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.

The following are the material facts that must be pleaded in the indictment in Art. 7(3) cases:

- That the accused is the superior of certain persons sufficiently identified, over whom he had effective control – in the sense of material ability to prevent or punish criminal – and for whose acts he is alleged to be responsible;
- The criminal acts of such persons, for which he is held responsible;
- The conduct of the accused by which he may be found to have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates; and
- The conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them.

Command Responsibility for Acts of Troops of Other Nations

Muñoz and Häussler comment that there is, arguably, a NATO-specific aspect of command responsibility that goes beyond the criminal law and requires the organisation of staff to take precautions to prevent serious violations of IHL and human rights law, that personnel are suitably trained and that subordinate commanders who have demonstrated their inability to prevent or repress serious violations should not be assigned to tasks that make such violations more likely⁵.

⁵ A. Muñoz Mosquesra and U. Häussler, *An approach to legal interoperability*, NATO Legal Gazette special issue, 10 April 2008, p. 6.

Command Responsibility and Legal Interoperability

Command Responsibility and Legal Interoperability

According to Häussler⁶, it was observed after Operation Allied Force that today's coalitions interoperate so closely that it may be difficult, if not impossible, for adversaries and outsiders, such as the ICRC, that seek to monitor the observance of obligations under IHL to identify who did what and to whom. Nevertheless, observing and monitoring are concepts linked to holding persons accountable and, under the doctrine of command responsibility commanders will be held accountable for failing to observe and monitor those under their command and control.

Key notions for legal advisers, therefore, are situational awareness, networking and taking a holistic view.

Keeping the commander out of legal trouble means the complete integration of legal advisers into the information stream and in the operational planning and execution processes.

Potential Problem Areas of Legal Interoperability in the Context of Law of War

The definition of Military Objectives

Additional Protocol I of 1977, Art. 55, para. 2

In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

US Military Commission Instruction No. 2, Art. 5D dated 30 April 2003

Military objectives are those potential targets during an armed conflict which, by their nature, location, purpose or use, effectively contribute to the opposing force's war-fighting or war-sustaining capability and whose total or partial destruction, capture or neutralization would constitute a military advantage to the attacker under the circumstances at the time of the attack.

ICRC Customary Law Rules, Rule 8

In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.

Other Potential Problem Areas

These include proportionality; combatant status and the notion of 'enemy combatants'; direct participation in hostilities; detainee policy, including interrogation and monitoring those passed to other states (GCIII 12); cultural property and booty of war.

⁶ U. Häussler in the *Military Law and Law of War Review*, 2005, vols. 3-4, p. 151.

Command Responsibility and Legal Interoperability

Identifying and Reporting War Crimes

Looking for signs of war crimes and taking those signs seriously

After the Iraq war of 2003, there were media allegations that the United States forces, as an interrogation technique, subjected uncooperative prisoners of war to prolonged periods of heavy metal music and popular American children's songs. Sergeant Mark Hadsell is reported as saying: 'They can't take it. If you play it for 24 hours, your brain and body functions start to slide, your train of thoughts slows down and your will is broken. That's when we come in and talk to them⁷.' Although there might be argument about whether such pre-interrogation techniques as keeping prisoners of war standing, kneeling or in uncomfortable positions for hours or depriving them of sleep is torture⁸, there seems little doubt that such treatment, or 'softening them up' by subjecting them to loud noises for long periods, amounts to coercion⁹.

Reports like this need to be taken seriously and not laughed off.

Factors¹⁰:

Compliance with the law of war results from good training, clear and lawful orders, a sense that compliance is part of a soldier's professional duty and firm action if violations occur. Perfect compliance is hard to achieve at the best of times, though it should always be the aim; it may, for the reasons outlined in this article, be more difficult to achieve in conditions of unequal combat. Thus, commanders need to be aware of factors that can lead to violations of the law of war being committed by soldiers under their command and take corrective action whenever the symptoms appear. Apart from anything else, those symptoms may indicate a breakdown in discipline or a drop in morale, with adverse consequences either way for the operational effectiveness of military units.

Common reasons why things go wrong are:

1. A sense of frustration among soldiers because of apparently consistent violations of the law by the enemy and a feeling that only extreme measures will put a stop to them.
2. If things are going badly a sense of hopelessness can creep in when soldiers see little point in upholding standards.
3. A misguided sense that military necessity somehow overrules the law of war so that, for example, soldiers think it is right to torture detainees to obtain timely military intelligence.
4. A sense that enemy nationals are somehow inferior and not deserving of care or respect. To prevent this, officers should ensure that disrespectful language and behaviour is not tolerated from the outset, so that such attitudes do not take root.

⁷ *Sesame Street breaks Iraqi POWs*, BBC news online, of 20 May 2003, quoting Newsweek.

⁸ V. Ladisch, 'Stress and duress': drawing the line between interrogation and torture, 24 April 2003, on www.crimesofwar.org.

⁹ From A P V Rogers, *Law on the Battlefield*, 2nd edition, Manchester 2004, at p. 56.

¹⁰ From A P V Rogers, *Unequal combat*, in 7 (2004) *Yearbook of International Humanitarian Law*, at p. 3.

Command Responsibility and Legal Interoperability

5. Lack of proper supervision. Over the years very many war crimes have been committed that involve the ill-treatment of detainees. Often abuses have been carried out at a low level by inexperienced or poorly trained soldiers who have not been adequately supervised by experienced non-commissioned officers or officers. It is important that frequent and unannounced checks are carried out in detention centres, that regular medical checks are undertaken and that a system by which detainees can make complaints to a responsible and independent officer is put in place. Higher military authorities have an important role to play here and cannot leave everything to the commander of the place of detention.

6. Creation, by words or deeds, by unit or sub-unit commanders of a climate of disrespect for the law or that minor violations will be tolerated is likely to lead to the commission of war crimes and is unacceptable.

7. Issuing staff with unclear or ambiguous orders, such as to 'give them a hard time' or to 'soften them up for interrogation', is dangerous and inadequate. Staff must know precisely what their powers and duties are with regard to persons held for interrogation. This is so important that the policy must be approved at the highest level of command and promulgated in such a way that there is no room for misinterpretation.

8. Failure of commanders at all levels to anticipate events and issue appropriate instructions. This is often due to a lack of imagination.

9. Especially in cases of unequal combat, it is dangerous to rely on uncorroborated local intelligence. People often have scores to settle and make use of the armed forces as their executioners in their webs of deceit.

10. Above all, the successful waging of unequal combat requires wise and experienced heads with good training. Eighteen to twenty year old conscripts or young officers just out of training are not suitable for the difficult tasks and decisions facing them unless they are firmly under the control of seasoned superiors. Careful decisions need to be made about the manning levels and force structures to be used.

Experience of Iraq before and since the end of active military operations shows that successful war fighting forces may not be ideal for carrying out the duties of an occupying force.

Why is this so important?

The commander may be fully occupied with the conduct of hostilities, which, for him will be the highest priority. However, the law imposes this obligation, so commander needs good peripheral vision.

Command Responsibility and Legal Interoperability

ICC Statute

According to Muñoz¹¹, the command responsibility provisions of the ICC Statute represent customary international law, notwithstanding the US's non-ratification of the statute. Of course, the leading case on the doctrine of command responsibility is the Yamashita case, a decision of a US military tribunal.

The Impact of Human Rights Law on the Law of War

For the applicability of human rights law, see:

- Bankovic
- Israeli Supreme Court in targeted killings case
- UK House of Lords in Al Skeini

When it is applicable, consideration must be given to the need to derogate under, for example, Art. 15 of the European Convention on Human Rights, bearing in mind the limitations on the right to derogate, notable Art. 2 and the right to life 'except in respect of deaths resulting from lawful acts of war'. Does that exception apply only where there is a derogation? There is no such war exception for torture. To what extent is the law of war *lex specialis*? See the ICJ in the Nuclear Weapons case.

Häussler comments¹² that NATO has better legal arguments than Amnesty International. The problem is that members of the public never hear them. That means that legal advisers also need to be integrated into the public relations system.

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apvr2@cam.ac.uk

¹¹ A. Muñoz Mosquera, *An approach to legal interoperability*, NATO Legal Gazette special issue of 10 April 2008, at p. 6.

¹² U. Häussler, *Meeting the lawfare challenge*, in the NATO Legal Gazette Issue No. 12, p. 6.

Legal Interoperability – a Croatian Perspective

Ms. Marina Jurić Matejčić, Legal Adviser – Croatia MOD

Ladies and Gentlemen, Dear Colleagues!

I am very honoured to be invited to the 2008 NATO Legal Conference and to have the opportunity to tell you something about legal interoperability from the perspective of Croatia.

I have been asking myself what can I say about the subject of our discussion bearing in mind that my country is relatively small, it is not a NATO member yet (we are beginning accession talks these days) and Croatia is not acting as a leading nation in international peacekeeping operations but only contributing members of Armed Forces to contingents of other countries, except in ISAF mission in Afghanistan where we can deploy up to 300 members of Croatian Armed Forces and mission on the Golan Heights (UNDOF) where Croatia will, from June, deploy up to 100 members of Croatian Armed Forces that will replace Slovak troops in an Austrian contingent. However, Croatia has (or had) peacekeepers in the following peacekeeping operations:

- Sierra Leone (UNOMSIL),
- India-Pakistan (UNMOGIP),
- West Sahara (MINURSO),
- Eritrea-Ethiopia (UNMEE),
- Liberia (UNMIL),
- East Timor (UNIMSET),
- Cyprus (UNFICYP),
- Ivory Coast (UNOCI),
- Georgia (UNOMIG),
- Sudan (UNMISUD) and
- Lebanon (UNIFIL).

And then I realised that a few words from the representative of a country like Croatia are useful and interesting especially for "old" NATO members because our experiences are similar to experiences of "new" NATO members as we detected some common problems and possible solutions during the bilateral talks with some of them.

Please regard this presentation as a "case study of one country" and not as an academic discussion because I would like to present you our legal practice concerning legal interoperability.

For a better understanding of the legal framework of Croatia in this field it is perhaps necessary to say something about our legislation beginning with the legal acts signed at the time when Croatia was hosting peacekeepers on its national territory. Croatian Armed Forces successfully achieved interoperability (the proof was a rather short mandate of peacekeeping operations).

After the end of military operations on its national territory, Croatia signed the Status of Forces Agreement (SOFA) at Wright Patterson Air Base, Dayton, Ohio, United States of America, on 21 November 1995. Croatia signed a Technical Arrangement between the Government of the Republic of Croatia and the North Atlantic Treaty Organisation on behalf of the implementation force with 15 Technical Annexes.

Legal Interoperability – a Croatian Perspective

The aim of this Status of Forces Agreement and Technical Arrangement with Annexes was to set out the procedures to be followed concerning the deployment of IFOR forces in Bosnia and Herzegovina onto, through and out of the territory of the Republic of Croatia.

The Republic of Croatia has accepted the invitation to the Partnership for Peace and subscribed to the Partnership for Peace framework document in May 2000.

In June 2001 the Republic of Croatia signed:

- An Agreement among the States Parties to the North Atlantic Treaty and other States participating in the Partnership for Peace regarding the Status of their Forces and
- An Additional Protocol to the Agreement among the States Parties to the North Atlantic Treaty and other States participating in the Partnership for Peace regarding the Status of their Forces.

These were ratified by the Croatian Parliament and published in the Official Gazette - International Treaties No. 14/01 and thus became parts of national legislation (in hierarchy above domestic laws). For the Republic of Croatia they have been effective since 10 February 2002;

Further Additional Protocol to the Agreement was signed on 15 February 2003, ratified by the Croatian Parliament and published in the Official Gazette - International Treaties No. 7/04

The legislation of the Republic of Croatia has no legal impediments that could inhibit the implementation of international agreements and commitment of the Republic of Croatia to fulfil its international obligations. According to Article 140 of the Constitution of the Republic of Croatia (Official Gazette No 41/2001. and 55/2001.) international agreements which are signed, ratified and published in the Official Gazette are part of the Croatian legal system. Those agreements are above domestic legislation and are implemented directly. Changes of legislation are absolutely necessary in smaller number of cases mostly to secure a more efficient implementation of international agreements

Article 7. Subsection 2 and 3 of the Constitution of the Republic of Croatia regulate that "The Armed Forces of the Republic of Croatia may cross their borders or be deployed beyond the national borders only by prior decision of the Croatian Parliament. The Armed Forces may cross the borders of the Republic of Croatia even without prior decision:

1. Within the international defence organisations the Republic of Croatia binds itself to and agrees to on the basis of international agreements,
2. Within humanitarian assistance operations.

The Republic of Croatia has a "lex specialis" Law on the Participation of Members of the Croatian Armed Forces, Police, Civil Defence and Government Employees in Peace Operations and Other Activities Abroad" that regulates the Armed Forces units and personnel participation, as well as the police component, Civil Defence, and Government Employees' participation in peace operations abroad and specifically:

Legal Interoperability – a Croatian Perspective

- authority to make a preliminary decision on participation,
- authority to make decision on sending and withdrawal,
- making and implementing the decisions and passing executive regulations and
- funding the participation.

Complying with the Law is considered:

- actions for accomplishing and keeping peace,
- actions including peace forces and peace missions,
- humanitarian assistance,
- attending the exercises and training,
- actions aimed at giving initiative to foster democracy, legal protection, human rights protection under the umbrella of the international organisations and alliances and
- other activities the Republic of Croatia is obliged to take part in based on a separate international agreement.

The legislation of the Republic of Croatia (Defence Law and Law on Service in the Armed Forces) regulate decision making (responsibilities of the Parliament, Government and the President as Chief Commander) but in some cases the mandate is not so clear which leads to a possible lack of legal certainty.

In some cases rules of engagement (ROE) can be a problem as well, bearing in mind, e.g., that Croatia is a State Party to all "antipersonnel mines" Conventions.

During the negotiations and signing of MOU's and Technical Agreements, as implementation arrangements on administrative, financial and logistics support during a multinational military deployment which is a requirement for the interoperability of the forces, the Legal Department of the Croatian Ministry of Defence which is the responsible authority, realised that most of the contingents in which Croatian Armed Forces are participating, consist of national forces from the countries with similar legal tradition (many of them former parts of the Austro-Hungarian Empire with German based legal system) which is deeply rooted in laws that are now in force in these countries.

Similar national legislation is only part of a similar cultural tradition which is helpful during decision making and coordination process as well as during training.

The examples are:

- Memorandum of Understanding between the Ministry of National Defence of the Republic of Lithuania and the Ministry Defence of the Republic of Croatia concerning the deployment of the Croatian Contingent in the Lithuanian-led Provincial Reconstruction Team in Afghanistan.
- Technical Agreement between the Ministry of Defence of Hungary, Bulgaria, Croatia and Slovak Republic Co-operation and Mutual Support during the International Security Assistance Force (ISAF) Mission.

Legal Interoperability – a Croatian Perspective

- Memorandum of Understanding between the Ministry of Defence of Albania, Macedonia, Croatia and Hellenic Ministry of National Defence concerning support to the combined medical team of Albania, Croatia and FYR Macedonia (Members of US-Adriatic Charter Initiative) for participation in NATO-led operation ISAF in Afghanistan.

Having in mind the NATO definition of force interoperability as “capability of forces from different nations to train, exercise and operate effectively together in the execution of assigned missions and tasks” it is necessary to identify the strategic and legal basis for operations and raise awareness of legal issues that can occur in multinational operations: the legal basis for the mission, the scope of authority for accomplishing the mission, rules of engagement, status of forces agreements, funding of the operation and the applicability of the law of war.

Croatia, based on its above mentioned experiences during the process of identifying its international missions legal framework, identified the problem of managing differences within the multinational contingents such as different national and international legal obligations and legal interpretations of obligations under the international law.

One of these legal obligations is to ensure the prosecution for criminal and disciplinary offences. Croatia does not have military courts but only disciplinary courts, so civilian courts have jurisdiction in all cases.

Use of force or use of certain type of weapons can pose a problem concerning means and measures that require positive legal authorisation and laws of many countries do not regulate the problem completely which leads to lack of legal certainty.

The provision of legal advice can be a problem for small contingents as well because they do not deploy Legal Advisers and members of their Armed Forces in some cases need legal advice relating to the application of international documents, treaties, non-binding instruments (MOUs & TAs) and operational documents, updating national caveats and ongoing legal assessment.

Possible solutions for these problems might be:

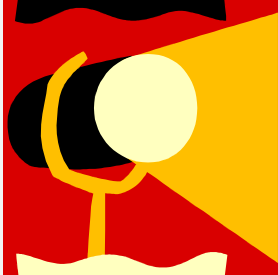
- national laws that are more precise (goal is to enhance legal certainty which will make them reliable);
- good education of Armed Forces before their deployment including training in legal matters (limited by their tasks and rank) and
- cooperation of lawyers (Legal Advisers) of deployed forces (countries) aiming to effective management of legal differences including legal interpretations of the same treaties, LOAC, human rights law etc.

In the Croatian “case”, as I already mentioned above, a good solution was contingents consisting of national forces from countries with similar legal tradition and legislation.

Thank you for your attention.

Ms. Marina Jurić Matejčić
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Spotlight



LTCOL Patricia A.

McHugh

Legal Adviser,

CC-Air HQ Izmir



Name: Patricia A. McHugh

Rank/Service/Nationality: Lt Col / USA Air Force

Job title: Legal Adviser, CC-Air HQ Izmir, Turkey

Primary legal focus of effort: Operations and International Law

Likes: Travel, spending quality time with family and friends, chocolate, and a challenge.

Dislikes: Uncooperative computers and really hot weather.

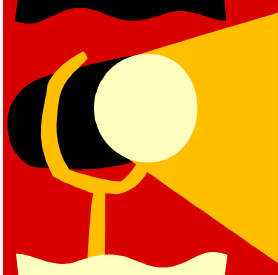
When in Izmir, everyone should: Walk along the Kordon (waterfront) and observe a spectacular sunset.

Best NATO experience: Working in a fascinating multi-cultural environment.

My one recommendation for the NATO Legal Community: Continue providing outstanding support and assistance to each other.

Patricia.mchugh@aiiz.nato.int

Spotlight



LTCOL Norbert

Pedzich

Legal Adviser,

Joint Force

Training Centre



Name: Norbert PEDZICH

Rank/Service/Nationality LTC/ POL AF

Job title: Legal Adviser /Joint Force Training Centre

Primary legal focus of effort: JFTC Legal Office has mainly been supporting the process of standing up a new NATO Centre and taking over its permanent facility, addressing status and Host Nation issues as well as assisting the development of internal concepts and directives, staff procedures, to include coordination with Support Unit and national elements and local authorities. The Legal Office also supports JFTC increasing training and exercise activities.

Likes: running (long distance), jazz, classical music

Dislikes: very hot and damp climate

When in Bydgoszcz , everyone should: At the corner of Gdanska and Jagiellonska Streets, there is the church of the Assumption of Holy Virgin. The small Gothic-Renaissance Roman Catholic church was built in the years 1582-1602. In Bydgoszcz the bugle call is sounded at 9 am, 12, 3 p.m. and 6 p.m. Inside one can find a Gothic chandelier, two magnificent wrought-iron gratings and a 17th century wooden altar.

Best NATO experience: Advanced NATO Operational Course in Oberammergau

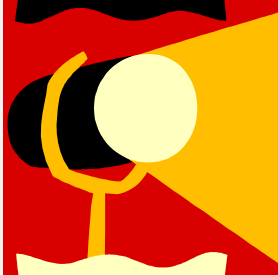
My one recommendation for the NATO Legal Community:

"Make up your mind that happiness depends on being free, and freedom depends on being courageous".

Pericles

Norbert.pedzich@jftc.nato.int

Spotlight



LTCOL Adrienne

Leah Schaffer

Legal Adviser,

NATO HQ

Sarajevo



Name: Adrienne Leah Schaffer

Rank/Service/Nationality: LTC/ Missouri Army National Guard/USA

Job title: Chief Legal Adviser, NATO, Headquarters, Sarajevo

Primary legal focus of effort: Advises the Commander and multinational staff on all international and operational legal matters, with particular emphasis on the Dayton Peace Accord, Law of Armed Conflict, Peace Support Operations, the interpretation and application of treaties including the Status of Forces Agreement, Bosnian defense reform laws, and general legal issues involving NATO and US operations.

Likes: Reading the bible, gospel music, jazz music, Latin dancing, flavored teas, caramel flavored coffee, laughter, and smiles.

Dislikes: Profanity, use of degrading words, and maltreatment of those less fortunate.

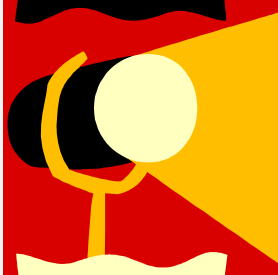
When in Sarajevo, everyone should: Immerse themselves in the cultural offerings in the community by visiting the museums; drinking coffee at the sidewalk cafes greeting the people in their own language, this will help you to experience the rapid pulse of the community.

Best NATO experience: Working along side NATO and non-NATO contributing nations forging reconciliation, unity, freedom, security, and tolerance; eradicating terrorism, ethnic cleansing, religious injustice, and the violation of human rights.

My one recommendation for the NATO Legal Community: If we put our heads together and keep an open mind we just might make a significant difference in a time of uncertainty.

Adrienne.Schaffer@nhqsa.nato.int

Spotlight



Major Javier

Palacios

Legal Adviser,

CC Land HQ

Madrid



Name: Javier Palacios

Rank/Service/Nationality Major / Judge Advocate General Corp/ ESP

Job title: Legal Adviser CC-LAND HQ Madrid

Primary legal focus of effort: Law of armed conflict, ROE, civilian claims, disciplinary issues on military operations

Likes: The countryside, read (especially History books), music (classic or folk) and my family

Dislikes: Rock and Roll, heavy and noisy music

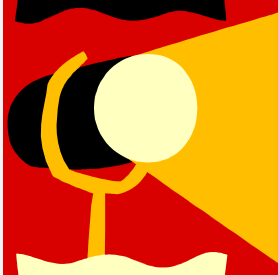
When in Madrid , everyone should: Phone me. I would be very pleased to show you my city and some ancient cities and towns near Madrid.

Best NATO experience: Kosovo (when I was deployed in 2002)

My one recommendation for the NATO Legal Community: Whenever possible, avoid the use of acronyms and abbreviations, especially when you are writing to a colleague who is new within the NATO structure. This would help an easier adjustment to NATO.

Javier.palacios@lamd.nato.int

Spotlight



Mr. Adrian Flores

Loth

Legal Intern,

SACT/SEE



Name: Adrian Leonhard Flores Loth

Rank/Service/Nationality: Civilian /DEU

Job title: Intern at SACT SEE Legal Office

Primary legal focus of effort: International (Public) and European Law, International Arbitration Law.

Likes: Running and strength endurance, military competitions and my turntables.

Dislikes: warm winters and melting snow; it should just disappear from one day to another.

When at SHAPE, everyone should:

At least once run around SHAPE to get an impression about the size of the facilities. I also really like the Green Gym, the Steaks offered at the Conti Mess (Tuesday is Steak day!) and the old cemetery in Soignies.

Best NATO experience: Working with interesting people in a multinational organization. Internship is a great possibility to get an idea how NATO works.

My one recommendation for the NATO Legal Community: Less bureaucracy to become a legal intern.

Adrian.flores@shape.nato.int



HAIL

&

FAREWELL

Hail

JFC Brunssum : COL Adrianus (Adri) Ruysendaal joined in September 2008

JFC Naples : LTCDR John E. Frajman joined in September 2008

NATO HQ Sarajevo : LTCOL Adrienne Schaffer joined in August 2008

ISAF : COL Jody Prescott joined in August 2008

Farewell

JFC Brunssum : COL Kees Van der Meij left on August 30, 2008

JFC Naples : LTCDR Steve Milewski left in August 2008

ISAF : COL Gary Brockington left in August 2008

GENERAL INTEREST/NATO IN THE NEWS

- Framework Document on the establishment of the NATO-Georgia Commission can be found at:
<http://www.nato.int/docu/pr/2008/p08-114e.html>
- Speech given by the NATO Secretary General at the Royal United Service Institute (RUSI) in London on September 18, 2008 can be consulted at:
<http://www.nato.int/docu/speech/2008/s080918a.html>
- Summary of the round-table discussion organised by UNESCO to discuss the implementation of the Universal Declaration of Human Rights is published at:
http://www.unric.org/index.php?option=com_content&task=view&id=19114&Itemid=42
- A collection of major legal publications issued by the United Nations will be available on HeinOnline as of October 1st, 2008. This will include the complete collection of the United Nations Treaty Series 1946-Date, International Court of Justice, Reports of Judgments, Advisory Opinions and Orders 1947-Date, Documents of the United Nations Conference on International Organizations etc. HeinOnline is accessible to staff in NATO billets. If you need more information on how to access, please contact Dominique Palmer-De Greve (Dominique.degrev@shape.nato.int).
<http://heinonline.org/HOL/Welcome>
- Eur-Lex provides direct free access to European Union law. You can consult the Official Journal of the European Union as well as the treaties legislation, case-law and legislative proposals. The site is available in all European Union languages:
<http://eur-lex.europa.eu/>
- The Philip C. Jessup International Law Moot Court Competition is the world's largest moot court competition, with participants from over 500 law schools in more than 80 countries. The competition is a simulation of a fictional dispute between countries before the International Court of Justice, the judicial organ of the United Nations. More information on:
<http://www.ilsa.org/jessup/index.php>

*Wait for that wisest of all
counselors, Time.*

Pericles

GENERAL INTEREST/NATO IN THE NEWS

- **"Troops in Contact. Air strikes and Civilian Deaths in Afghanistan"**

Report by Human Rights Watch, published on September 2008

The report "Troops in Contact. Air strikes and Civilian Deaths in Afghanistan" is based on field research in Afghanistan and interviews with US, NATO and Afghan Officials. It created a detailed database of every reported air strike between November 2005 and July 2008.

According to Human Rights Watch there have been 556 civilian killed by military air strikes since 2006. This number does not include casualties caused by ground fire or other military operations.

The report describes the International Forces operating in Afghanistan and several incidents which occurred in the Districts of the Kapisa, Herat, Helmand and Nangrahar Provinces.

Furthermore, it presents the Taliban tactic of Shielding as an attempt to avoid military (counter-) attacks and gives an overview of the policies for the use of air strikes and problems in their implementation.

Human Rights Watch also shows the legal aspect of civilians under the International humanitarian law as well as the rights and duties of armed forces in respect to civilians in combat zones.

Additionally, Human Rights Watch gives specific recommendations to the parties of the conflict in Afghanistan (US, NATO, Afghan government/Taliban, al-Qaeda and other opposition armed groups) for reducing or even avoiding civilian casualties.

For more detailed information see:

<http://hrw.org/reports/2008/afghanistan0908/afghanistan0908web.pdf>

- **Reports of ethics violations by attorneys** in Kosovo have increased dramatically in less than a year, yet—thanks to the new disciplinary system—the Kosovo Chamber of Advocates (KCA) has been efficient in resolving these cases. The recently-implemented ethics code and disciplinary system for attorneys and non-professional members of the legal community have increased the ability of the public to report abuses and the KCA's ability to effectively investigate and respond to those accusations.

http://www.abanet.org/rol/news/news_kosovo_ethics_code_proven_effective.shtml

GENERAL INTEREST/NATO IN THE NEWS

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.

The **NATO School** in co-operation with the **International Institute of Humanitarian Law** (Sanremo / Italy) announces its 2008 "Workshop on Law of Armed Conflict and Human Rights in International Peace Operations" which will be organised at the NATO School from 3 to 5 December 2008. Notification letter and registration form are forwarded with this Gazette.

More information on <http://www.iihl.org/>

*If I have ever made any
valuable discoveries, it has
been owing more to
patient attention, than to
any other talent.*

Isaac Newton

UPCOMING EVENTS

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

http://www.natoschool.nato.int/internet_courses/courses_guide.htm

- Focused seminars are organized by the **College of Europe** to enable participants to discern, evaluate and optimize their time in acquiring EU information. Two crash courses will be held in Brussels on October 17, 2008 and December 5, 2008. More information on :

<http://www.coleurop.be/content/development/prof/EUFactFinding/index.html>

- A 2-Day conference is organized by SOLON, the Institute of Advanced Legal Studies, and the Centre for Contemporary British History on February 20 and 21, 2009 at the Institute of Advanced Legal Studies in London. Subject of the conference is **War Crimes – Retrospectives and Prospects**: "Identifying war crimes and the perpetrators is a key part of post-conflict resolution". Speakers include, Professor David Fraser, Mr. Michael Kandiah, Dr. David Seymour. Details including the programme and the booking form are available on the SOLON, IALS and CCBH Websites.

<http://www.perc.plymouth.ac.uk/solon/>

<http://ials.sas.ac.uk/>

<http://icbh.ac.uk/>

- **Legal Arguments in Debates on War and Peace.** This conference is organized on November 6, 2008 by the Danish Institute for Military Studies (DIMS) and will raise questions such as " to what degree do legal considerations limit the room for political decision about making war ? How is the growing role played by legal arguments reflected in contemporary debates about war and peace ?"

Keynote speakers are Professor David Kennedy (USA) from Harvard University and Mr Niels Helveg Petersen (DNK), MP and former Minister of Foreign Affairs.

Attending the conference is free of charge. All participants must register before October 24, 2008. Additional information can be obtained by contacting the Course Secretariat at dims-sekr@difms.dk or going to the website www.difms.dk



Nothing is worse than active ignorance.

Johann Wolfgang von Goethe

Articles/Inserts for next newsletter can be addressed to Lewis Bumgardner (Sherrod.Bumgardner@shape.nato.int) with a copy to Dominique Palmer-De Greve (Dominique.Degreve@shape.nato.int) and Kathy Bair (bair@act.nato.int)

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