

SPECIAL INTEREST ARTICLES

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Hail and Farewell

GENERAL INTEREST

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Introduction

Fellow Legal Professionals and Persons Interested in NATO,

This issue of the Gazette contains two articles about ISAF: a commentary about how human rights law may be more blended into operations with the goal of better achieving mission success and a report of a recently held ISAF LEGAD and Targeting Conference; an exposition about the Montreux Convention from our noted maritime author, Lieutenant Commander Darren Reed; a discussion of the newly formalized relationship between the NATO School and the International Institute of Humanitarian Law; and the remarks of the SHAPE Legal Adviser, Mr. Thomas Randall concerning NATO's use of civilian contractors.

Special attention by readers of this Gazette is invited to the 3-5 December 2008 "**Workshop on Law of Armed Conflict and Human Rights in International Peace Operations**" that will be conducted at the **NATO School** in co-operation with the **International Institute of Humanitarian Law**. As identified in our list of upcoming events, this Wednesday to Friday workshop features an exceptional faculty who will guide the participants in examining the core principles and rules of International Humanitarian Law and Human rights and their present application and implementation in International Peace operations. The draft schedule of the workshop is attached to the e-mail sending this Gazette. To not miss this unique educational opportunity, please contact the NATO School Student Administration at studentadmin@natoschool.nato.int.

From now until the Christmas and New Year's holidays is one of the most hectic times of the NATO year as the robust exercise program continues and 2008 projects are pushed to their conclusions. As always, if insight is gained or issues are raised during this period of high-operational tempo that our extended NATO legal community would be interested in, please consider writing a short article for publication in this Gazette. A conversational style is acceptable and desired. We publish this Gazette because our readers have something to say to each other about the work we are undertaking. I look forward to your submissions for the next Gazette either as an article or a notice of an interesting or important upcoming event. Please send your items to Sherrod.bumgardner@shape.nato.int with a copy to the Gazette editor dominique.degreve@shape.nato.int

Sincerely,
Sherrod Lewis Bumgardner

The Use of Force during NATO-led Operations in Afghanistan: Minimizing Human Suffering without Undermining Effectiveness

Capt Federico Sperotto ITA AF – Mount

The operational environment in Afghanistan raises difficult issues on the choice of methods to counter those who are offering resistance to NATO's efforts to implement the UN mandate. Against those entities –whose aggressiveness seemingly is increasing daily– NATO troops operate in accordance with the relevant rules of public international law including the Law of Armed Conflict (LOAC). Necessity, proportionality, the principle of distinction and the correlative prohibition of indiscriminate attacks are the core requirements for the legitimate use of lethal force. When a NATO unit is under attack or is facing an imminent threat of an attack, soldiers plainly react in self-defense. After an attack occurs, issues arise concerning the pursuit of the attackers or persons who displayed hostile intent that did not constitute an imminent attack, or when NATO uses air power to defend its personnel who are in hostile contact with enemy forces.

The right to self-defence is considered as *inherent*. It permits the use of military force—including deadly force—when an attack occurs. According to one authoritative scholar, this right has always been “anticipatory” under traditional international law; its exercise is valid against imminent as well as actual attacks or dangers². In other words, this right to anticipatory self-defense is the right to counter an attack that is certain and imminent. When acting in anticipatory self-defense, the imminence of an attack is evidence that force is necessary as *prevention from harm*. A corollary to this assertion is that when force is used without an imminent threat this also is evidence that its use may have been unnecessary. Thus, the imminence of the threat will be the governing standard. The criteria has been enunciated since the XIXth Century as a necessity of self-defense *instant, overwhelming, leaving no choice of means and no moment for deliberation*³. Different solutions that lower this international legal standards for the use of force are considered suspect. As observed by M. Sapiro : “The further a decision to use force moves away from the requirement of imminence, the more likely the possibility of a mistake⁴.”

Another issue embedded in the concept of imminence in self-defence relates to the status of “combatancy.” Combatants—regular or irregular troops and militia belonging to the party in conflict—can be targeted whether or not they are actually engaged in combat. This is not the case with civilians. The core rule stated in Article 51 of the 1977 Additional Protocol (I) to the Geneva Conventions of 1949 is that, “Civilians shall enjoy the protection afforded by this section [general protection against effects of hostilities] unless and for such time as they take a direct part in hostilities.” Concerning non-international armed conflicts, the reference is Protocol II, Article 13 that provides the rule that is customary in nature: “the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations.”

Human Rights Watch, “Troops in Contact”: Airstrikes and Civilian Deaths in Afghanistan, 8 September 2008. 1-56432-362-5. Online. UNHCR Refworld, available at: <http://www.unhcr.org/refworld/docid/48c6251d2.html> and <http://hrw.org/reports/2008/afghanistan0908/> [accessed 28 October 2008]

² D. W. BOWETT, *Self-Defense in International Law*, 1958, p. 189

³ R.Y. JENNINGS, *The Caroline and McLeod Cases*, 32 AM. J. INT’L LAW, 82, 89, 1938)

⁴ M. SAPIRO, *Preempting Prevention: Lessons Learned*, 37 N.Y.U. J. INT’L L. & POL. 357, 367, 2005)

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This rule binds those States that did not ratify the Protocols, even if some of those States affirm that not the entire Article 51 or Article 13 belong to customary international law⁵.

It is worth noting that while the nature of the ongoing conflict in Afghanistan is subject to some dispute because of differing views as to whether it is an internal armed conflict, an international armed conflict, or an internal armed conflict that has become internationalized⁶; in fact the nature of the conflict has no relevance to the standards contained in Article 51 of Additional Protocol I and Article 13 of Additional Protocol II. The two Articles merely constitute a reaffirmation and reformulation of the existing customary norms that apply in all circumstances⁷.

A civilian taking part in hostilities endangers his life, as harming civilians who participate in hostilities is permitted, even if the result is death and innocent bystanders are hit. Moreover, participation in hostilities by civilians is subject to trial and punishment as acts of belligerency that have been rendered unlawful⁸. In spite of opinions sustaining the contrary⁹, there is no accepted intermediate category between civilians and combatants under current international law. Thus, civilians directly taking part in fighting assume the role of combatants. Consequently whether individually or as a member of a group, they become legitimate military targets. As such, they are subject to direct attack to the same extent as combatants, while precautions in attack and against the effects of indiscriminate or disproportionate attacks pertain to peaceable civilians. Under international law, former Taliban operatives, warlords and insurgents are civilians, who may not legitimately directly participate in hostilities. If they do so, they lose their privileges as civilians and become legitimate targets.

⁵ *Israel and the United States are among these states. However, see Supreme Court of Israel, HCJ 769/02 [2006] The Public Committee Against Torture in Israel et. al. v. The Government of Israel et. al., paragraph 30 (internal quotation marks omitted) where the Court found "all of the parts of article 51(3) of the First Protocol express customary international law." Also, 2 Am. U. J. Int'l L. & Pol'y 416 (1987) Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions; Dupuis, Martin D.; Heywood, John Q.; Sarko, Michele Y.F., where the Deputy Legal Adviser, United States Department of State, Michael J. Matheson and Judge Abraham D. Sofaer, Legal Advisor, United States Department of State offered Article 51 of Additional Protocol I and Article 13 of Additional Protocol II bound the United States as opinio juris with the exception of the language in Article 51(6) dealing with reprisals that largely deal with the use of nuclear weapons.*

⁶ (see, e.g., Human Rights Watch, "Troops in Contact: Air-strikes and Civilian Deaths in Afghanistan," 2008, p. 34) A. Roberts, "Counter-terrorism, armed force and the laws of war", *Survival*, Vol. 44, 2002, p. 7. On that concept see H-P. Gasser, "Internationalized non-international armed conflicts: Case studies of Afghanistan, Kampuchea and Lebanon", *American University Law Review*, Vol. 33, No. 1, Fall 1983, pp. 145-61, and J.G. Stewart, "Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict," *International Review of the Red Cross*, Vol. 85, 2003, p. 313.

⁷ *inter alia, International Criminal Tribunal for the Former Yugoslavia, ICTY, the Prosecutor v Pavle Strugar, IT-OT-42-T-22, 31 January 2005*.

⁸ *see on this point the US Supreme Court, Ex Parte Quirin et al. v. Cox, Provost Marshal (1942), 1, 31*.

⁹ *Yoo, John Choon and Ho, James C., The Status of Terrorists (August 25, 2003). Virginia Journal of International Law, at SSRN: <http://ssrn.com/abstract=438123> or DOI: 10.2139/ssrn.438123*

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According to the ICTY, "[t]he protection of civilians and civilian objects provided by modern international law *may cease entirely or be reduced or suspended* [...]. If a group of civilians takes up arms [...] and engages in fighting against the enemy belligerent, they may be legitimately attacked by the enemy belligerent whether or not they meet the requirements laid down in Article 4 (A) (2) of the Third Geneva Convention of 1949."¹⁰ Dr. Dieter Fleck enumerates some conducts as hostile acts that may be resisted by force: "A civilian who kills or takes prisoners, destroys military equipment [...] civilians who operate a weapons system, supervise such operation, or service such equipment."¹¹

Professor Antonio Cassese restricts the situations in which it is allowed to recourse to deadly force, holding that "A civilian suspected of directly preparing an attack or an hostile act ... may not be attacked and killed if: ... (2) he is not carrying arms openly while in the process of engaging in a military operation or in an action preceding a military operation [...] For a belligerent to lawfully fire at a civilian it is necessary that the civilian carries arms openly before and during an armed action; if it were not so, belligerents would be authorized to shoot at any civilian, on the mere suspicion of their being potential or actual unlawful combatants¹². This position which actually referred to an operational situation occurring in the West Bank is quite prudent.

In a landmark decision on a targeted killings policy in Israel, the Israeli Supreme Court makes the case of a terrorist sniper shooting at soldiers from his porch. Shooting at him is proportionate even if as a result an innocent civilian neighbor or passerby is harmed. That is not the case if the building is bombed from the air and scores of its residents and passersby are harmed¹³.

Regarding the use of air power or indirect fire, international humanitarian law prohibits attacks which may be expected to cause *incidental* loss of civilian life and injury to civilians which would be excessive in relation to the concrete and direct military advantage anticipated. Such a disproportionate attack is considered as indiscriminate, and a grave breach of the Law of War—i. e. a war crime—when committed willfully. In *Galic*, the ICTY described a wide concept of willfulness. The Chamber held that the notion of 'willfully' incorporates the concept of "recklessness", whilst excluding mere negligence. The Court stated that a perpetrator who recklessly attacks civilians acts 'willfully'¹⁴. Recklessness is the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening (*dolus eventualis*). Thus, to fire blindly, without a clear idea of the nature of the target, constitutes an indiscriminate attack.

¹⁰ ICTY, *The Prosecutor v. Kuprescic et. al.*, IT-95-13, 14 January 2000)

¹¹ D. FLECK, ed., *The Handbook Of Humanitarian Law In Armed Conflicts*, 1995, p. 232

¹² A. CASSESE, *Expert Opinion on whether Israel's Targeted Killings of Palestinian Terrorists Is Consonant with International Humanitarian Law*, p. 8

¹³ HCJ 769/02, *The Public Committee Against Torture in Israel v. the Government of Israel*, December 14, 2006, para. 46

¹⁴ ICTY, *The Prosecutor v. Stanislav Galic*, Case No. IT-98-29-T, 5 December 2003

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Professor Yoram Dinstein argues the point that when an attack is planned a small military object surrounded by populated civilian areas, the only legitimate *modus operandi* may be to resort to a surgical raid with precision guided ammunitions¹⁵.

The ISAF mission is to cooperate with the Afghan government to improve the security situation throughout Afghanistan, a territory where apart from NATO, the military personnel participating in the US-led coalition Operation Enduring Freedom (OEF) and the Afghan National Army, all other persons are civilians. The UN Security Council (Resolution 1833/2008) while recognizing the efforts taken by ISAF and other international forces to minimize the risk of civilian casualties, called for compliance with international humanitarian and human rights law and for all appropriate measures to be taken to ensure the protection of civilians. This resolution urged the continuous review of tactics and procedures. This preoccupation for human rights—reaffirmed by the Security Council in several other resolutions¹⁶—demonstrates the widespread sense of uneasiness toward the growth of civilian casualties. Particularly in an operation where winning the trust and confidence of the civilian population is essential, a critical review of the traditional approach to “collateral damage” seems obligated. On this point, the ICTY noted that the traditional “law of warfare” has been replaced by the more recent and comprehensive notion of “international humanitarian law”, which has emerged as a result of the influence of human rights doctrines on the Law of Armed Conflict¹⁷.

Behind the formal reaffirmation of the core principles of the law of warfare, there is a revision of the influence of human rights in the conduct of military operations. This powerful influence demonstrates that human rights principles act alongside the laws of war to better focus the scope of military action against persons directly participating in hostilities. Solutions to limit the suffering on non-combatants blend and import human rights principles into a law of war framework. For example, while IHL allows casualties not exceeding the anticipated military advantage these casualties are proportion to the direct and substantial military advantage anticipated. While IHL uses the language of objectivity, the result of operational-tactical evaluation is ultimately subjective. Under human rights laws a simpler, and certainly more human standard is applied because the use of lethal force is limited to circumstances where they are *absolutely necessary* and the deprivation of life is always an *unintended outcome*¹⁸.

This new blended approach requires a new balance between the two bodies of law. It does not prohibit drastic measures, such as the use of fighter jets to repel insurgent attacks, but adopts more “pinpointed” measures against recognized members of hostile forces who pose an immediate menace to the security of NATO, its allies or the civilian population. When using deadly force, the harm to nearby innocent civilians becomes a fundamental and controlling consideration.

¹⁵ Y. DINSTEIN, *The Conduct of Hostilities under the Law of International Armed Conflict*, 2004, p. 126

¹⁶ see e. g., Res. 1674 and 1738/2006

¹⁷ ICTY, *The Prosecutor v. Dusko Tadić, IT-94-1, Jurisdiction Decision*, 2 October 1995

¹⁸ Eur. Ct. H. R., *McCann And Others v. The United Kingdom - 18984/91* 27 September 1995, para. 212

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Taken to their fullest extension, while the principles illustrated above may reduce the margins of security for ISAF, NATO's visible commitment to the protection of the civilian population builds trust and confidence when compared to terrorists or insurgents who fail in their duties as belligerents and respect human rights. Self-restraint wins hearts and minds. While the former Chief Justice Barak of Israel affirmed, "At times democracy fights with one hand tied behind her back,"¹⁹ the military forces of law abiding nations can accept this constraint. They recognize that modern wars are fought amongst the people²⁰ and they know that winning them requires helping the population create a civil society that turns against human suffering and violence. Modern warfare requires a human rights-oriented approach. The use of military force is justifiable, but minimum force is key. In a human rights-oriented approach, the lives of those deployed are not privileged since the use of minimal and precise force puts troops at more immediate risk than using overwhelming force. However, it is valuable, as it protects people and minimize all casualties, improves dialogue with local people, wins hearts and minds and puts terrorists and criminal havens to an end.

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Fall 2008 – ISAF LEGAD and Targeting Conference

COL Jody Prescott USA A – Chief Legal Adviser ISAF

On 11 and 12 October, ISAF hosted the Fall 2008 Legal and Targeting Conferences, respectively. Organized by Lieutenant Colonel Steve Weir, U.S. Army, ISAF Deputy Legal Advisor, the legal conference was a non-classified event, but the targeting conference was of course classified. This article briefly describes the legal presentations given during each conference. The presentations themselves are available at www.cimicweb.org. The LEGAD conference was attended by Legal Advisors from Regional Commands East, Capital, South and West, from the CAOC at Al Udeid, Combined Security Transition Command – Afghanistan (CSTC-A), the American, Canadian, Danish, Finnish, German, Hungarian, Romanian, and Swedish national contingents. Representatives of the ICRC, UNAMA, the U.S. Embassy, USAID, and GTZ (a German NGO involved in Rule of Law in Afghanistan) also attended, for a total of over 50 people for most of the day.

The first briefs were given by the ICRC representatives. Mr. Patrick Hamilton, the ICRC Deputy Head of Delegation, presented a briefing on the role and responsibilities of the ICRC in Afghanistan. This briefing described the history of ICRC efforts in Afghanistan, and ongoing efforts in furtherance of the ICRC mission. Ms. Mona Sadek, the ICRC Protection Coordinator, presented a briefing dealing specifically with detention, and the issues surrounding detention of individuals in Afghanistan, and the standard of humane treatment to be accorded detainees.

The next three briefings were given by representatives of the USAID Rule of Law Program. The team headed by Mr. Jim Agee briefed on the many projects that USAID is working on in the area of Rule of Law in Afghanistan. These efforts include training for prosecutors and judges, the implementation of a simplified case management system called ACAS, and the renovation and refurbishment of courthouses and prisons.

Mr. Thomas Lynch, the chief of UNAMA's Provincial District Coordinator Mechanism Project, described for the audience the program UNAMA initiated this year to try to coordinate the different efforts of all the different actors in the area of Rule of Law in Afghanistan. Although there will not be a coordinator in each province, by the time the program has reached full operational capacity eight coordinators will be covering the entire country. Their job will be to gather information as to the status of Rule of Law projects at all levels, and to spread the information so as to allow the different actors to deconflict their activities.

Next, Major Glen Rippon, Canadian Forces, briefed the area of claims in ISAF. Major Rippon is the Administrative Law LEGAD for HQ ISAF, and besides claims also handles detention matters and Memoranda of Agreement and Understanding. Major Rippon explained to the audience the impact of the Military Technical Agreement between NATO and the Government of the Islamic Republic of Afghanistan upon claims, and the degree to which he worked with the claims officers for the national contingents on settling claims. Major Rippon also described settling claims in Afghanistan in general, and claims issues that had come to the fore recently, such as extravagant livestock claims and land claims.

After lunch, Major Michael McGovern, U.S. Army, the Rule of Law chief for Regional Command East, described for the audience the work done in Regional Command East to further the Rule of Law. Major McGovern outlined the role of his office, and his office's working relationships with the judge advocates in the separate task force areas in Regional Command East. Major McGovern also highlighted the many Rule of Law efforts occurring in Regional Command East across the spectrum of personnel, infrastructure, and training.

Fall 2008 – ISAF LEGAD and Targeting Conference

Major Edmund Thomas, Canadian Forces, an Afghan Military Justice mentor with CSTC-A, briefed the audience on the work being done to train Afghan Army legal officers, and to provide a training program what would allow the Afghan Army to sustain its own production and training of legal officers. Major Thomas also described the challenges his team faces in developing this capacity, and the collaborative efforts undertaken with other agencies to develop it properly.

Lieutenant Colonel Pam Meyers, U.S. Army, ISAF Rule of Law Chief, provided the audience with a briefing on the NATO EBAO methodology that the ISAF Legal Office is using in its Rule of Law efforts. The ISAF Legal Office is responsible for briefing COM ISAF on Effect 5 in the ISAF Campaign Plan, Establishing Rule of Law. Given the multiplicity of Rule of Law actors in Afghanistan, the tremendous amount of human and infrastructural capacity that must be built in order to establish Rule of Law in Afghanistan, and the lack of coordination between the different actors and their respective efforts, the EBAO that the ISAF Legal Office is using is intended to develop a holistic picture of Rule of Law efforts in Afghanistan. This would allow COM ISAF to determine where gaps and deficiencies existed, thereby enabling him to direct assets towards in these directions.

Lieutenant Colonel Meyers was followed by Colonel Prescott, U.S. Army, ISAF Chief Legal Advisor, who briefed the audience on the existing and the new measures COM ISAF has put in place to reduce civilian casualties in Afghanistan. The presentation began with a brief description of NATO STANAG 2449, Training in the Law of Armed Conflict, and the current fire control measures used in targeting. The new measures include a new tactical directive on the conduct of tactical operations, a new vehicle checkpoint SOP, and new civilian casualty tracking and inquiry mechanisms at the HQ ISAF staff level.

Colonel Prescott was followed by Mr. Nazir Achmad, a local Afghan attorney employed by the U.S. Army in Regional Command East, who gave the last legal presentation of the day. Mr. Achmad has been very active in Rule of Law efforts in Afghanistan, and he described Rule of Law activities in Regional Command East spanning the range from helping to train numerous judicial personnel in conjunction with Kabul University to coordinating with local and national government officials in the building of the Khost Justice Center, a model facility that brings all the elements of the judicial process together in one complex.

The next day, during the classified targeting conference, Commander Gail Axon delivered the first presentation. The audience was comprised of a mixture of planners, targeteers and Legal Advisors. Commander Axon explained in detail the staff products being processed with regard to targeting and Rules of Engagement within HQ ISAF, and the working interpretations developed for implementation of the different targeting guidance authorities. During the other presentations by targeting subject matter experts, Commander Axon and the Legal Advisors in the audience helped address specific legal questions which arose.

Fall 2008 – ISAF LEGAD and Targeting Conference

Planning has already started for the next ISAF Legal Conference, to be held in Kabul in April 2009. The ISAF Legal Office will work with the CSTC-A legal mentors to gather more host nation input into the design of the conference, and promote more local national Legal Advisor participation in the conference itself.



Starting on the left top, clockwise, LTC "Mullah" Steve Weir, COL Jody Prescott, CDR Les Reardanz (former ROL), Maj Glen Rippon (Adlaw); CDR Gail Axon (Oplaw) and LTC Pam Meyers, ROL.

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The Montreux Convention

Lt Cdr Darren Reed GBR N – Legal Adviser MCC Northwood

In this short note, Lt Cdr Darren Reed, AMCC(Northwood)'s Legal Adviser, outlines the regime established under the Montreux Convention 1936 which regulates the passage of ships through the Turkish Straits into and out of the Black Sea and their presence in that Sea. The Montreux Convention 1936 deserves publicity and closer study, especially concerning the recent events in Georgia. 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.

Introduction

The Montreux Convention 1936 gave Turkey authority to regulate the movement of ships through the Turkish Straits into and out of the Black Sea. Despite the fact that it was signed over 70 years ago, it is still in force today. The Convention importantly regulates the type, size and number of warships that can transit the Straits and operate in the Black Sea at any one time.

Historical Background

The Turkish Straits comprise two narrow straits, the Istanbul (Bosphorus) and the Canakkale (Dardanelles), which connect the Sea of Marmara with the Mediterranean Sea on the one side and the Black Sea on the other. The Straits have been of significant strategic importance since Paris stole Helen from Menelaus and started the Trojan war¹. Following the Turkish War of Independence², the 1923 Treaty of Lausanne, which defined the boundaries of Greece, Bulgaria, and Turkey and led to the recognition of the new Republic of Turkey³, demilitarised the Dardanelles and opened the Straits to unrestricted civilian and military traffic, under the supervision of the International Straits Commission.



¹ Troy is believed to have been located just south of the Dardanelles.

² Kurtuluş Savaşı in Turkish.

³ As the successor state to the Ottoman Empire.

The Montreux Convention

By the late 1930s, the military situation in the Mediterranean had significantly changed with Italy rearming and fortifying the Dodecanese islands⁴. Concerned about possible Italian expansion into Anatolia and also fearing Bulgarian rearmament, Turkey understandably wished to fortify the Straits, an act that was prohibited by the Treaty of Lausanne. Consequently, at the request of the Turkish Government, negotiations on a new treaty began on 22 June 1936, with representatives from Australia, Bulgaria, France, Germany, Greece, Japan, the Soviet Union, Turkey, the United Kingdom and Yugoslavia. The Montreux Convention was ratified by all attendees⁵, except Australia and Germany, who had not been signatories to the Treaty of Lausanne, and came into force on 9 November 1936.

The Convention

While Article 1 of the Convention affirms "the principle of freedom of transit and navigation by sea in the Straits", the Convention is best viewed as setting up a regime of limitations on the free movement of ships through the Straits and into the Black Sea depending on type, i.e. a merchant vessel or warship, and flag State of the vessel concerned, i.e. Black Sea or non Black Sea State, as well as whether there is or is not a state of war.

Merchant Vessels

Merchant vessels are defined negatively in the Convention, i.e. by what they are not, namely "all vessels which are not covered by Section II of the present Convention."⁶ Section II of the Convention concerns warships ("vessels of war") and although various categories of those vessels are defined (at Annex II) there is no one definition given of a "vessel of war". However, I think we can safely assume that if a vessel doesn't fall into one of those categories and is not an auxiliary then it should be treated as a merchant vessel for the purposes of the Convention.

In peace time the Convention allows merchant vessels to enjoy "complete freedom of transit and navigation in the Straits, by day and by night, under any flag and with any kind of cargo"⁷. However, while pilotage through the Straits is optional, a merchant vessel has to comply with a number of formalities if it wishes to transit the Straits, formalities which are not present in the international straits regime established by UNCLOS⁸.

All ships entering the Straits are required to communicate to Turkish officials their name, nationality, tonnage, destination and last port of call as well as being required to stop at a sanitary station near the entrance to the Straits for the purposes of the "sanitary control prescribed by Turkish law"⁹ within the framework of international sanitary regulations. Merchant ships also have to pay charges to cover the cost of that sanitary control¹⁰.

⁴ Which were, at the time, under Italian control having been ceded to Italy following the Italo-Turkish War of 1912 (*guerra di Libia in Italian, and Trablusgarp Savaşı in Turkish*).

⁵ By Japan with reservations.

⁶ Article 7 Montreux Convention. All footnotes concerning articles relate to the Montreux Convention unless stipulated otherwise.

⁷ Article 2.

⁸ The 1983 United Nations Convention on the Law of Sea (UNCLOS) Part III.

⁹ Article 3.

¹⁰ Annex I

The Montreux Convention

In time of war when Turkey is not a belligerent, the regime is no different from peace time and merchant ships continue to enjoy freedom of movement through the Straits subject to the above requirements¹¹. If Turkey is a belligerent, then merchant vessels of States not at war with Turkey still enjoy freedom of transit as long as they proceed in daytime, follow a route set by the Turkish authorities and do not assist the enemy¹². The same requirements exist, with the added obligation of compulsory pilotage, if Turkey considers itself threatened by imminent armed conflict¹³.

Vessels of War in Peacetime

As stated above "vessels of war" as a generic grouping were not defined in the Convention, although particular classes of such vessels were. The definitions were taken verbatim from the London Naval Treaty of 25 March 1936 and have not been updated since. Thus there is no mention of missile systems or limitations on the type, range and power of modern weapon systems but there is much made of the calibre of the main armament that the ships carry as well as the standard displacement of the vessel¹⁴.

Warships of Non Black Sea Powers

The Convention differentiates between Black Sea and non Black Sea powers with the latter considerably more limited in the size and type of vessel of war that can transit the Straits. In fact, only the following types of warship possessed by non-Black Sea powers are able to transit the Straits:

- Light surface vessels - surface vessels of war (other than aircraft-carriers) whose standard displacement is between 100 and 10.000 tons, which do not carry a gun with a calibre exceeding 8 inches¹⁵.

Minor war vessels - surface vessels of war, whose standard displacement is between 100 tons and 2.000 tons, which do not carry gun with a calibre exceeding 6.1 in (155 mm.), are not designed to launch torpedoes or proceed at a speed greater than 20 knots¹⁶.

¹¹ Article 4

¹² Article 5

¹³ Article 6

¹⁴ As defined at Annex II A(1) "The standard displacement of a surface vessel is the displacement of the vessel, complete, fully manned, engined, and equipped ready for sea, including all armament and ammunition, equipment, outfit, provisions and fresh water for crew, miscellaneous stores and implements of every description that are intended to be carried in war, but without fuel or reserve feed water on board. (2) The standard displacement of a submarine is the surface displacement of the vessel complete (exclusive of the water in' non-watertight structure), fully manned engined and equipped ready for sea, including all armament and ammunition equipment, outfit, provisions for crew, miscellaneous stores and implements of every description that are intended to be carried in war, but without fuel, lubricating oil, fresh water or ballast water of any kind on board"

¹⁵ Annex II B(3)

¹⁶ Annex II B(5)

The Montreux Convention

- Auxiliary Vessels - naval surface vessels, whose standard displacement exceeds 100 tons, which are normally employed on fleet duties or as troop transports or in some other way than as fighting ships, and which are not specifically built as fighting ships, provided that

- (a) they don't mount a gun with a calibre exceeding 6.1 in;
- (b) mount more than eight guns with a calibre exceeding 3 in;
- (c) are not designed or fitted to launch torpedoes;
- (d) are not designed for protection by armour plate;
- (e) are not designed for a speed greater than twenty-eight knots;
- (f) are not designed or adapted primarily for operating aircraft at sea; and
- (g) do not mount more than two aircraft-launching apparatus¹⁷.

Warships of Black Sea Powers

In addition to the above types of warship, Black Sea Powers are also permitted to send their capital ships, i.e. vessels with a standard displacement in excess of 10,000 tons¹⁸ through the Straits¹⁹. Aircraft carriers, defined as "surface vessels of war, whatever their displacement, designed or adapted primarily for the purpose of carrying and operating aircraft at sea"²⁰ are not included within the definition of capital ships and thus are not allowed to transit the Straits.

However, the "fitting of a landing-on or flying-off deck on any vessel of war [such as a helicopter landing pad/flight deck], provided such vessel has not been designed or adapted primarily for the purpose of carrying and operating aircraft at sea, shall not cause any vessel to be classified in the category of aircraft-carrier"²¹. Additionally, unlike non-Black Sea powers, Black Sea powers can send through the Straits submarines constructed or purchased outside the Black Sea "for the purpose of rejoining their base" provided that adequate notice of the laying down or purchase of such submarines have been given to Turkey. Furthermore, those submarines can pass out of the Straits to be repaired outside the Black Sea, provided, once again, that Turkey has been informed. In either case submarines must pass through the Straits singly, in daylight, and on the surface²².

Restrictions on all warships

Both Black Sea and non Black Sea powers have to notify the Turkish Government in advance (8 and 14 days respectively) of the destination, name, type and number of warships that will be transiting the Straits and, if applicable, their return date. Furthermore all warships must begin their transit through the Straits in daylight and, at the beginning of the transit, communicate to a signal station at the entrance to the Dardanelles or the Bosphorus the exact composition of the force²³.

¹⁷ Annex II B(6)

¹⁸ Annex II B(1)

¹⁹ Article 11

²⁰ Annex II B(2)

²¹ Annex II B(2). Hence when two Moskva class warships (some 15,000 tons unladen and carrying 14 Kamov Ka-25 'Hormone' helicopters), entered into the Soviet Navy in 1967 and were base-ported in the Black Sea, they were designated as "aviation cruisers" in order to avoid the prohibition on the passage of "aircraft carriers" through the Straits. The Kiev class warships which replaced them were termed "Large Antisubmarine Cruisers" (Bolshoi Protolovadochnyi Kreizer) for similar reasons despite being considerably larger (upwards of 43,000 tons) and carrying 12 to 13 Yak-38 VSTOL fixed wing aircraft as well as 14 to 17 Ka-25/27/29 helicopters.

²² Article 14

²³ Article 13

The Montreux Convention

However, such notification requirement is waived in the case of a non-Black Sea Powers wishing to send warships, not amounting to more than 8,000 tons, on a humanitarian mission into the Black Sea provided an authorisation is obtained from the Turkish Government²⁴.

The maximum number of warships that can be in the course of transit at any one time is 9 in a convoy and their aggregate tonnage must not exceed 15,000 tons²⁵. However, capital ships of Black Sea powers, which, of course, may be greater than 15,000 tons, can transit the Straits provided that they do so single, escorted by not more than two destroyers²⁶. Warships in transit of the Straits are not permitted to launch or recover aircraft during transit²⁷ and must not remain in the Straits longer than is necessary to effect that transit²⁸.

Warships visiting any of the ports within the Straits, at the invitation of the Turkish government are not subject to the same limitations provided that they leave the Straits by the same route as they entered it²⁹.

The aggregate tonnage which non-Black Sea Powers may have in that sea in time of peace is limited to 45,000 tons, provided that not more than 30,000 tons is attributable to any one non-Black Sea power alone³⁰. Additionally warships of non-Black Sea Powers shall not remain in the Black Sea more than 21 days³¹.

Auxiliaries specifically designed for the carriage of fuel, liquid or nonliquid, do not have to give notice nor are they included in any of the limitations on tonnage provided they pass through the Straits singly. However, they are subject to all other limitations as apply to warships³².

Vessels of war in times of Armed Conflict

The same limitations and permissions as outlined above apply during times of armed conflict when Turkey is not a belligerent³³. However, warships belonging to belligerent Powers may not pass through the Straits except for the sole purpose of returning to their home bases. Furthermore, the treaty expressly indicates that rights and obligations arising out of the Covenant of the League of Nations are not prejudiced in any way³⁴.

When Turkey is a belligerent, the passage of warships through the Straits is left entirely to the discretion of the Turkish Government³⁵, likewise if Turkey considers that she is threatened with imminent danger of war³⁶.

²⁴ Article 18(1)d – provided, if the addition of those warships on humanitarian duties would breach the upper limit of 45,000 tons (see below) from non Black Sea powers, no other Black Sea power has objected.

²⁵ Article 14

²⁶ Article 11

²⁷ Article 15

²⁸ Article 16

²⁹ Article 17

³⁰ Article 18(1)

³¹ Article 18(2) – regardless of whether they are present on humanitarian duties.

³² Article 9 – but their armament should not exceed, for use against floating targets, more than two guns of a maximum calibre of 105mm, for use against aerial targets, more than two guns of a maximum calibre of 75mm.

³³ Article 19

³⁴ Id

³⁵ Article 25

³⁶ Article 20

The Montreux Convention

To whom does the Convention apply?

Given that those countries signed the Convention, it undoubtedly applies to Bulgaria, France, Greece, Japan, Turkey and the United Kingdom as well as Russia and the former Republics of Yugoslavia as successor States to the Soviet Union and Yugoslavia respectively. Part III of UNCLOS provides for rules governing transit passage through straits used for international navigation and those rules would, in normal course, apply to the Turkish Straits. However, UNCLOS recognizes the existence of Conventions such as Montreux and allows the regimes set up by such to continue and not to be dislodged by the transit passage provisions in UNCLOS³⁷.

There are two possible conclusions that can be drawn from this, both deduce that the UNCLOS transit regime does not apply to the Turkish Straits but differ in deciding what regime does apply. One interpretation is that all who have ratified UNCLOS are bound by the regime established by the Montreux Convention. The other is that only those who have signed the Montreux Convention are bound by it and those who haven't are subject to the position prior to UNCLOS, i.e. non-suspendable innocent passage³⁸. Without going into detail, I prefer the first argument. Firstly, no State party to UNCLOS has specifically objected to Article 35(c)³⁹, more pertinently, State practice⁴⁰ would tend to suggest that the provisions of the Montreux Convention have passed into customary international law binding on non State parties and finally the wording of Article 35(c) is specific and does not, for example, qualify its application to only those who have ratified the long standing conventions relating to specific straits.

Conclusion

Despite its age and its somewhat archaic descriptions of warships, the Montreux Convention of 1936 still governs the transit of all ships exiting and entering the Black Sea. As such it deserves wider publicity and closer study than it received prior to Russian activity in Georgia some months ago, when it was clear from the reporting in the press that the knowledge of its existence and, more importantly, its provisions was significantly wanting.

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³⁷ Article 35(c) UNLOS states that its transit passage provisions do not apply to "straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits".

³⁸ Article 16(4) Territorial Sea Convention 1958.

³⁹ Indeed some have specifically invoked it in their declarations on ratifying UNCLOS e.g. Chile in respect of the Strait of Magellan.

⁴⁰ The world's leading maritime power, the United States, a party to neither UNCLOS nor the Montreux Convention, abides by the provisions and limitations of the Montreux Convention

Memorandum of Understanding signed by the NATO School with the International Institute of Humanitarian Law (IIHL)

LTCOL Jeffrey Sattler (USA AF), Legal Adviser – NATO School
Dr. Katharina Ziolkowski, Legal Adviser – NATO School

On 23 July 2008, Colonel James J. Tabak, NATO School Commandant, signed a Memorandum of Understanding with the International Institute of Humanitarian Law, Sanremo, Italy (IIHL) in order to establish a wide range of co-operation with the Institute. During his visit to the NATO School for the signing ceremony, the NATO School was honoured to interview the President of the Institute, Ambassador Maurizio MORENO.

NATO School / PA: How would you describe the role of your Institute?

Ambassador M. Moreno: The International Institute of Humanitarian Law was founded in Sanremo, Italy on 26th September 1970 to promote International Humanitarian Law. In pursuit of this purpose the Institute organises courses on the law of armed conflict, human rights and refugee law. In addition, we organise international conferences, meetings and seminars for scholars and practitioners as well as an annual Round Table on current issues of international humanitarian law. In September, the Institute held its 31st Round table which focused on “*International Humanitarian Law and Human Rights in Peace Operations*”.

Immediately following its foundation, the Institute began to organise international seminars and workshops on topical issues concerning international humanitarian law. In 1976, it organised its first International Military Course on the Law of Armed Conflict. Soon after, the first Refugee Law Course was added to the Institute's annual program. This year we have 13 courses on the law of armed conflict mainly for military personnel, seven courses on the movement of people, the Round Table, the Summer Course on International Humanitarian Law, and five seminars and workshops on topical issues. In addition, we arranged a tailor-made two-week course on the Law of Armed Conflict for Iraqi officers in Iraq. We also host additional events that take place at the Institute. During the 38 years of activity, the Institute has organised hundreds of courses on the law of armed conflict mainly for military personnel. Almost 7000 persons have attended these courses up till now, representing 170 countries. Another important field of activity involves the running of courses on refugee law for officials and practitioners representing various non-governmental organisations. Participants to these courses amount to 2000 with almost 100 countries represented. In addition, thousands of persons from around the world have attended other events organised by the Institute.

The Institute has also contributed to disseminating international humanitarian law through its publications, the most acclaimed being the so-called “*San Remo Manual on International Law Applicable to Armed Conflicts at Sea*”.

Through the years the Institute has gained expertise in teaching international humanitarian law in a practical manner, and the feedback we have received has always been very positive. Naturally, continuous efforts are made to update our annual programs and course material. The Institute's role as an international, independent and non-profit organisation requires great commitment to maintaining its status as an Institute of excellence.

NATO School / PA: What is the purpose of the recently signed MOU between your Institute and the NATO School?

Memorandum of Understanding signed by the NATO School with the International Institute of Humanitarian Law (IIHL)

Ambassador M. Moreno: Our Institute wants to establish and increase contacts to encourage cooperation with other leading organisations in the field of teaching and training of international humanitarian law for military personnel. We consider the NATO School in Oberammergau as being an excellent partner for this purpose. This MOU is a good start to establishing a practical working relationship. It opens doors to reciprocal cooperation. Together, we can achieve a larger visibility, benefit from each other's expertise and endeavour to organise joint projects as agreed.

NATO School / PA: Do you have any particular expectations in terms of cooperation between the two mentioned organisations?

Ambassador M. Moreno: Certainly. We at the Institute hope that this MOU will make it possible to have high calibre lecturers from the NATO School to lecture at our courses. Likewise, we are ready to offer qualified lecturers during courses organised by the NATO School. We would even be prepared to run courses or seminars together on topics of mutual interest. In our opinion this MOU also gives better possibilities of informing NATO, the PfP and Mediterranean Dialogue countries and particularly their military authorities about the activities of our Institute. Likewise, we can distribute information about activities of the NATO School to our own participants.

NATO School / PA: What is the practical outcome of this MOU?

Ambassador M. Moreno: The practical outcome is to have an enlarged pool of experts, lecturers and other resources available for our activities on both sides. In addition, we will have better possibilities of informing military authorities in numerous countries about our activities. Of course, we will also act as a forum for information on the activities of the NATO School. Signing the MOU is only the beginning of our cooperation and reciprocal support. Now we have to start the practical work. How well we achieve these goals only time will tell.

Anybody who is practicing operational law today is painfully aware that in many ways the present Law of Armed Conflict treaty provisions as well as the respective customary law regulations do not easily correspond to the new situations and actors we face in modern armed conflicts. Likewise, many Legal Advisors and operators today are struggling with questions about applicability of the Law of Armed Conflict in military peace support operations and the applicability of Human Rights Law in armed conflict situations.

Furthermore, the role of terrorists, private security companies and other non-state actors taking part in hostilities represents a challenge for military lawyers. Taking into account the legal challenges of these and other emerging areas of the law, NATO more than ever can profit from looking to academic institutions outside the Alliance in order to stay abreast of new developments and recent legal professional discussions in the area of Law of Armed Conflict and Human Rights. Thanks to the recent agreement between the NATO School and the IIHL, NATO now has the opportunity to tap into the acknowledged expertise of the IIHL, which we consider to be one of the leading institutions in the field of LOAC worldwide.

Memorandum of Understanding signed by the NATO School with the International Institute of Humanitarian Law (IIHL)

As its first joint activity, the NATO School in co-operation with the IIHL offers an intensive three day "Workshop on the Law of Armed Conflict and Human Rights in International Peace Support Operations" which will take place in Oberammergau from 3 to 5 December 2008. This Workshop will focus on case studies in this area of law and provide the participants deep insight into the current legal questions of peace support operations. For further information, please contact: ziolkowski.katharina@natoschool.nato.int.

This Workshop, however, is only the beginning of what promises to be a richly rewarding partnership. Co-operation with the IIHL will be extremely beneficial for both the NATO School as well as for the whole NATO community as the Alliance faces the challenges of armed conflict in the 21st Century.



Ambassador N. Moreno, IIHL
(photo by PAO, NATO School, Oberammergau)



Colonel J. Tabak, NATO School
(photo by PAO, NATO School, Oberammergau)

Ins and Outs of the Use of Civilian Contractors during Operations

Mr. Thomas E. Randall, Legal Adviser – SHAPE

Opening Comments to the 48th Symposium organised by the SHAPE Officers' Association on October 17, 2008()*

It is an honour and distinct pleasure to have been invited by the SHAPE Officers' Association to serve as the moderator of what promises to be a most interesting discussion this morning.

Before introducing our first speaker, however, I wish to commend the SHAPE Officers Association for their selection of this topic, the "INS AND OUTS OF THE USE OF CIVILIAN CONTRACTORS DURING OPERATIONS." Other ways of expressing this might be the "pros and cons", or the "plusses and minuses" or perhaps the "ups and downs" of using contractor support. But however you express it, this title reflects that the use of private companies, that is, contractors, to support military operations offers many advantages. At the same time, our theme also suggests that using contractor support also presents certain challenges. Our aim this morning is to explore this in more detail.

As most of you in the audience probably recognize, this topic is HUGE ! First it is huge in the sense of the number and breadth of issues it presents. We could probably hold a two-week seminar on this subject and still not cover all there is to discuss.

In fact, I will mention in a moment two international projects that have been ongoing for a number of years to better define the legal parameters and policies that govern the use of contractors and private security companies in support of military operations.

But this topic is huge also in the sense of its IMPORTANCE to military operations and Commanders, both national and NATO. This fact is borne out by a few telling statistics regarding the extent that contractors are supporting some current, large-scale, military operations:

- In Afghanistan, there are an estimated 62,000 MILITARY personnel (ISAF plus Operation Enduring Freedom Forces);
- In addition, by some estimates, there are approximately 28,000 Contractor Personnel also supporting operations there. So if we combine these two numbers, and work out the percentages, it would reflect that close to 1/3 of the total force structure in Afghanistan, if we can call it that, is comprised of contractor personnel.
- If we turn to Iraq, the numbers are even more revealing --- there are an estimated 140,000 US military personnel deployed in Iraq, along with about 8,000 more from the UK, Poland, South Korea and other nations.
- In comparison – according to a 2008 US Congressional budget office report, there are over 190,000 contractor personnel supporting military operations in Iraq – considerably more than the number of military personnel ! Although a good number of these are local nations, that is citizens or residents of Iraq, they are all under contracts with nations or international organisations carrying out missions in Iraq.
- The high proportion of contractor personnel in Iraq may, to some extent, reflect the phenomenon as an operation matures, and as the types of services and support required become more diverse, the need for contractor support, versus military forces, increases.

() The author wishes to thank Mrs. Cecile Vandewoude for her excellent research and assistance in preparing these remarks.*

Ins and Outs of the Use of Civilian Contractors during Operations

- Finally, one other telling statistic – again relating to contractor support in Iraq – has to do with casualties --- over 4,000 US military personnel have lost their lives during operations in Iraq since 2003, along with over 200 from the UK and other nations. But we should also point out that something in the order of 550 non-Iraqi civilian workers, including contractor personnel, have given their lives to this mission.
- Thus it is clear, given the types of military missions now being carried out, so-called asymmetrical warfare, the contractor employee may also face a considerable risk of paying the ultimate price.

A moment ago, I mentioned that this is a huge topic. This is also in the sense of its impact on the way nations, and alliances, conduct and support military operations.

The extent to which contractor support may be employed, and the types of functions contractor personnel may undertake in support of military operations, are determined by a number of critical factors. One of these with which I am most familiar, is legal status. You will hear Colonel Loriaux address these in some detail later on this morning.

But from my experience as a legal practitioner, both in US Military Headquarters, as well as here at SHAPE, two principal concerns about legal status come to mind :

FIRST there is the ever-present concern about a contractor employee's legal status, or legal protections, when accompanying a military force in a foreign nation. This is an issue even within many NATO and PfP nations, let alone in more remote countries such as Iraq and Afghanistan.

This involves such practical concerns as whether contractor employees may enter the country without visas, whether they will require work permits or licenses under local law. Whether their income, and the corporations' income, will be subject to taxation, whether their purchases within the country which are necessary to carry out the contract will be subject to VAT, or whether the material they require to bring into the country will be subject to customs duties.

Many of these, of course, will result in additional costs which must ultimately be borne by the nation, or international organisation that contracts for goods and services in support of their operations.

Legal status may also involve the critical issue of whether contractor personnel are subject to the Host Nation's criminal laws, a major concern in countries such as Iraq and Afghanistan that have criminal justice systems vastly different from those found in Europe and America.

Issues such as these must normally be resolved through the negotiation and conclusion of special arrangements, such as agreements supplementing the NATO or PfP SOFA, Host Nation Support Agreements and so-called military Technical Agreements, as are found in Iraq and Afghanistan.

For lawyers and others working in support of military operations, this is always a major concern that we must be prepared to address with Host Nations. Political intervention may also be necessary to convince our hosts of the importance of these legal protections for contractor employees as well as our military forces.

Ins and Outs of the Use of Civilian Contractors during Operations

The second major concern has to do with the legal status of contractors, who support military operations under international law or, more specifically, the Law of Armed Conflict. I will not go into a lot of detail here, since you will receive an excellent briefing on this topic from Colonel Loriaux.

He will discuss, among other things, how to draw the important line that defines permissible activities from those that would cause a civilian accompanying a military force to lose his or her protections as a non-combatant, and cross over into the unprotected domain of being treated as an unlawful belligerent. There are potentially serious consequences for any civilian who is put into this position, including contractor employees.

The litmus test, which is easy to say, but difficult to define, is whether a civilian, such as a contractor employee, takes actions which amount to "direct participation" in hostilities, as opposed to merely providing support to military operations.

This is such an important, and complex determination, highly fact specific, that the International Committee of the Red Cross, assisted by multinational teams of experts, has actually been conducting a "direct participation" study for a number of years in an attempt to come up with a list of factors to be considered in determining where to draw this important line.

Finally, one other type of contractor support that I should mention, before yielding the floor to our speakers, is the role of the private military or security companies – PMSC's. These have been employed by nations and organisations for a number of years to protect senior civilian leaders, diplomats, senior military officers, convoys, critical facilities and installations, as well as for prisoners' detention and providing advice or training to local forces and security personnel.

Recent events, however, have brought them, and their activities, more and more into the public eye, both in Host Nations, and back in their home nations. At times there have been allegations their use of force has been excessive or improper. This has raised legal and political concerns about whether their activities have crossed over the line such that they have become unlawful belligerents.

One reaction to these concerns has been, at least in the case of the USA, to broaden the reach of its criminal laws to permit the prosecution of contractor employees and other civilians accompanying US forces abroad, for violation of US criminal law.

In addition, the special case of private security companies has also recently been addressed by certain nations acting collectively. Last month, 17 nations, including Canada, the UK, France, Germany, the USA, Afghanistan and Iraq reached agreement in Montreux, Switzerland, on a set of standards and practices to be followed in the selection and use of PMSC's.

Ins and Outs of the Use of Civilian Contractors during Operations

This list of standards, now referred to as the "Montreux document" (which is NOT to be confused with the famous Montreux Convention governing navigation through the Turkish straits !), does not constitute a binding international agreement, but instead represents an agreed set of "good practices" which states are encouraged to follow with respect to PMSC's.

These practices address a broad range of issues, such as screening of companies and their employees for any past misconduct, training, certification and accountability for their actions.

One important point that is emphasized throughout the Montreux document, however, is that states and organizations that hire and rely upon PMSC's are not relieved from their legal obligations and accountability under international law for actions undertaken by these private companies.

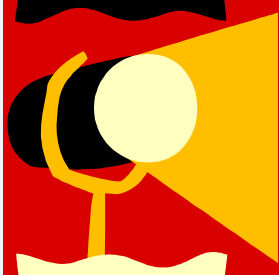
So these are just a few of the critical issues regarding the use of civilian contractors during military operations that I wished to mention prior to turning to our speakers this morning.

*Mr. Thomas Randall
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(*) Note from the Editor

The other presentations on the use of civilian contractors during operations which were made during the 48th Symposium of the SHAPE Officers Association will appear in issue # 18 of the NATO Legal Gazette.

Spotlight



Colonel Adrianus

(Adri) Ruysendaal

Legal Adviser,

JFC HQ Brunssum



Name: Adrianus Jacobus (Adri) Ruysendaal

Rank/Service/Nationality: Colonel, Royal Netherlands Army, Netherlands

Job title: Chief Legal Adviser

Primary legal focus of effort: Advise the Commander and staff of JFC HQ Brunssum and offer legal solutions to the international and host nation challenges faced by this Headquarters.

Likes: Honesty

Dislikes: Traffic jams

When in Brunssum, everyone should: come and have a coffee with me.

Best NATO experience: working with people that have different cultures.

My one recommendation for the NATO Legal Community:

I will take this opportunity to give more than one recommendation. In my opinion a Legal Adviser needs to be pro-active. If a problem occurs try to solve it as soon as possible and don't wait too long.

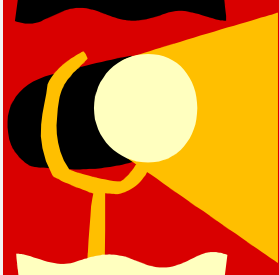
Tell our Commander what he can do and what he can't do and give him the immediate solution.

Be inventive and try to find solutions for other problems outside the legal business. Don't create problems but solve them.

Put yourself in the situation of others and consider how you would react, be sympathetic to their needs and assist them accordingly.

legal@jfcbs.nato.int

Spotlight



Mrs. Suzannah

Threlfall

Legal Assistant,

NCSA



Name: Suzannah Threlfall

Rank/Service/Nationality: Civilian/GBR

Job title: Assistant to Legal Adviser, NATO CIS Services Agency (NCSA)

Primary legal focus of effort: The Office of the NCSA Legal Adviser provides legal support to all NCSA command and staff elements on official NATO matters and all matters which have legal implications affecting the responsibilities, functions, operations and activities of NCSA.

Likes: Travelling, Theatre & West-End Musicals, Socialising, Shopping & Belgian Chocolate!

Dislikes: Smoking.

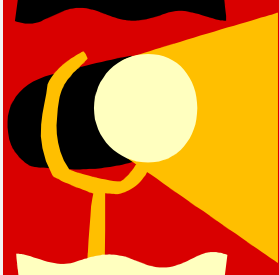
When in Mons, everyone should: Visit the Grand Place to rub the famous 'monkey's head', buy a fresh hot waffle from a street stall and take in the ambience of the local surroundings!

Best NATO experience: Attending the NATO Legal Advisors Course in Oberammergau.

My one recommendation for the NATO Legal Community: Information sharing is paramount.

Suzannah.threlfall@ncsa.nato.int

Spotlight



Captain Julie

Marionneau

Legal Adviser,

JFC HQ Naples



Name: MARIONNEAU Julie

Rank/Service/Nationality: CAPTAIN OF-2/FRENCH AIR FORCE/FRENCH

Job title: LEGAD Balkans at JFC Naples.

Primary legal focus of effort: Kosovo, KFOR/Institutions of Kosovo legal issues.

Likes: Reading, Nautical sports, Latin American Music.

Dislikes: Doing nothing.

When in Naples, everyone should: Enjoy at Gambrinus café, piazza del plebiscito, una 'deliziosa 'nociola' in one hand and 'il corriera della serra' in the other hand.

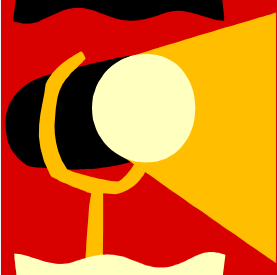
Best NATO experience: ISAF, Afghanistan.

My one recommendation for the NATO Legal Community:

I will quote Antoine de Saint Exupéry in "Vol de Nuit" to remain in the air field and give another perspective of the 'grey area' one of the most favorite and useful expression used by operational Lawyers. "Voyez-vous Robineau, dans la vie il n'y a pas de solutions. Il y a des forces en marche: il faut les créer et les solutions viennent."

frenchlegad@gmail.com

Spotlight



Colonel Kevin

Luster

Legal Adviser,

JWC Stavanger



Name: Kevin J. Luster

Rank/Service/Nationality: Colonel, United States Army

Job title: Legal Adviser

Primary legal focus of effort: Operational Law / International Law / Exercise Training

Likes: Dogs, Swimming, Skiing, Surfing, and Hiking.

Dislikes: E-mail strings.

When in Stavanger, everyone should: Walk around the downtown harbor area and take a boat trip up Lysefjord .

Best NATO experience: Discovering how friendly the folks at JWC are.

My one recommendation for the NATO Legal Community: Continue to share ideas for resolving difficult issues.

Kevin.luster@jwc.nato.int



HAIL

&

FAREWELL

Hail

NATO HQ Sarajevo : SSG Barry Adwell joined in October 2008

Farewell

NATO HQ Sarajevo : CPT Martin Wilde left in October 2008

HQ SACT : Mr. Alexander Schott left in November 2008

GENERAL INTEREST/NATO IN THE NEWS

- Serbia signed a PfP Security Agreement with NATO : the agreement will facilitate the exchange of classified information between Serbia and NATO for practical purposes. NATO has signed such agreements with most Euro-Atlantic Partnership Council and Mediterranean Dialogue partners.

<http://www.nato.int/docu/update/2008/10-october/e1001a.html>

- The signing ceremony of the Memorandum of Understanding for the Confined Shallow Waters Centre of Excellence took place on 3 October 2008 at HQ SACT. The CSW CoE which is located in Kiel, Germany will bring together and consolidate the available and relevant subject expertise in order to develop command and control principles and procedures for operations in confined and shallow waters. The sponsoring nations are Germany, Greece, the Netherlands and Turkey.

<http://www.act.nato.int/news.asp?storyid=309>

- The Strategic Airlift Capability (SAC) Memorandum of Understanding was signed by 12 SAC Nations on 1 October 2008. The MOU brings into force the Charter of the NATO Airlift Management Organisation (NAMO). The NAMO will acquire three C-17 aircraft to meet strategic airlift requirements of the SAC member nations – 10 NATO members and 2 non-NATO countries, PfP and EU members Sweden and Finland. Creation of the NAMO caps two years of negotiations within NATO and among SAC participants covering issues related to establishing the NAMO and manning, equipping, basing and operating the fleet.

<http://www.nato.int/docu/pr/2008/p08-124e.html>

- On 8 October 2008, the General Assembly of the United Nations adopted Resolution 63/3A entitled "Request for an advisory opinion of the International Court of Justice whether the unilateral declaration of independence of Kosovo is in accordance with international law." ICJ has adopted the request and issued an order in which timelines for written statements is fixed

<http://daccessdds.un.org/doc/UNDOC/GEN/N08/470/97/PDF/N0847097.pdf?OpenElement>

<http://www.icj-cij.org/docket/files/141/14811.pdf?PHPSESSID=e57a43ab4d37a6a5b2602875ee9d77d7>

GENERAL INTEREST/NATO IN THE NEWS

- Insight on Kadi & Al Barakaat v. council of the EU & EC Commission is published in ASIL Insight of October 28, 2008. European Court of Justice quashes a Council of the EU Regulation implementing UN Security Council Resolutions.

For more information, please go to :

<http://www.asil.org/insights081028.cfm>

- Report of the 18th conference of the Legal Advisers to the German Army and the Representatives of the German Red Cross is available at the following link. Subject of the conference was "30 Years Additional Protocols to the 1949 Geneva Conventions : Past, Present and Future.

<http://www.germanlawjournal.com/article.php?id=1023>

- On 31 October 2008 Judge Rosalyn Higgins, President of the International Court of Justice, addressed the Sixth Committee of the General Assembly of the United Nations on the subject of "Jurisdiction at the International Court of Justice." Her presentation can be found at: <http://www.icj-cij.org/presscom/files/1/14841.pdf>

- The fifth edition of Malcolm N. Shaw's textbook on International Law has been published. It provides a clear and comprehensive introduction to the subject and fully revised and updated the Spring 2003 edition. New chapters on Inter-state Courts and Tribunals, the International Court of Justice and the International Tribunal on the Law of the Sea have been added.

"People demand freedom of speech to make up for the freedom of thought which they avoid"

Søren Kierkegaard

UPCOMING EVENTS

- 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. This workshop will examine the core principles and rules of International Humanitarian Law and Human rights and their present application and implementation in International Peace operations, including those which do not rise to the level of armed conflict. The draft schedule of the workshop is attached to the e-mail sending this Gazette. To register, please contact the NATO School Student Administration Office : studentadmin@natoschool.nato.int

More information on <http://www.iihl.org/> or <http://www.natoschool.nato.int/>

- In cooperation with the **Istituto Superiore Internazionale di Scienze Criminali**, the **NATO School** organises the **Sharia Law and Military Operations Seminar** on 15-19 December 2008. The goal of this seminar is to provide instruction to military officers, legal advisers, operational planners, political and policy advisers on Sharia Law. To register, please contact the NATO School Student Administration Office : studentadmin@natoschool.nato.int
- The next **NATO Legal Advisers Course** will be held on May 18 - 22, 2009. http://www.natoschool.nato.int/internet_courses/courses_guide.htm
- The **NATO Legal Conference** will be organised from June 8 - 12, 2009 in Strasbourg, France.
- The next **Advanced NATO Operational Law Course** is scheduled at the NATO School from July 6 - 10, 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. A crash courses will be held in Brussels on December 5, 2008. More information on : <http://www.coleurop.be/content/development/prof/EUFactFinding/index.html>

UPCOMING EVENTS

- The Afghanistan Study Group is pleased to announce its upcoming panel discussion on **Security in Afghanistan to be held on November 19th, 2008, from 6:00 to 7:30pm.**

The international panel includes:

Dr. Shahrbanou Tadkbakhsh (CERI, SciencesPo, Director of Program for Peace and Human Security)

Ms. Ayesha Khan (University of Cambridge and Chatham House Fellow)

Mr. Nasir Shansab (Afghan post-conflict policy analyst Executive Manager, ACATCO, LLC)

The session will be held at King's College London, Strand Campus. The exact venue details will be circulated next week.

A reception will follow. This event is open to the public, no RSVP required.

<http://www.kcl.ac.uk/>

- 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/>



"All truths are easy to understand once they are discovered; the point is to discover them."

Galileo Galilei

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