

# NATO Legal Gazette

29 September 2011

Issue 26

Editor: ACT/SEE Legal Office

## SPECIAL INTEREST ARTICLES

- A Glimmer of Hope Paves the Modern Legal Challenges to Contemporary Peacekeeping by LTC Leandro

- Cyber Defense and Counterintelligence by Mr. Pregent

- "The Necker Cube" and Human Rights: Again on Joint Actions as a(n) (in)sufficient stand-alone legal basis for the detention and transfer of individuals within the (Floating) territory of Member States by CDR Pierini

- Book Review : Prosecuting Heads of State by Mr. Roobaert

## **SPOTLIGHTS :**

- Captain Audun Westgaard, JWC  
- Mr. Richard Pregent, ACCI

- Hail and Farewell

## GENERAL INTEREST

- In the News  
- Calendar of Upcoming Events

## Introduction

Dear Fellow Legal Professionals and Persons Interested in NATO,

Greetings from Riga, Latvia, which is hosting Exercise Steadfast Pinnacle, a scenario-based training symposium for Flag and General Officers commanding organizations in the NATO Command or Force Structure. Our 26<sup>th</sup> issue of the NATO Legal Gazette offers articles by two new contributors: LTCOL Francisco José Bernardino da Silva Leandro who is the Legal Adviser at the National Defence Institute of Portugal and Mr. Richard Pregent, the Legal Adviser for Allied Command Counter-Intelligence. We thank them for their submissions and look forward to future articles they may wish to share with the NATO legal community.

The author of our third article, Commander Jean-Paul Pierini, is a frequent contributor whose last article in Issue 23, *Is the Grass Always Greener on the other side?*, produced a reply that we published in Issue 25. Commander Pierini now replies to this reply and in the future the NATO Legal Gazette will publish any comments from our readers with an answer from the author in the same issue.

Beginning on page 26 Mr. Vincent Roobaert has again provided a thoughtful book review, this time considering the 2009 title from Cambridge University Press: *Prosecuting Heads of State*, edited by Ellen L. Lutz and Caitlin Reiger.

The remainder of 2011 is filled with activities for the NATO Legal community with the second NATO Legal Advisers course being conducted at the NATO School in Oberammergau during the week of 10 October, the 2011 NATO Legal Conference in Lisbon, Portugal, beginning on 24 October, and a meeting of the STANAG Working Group on Law of Armed Conflict is planned for the week of 5 December at the ACT SEE building at SHAPE, Belgium.

Issue 27 of the NATO Legal Gazette will publish presentations made in June at the 60<sup>th</sup> Celebration of the NATO SOFA Conference wonderfully hosted in Tallinn, by the Ministry of Defence of Estonia. We welcome any articles of broad interest to the NATO Legal Community for Issue 28 which we hope to publish either in December or early 2012. Where did 2011 go!

Best wishes,  
Lewis

Sherrod Lewis Bumgardner  
ACT/SEE Legal Adviser

# A Glimmer of Hope Paves the Modern Legal Challenges to Contemporary Peacekeeping

LTC Francisco Leandro(\*)

"It was the end of the first day of a hundred-day civil war and a genocide that would engulf all of us in unimaginable carnage... we were still faced with the restrictions on our ROE... which made these rescue efforts a matter of luck and persuasion rather than of force."

Lt Gen Roméo Dallaire<sup>1</sup>

## 1. Background & Outline

"Beati gli operatori di pace, perché saranno chiamati figli di Dio."

Vangelo secondo Matteo 5, 1-12a

In line with the United Nations<sup>2</sup> and NATO definition of peacekeeping<sup>3</sup> we generically understand it as the use of military forces, provided by contributing States, to intervene in another State or State's territory on behalf of the United Nations, with<sup>4</sup> or without<sup>5</sup> the consent of the host State, and based on the United Nations «mandate». In light of these definitions we understand peacekeeping personnel, departing from the provisions of the Convention on the Safety of United Nations and Associated

---

(\*) LTC Leandro wrote this paper for the final dissertation of the advanced diploma on "International Humanitarian Law in Peace Operations" jointly organized by the International Institute of Humanitarian Law (IIHL) and the Institute for International Political Studies (ISPI). Please note that nor ISPI neither the IIHL did commission the paper and that it does not reflect the views of the IIHL or the ISPI.

<sup>1</sup> United Nations Assistance Mission in Rwanda (UNAMIR) Force Commander - Shaking Hands with the Devil, Arrow Books (2004), ISBN 978-0-679-31171-3, pages 262-264.

<sup>2</sup> For the purpose of the present document peacekeeping is a generic expression which expresses the possibility of using the military force, by the international community, based on the host State consent and should be understood as "... a technique to preserve the peace, however fragile, where fighting has been halted, and assist in implementing agreements achieved by the peacemakers " (United Nations Peacekeepers Guidelines, 2008, p. 18) and encompasses traditional, multifunctional and robust peacekeeping.

<sup>3</sup> NATO Allied Joint Publication 3.4 (A) p. 3-3 - §304 (2005). Peace Support Operations - Peacekeeping operations are generally undertaken in accordance with the principles of Chapter VI of the UN Charter to monitor and facilitate the implementation of a peace agreement. A loss of consent and a non-compliant party may limit the freedom of action of the Peacekeeping force and even threaten the continuation of the mission. Thus the requirement to remain impartial, limit the use of force to self-defence, and maintain and promote consent, should guide the conduct of Peacekeeping - (1) Peace Enforcement operations normally take place under the principles of Chapter VII of the UN Charter. They are coercive in nature and are conducted when the consent of all Parties to the conflict has not been achieved or might be uncertain. They are designed to maintain or re-establish peace or enforce the terms specified in the mandate. (2) The goal of Peace Enforcement missions is to enforce the provisions of a mandate designed to maintain or restore peace and order to allow the operations of a separately mandated Peacekeeping force.

<sup>4</sup> (PK) Peacekeeping – Peacekeeping forces under United Nations Chapter VI Pacific Settlement of Disputes – based on host State consent.

<sup>5</sup> (PE) Peace Enforcement - Peace enforcement forces under United Nations Chapter VII based on the threat to international peace. Chapter VII - Action with respect to threats to the peace, breaches of the peace, and acts of aggression.

## A Glimmer of Hope Paves the Modern Legal Challenges to Contemporary Peacekeeping

Personnel<sup>6</sup>, "as individuals engaged or deployed by the Secretary-General of the United Nations as members of the military, police or civilian components of a United Nations operation, or other officials and experts". Therefore, the aim of the present essay is to identify and discuss the application of the International Humanitarian Law (Geneva Law and Hague Law), hereinafter referred to as IHL and the International Human Rights Law, hereinafter referred to as IHRL to peacekeeping operations, as foreseen by the Capstone Doctrine<sup>7</sup>. Consequently, the essay outline is organized in three different areas: firstly and foremost the questions related to the peacekeeping forces legal status, secondly the issues concerning the applicability and complementarities of international law in peace operations and thirdly, the problems arising from the peacekeepers individual accountability as an international law enforcement mechanism. Lastly, conclusions will be drawn attempting to summarize essential ideas.

### 2. Jus ad bellum: Peacekeeping Forces Legal Status

*"It is clearly a fact that the use of force and the legal status of personnel in peace operations are connected."*

Ola Engdahl<sup>8</sup>

The status of peacekeeping forces members is indeed a key legal issue which has an extensive impact on the application of IHL and IHRL when forces are deployed. The following diagram organizes the participants in an armed conflict<sup>9</sup> mainly in four categories: State actors; Non-State actors; Lawful combatants; and Protected personnel.

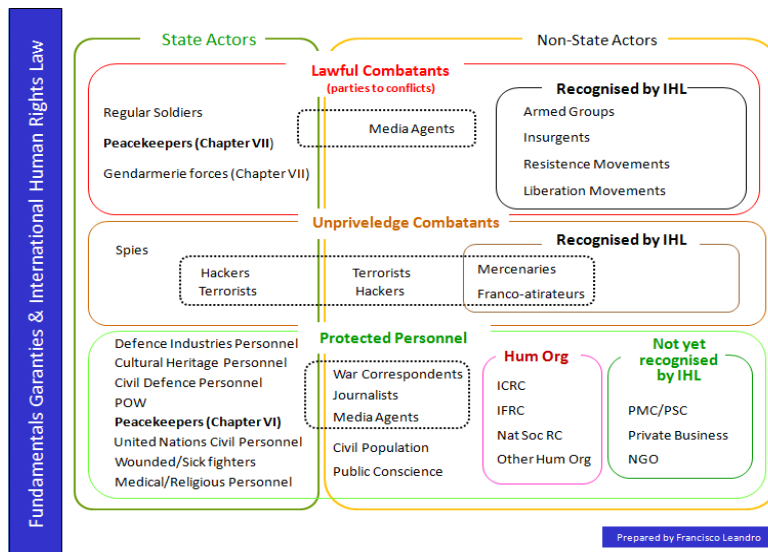
<sup>6</sup> Article 1<sup>o</sup> (a) and (b) – (A/RES/49/59, 9<sup>th</sup> of December 1994) considering also the Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel (2005) - This Protocol has not yet entered into force (February 2011).

<sup>7</sup> United Nations Peacekeeping Operations Principles and Guidelines (2008), p. 14 - IHRL is an integral part of the normative framework for United Nations peacekeeping operations. The Universal Declaration of Human Rights, which sets the cornerstone of international human rights standards, emphasizes that human rights and fundamental freedoms are universal and guaranteed to everybody. United Nations peacekeeping operations should be conducted in full respect of human rights and should seek to advance human rights through the implementation of their mandates... (p. 15) United Nations peacekeepers must have a clear understanding of the principles and rules of international humanitarian law and observe them in situations where they apply.

<sup>8</sup> The legal status of United Nations and associated personnel in peace operations and legal regime protecting them - 31<sup>st</sup> Round Table on Current Problems of IHL, Sanremo 4-6<sup>th</sup> September (2008), IIHL (January 2009), p. 117.

<sup>9</sup> For the benefit of the present essay we understand armed conflict as follows: "... an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State." International Criminal Tribunal for the Former Yugoslavia - Case n<sup>o</sup>. IT-94-1-A72, Prosecutor v. Duško Tadić a/k/a "Dule", Appeals Chamber, 2<sup>nd</sup> October 1995, §70 (1994-1995), 1 ICTY JR 352, at §70, reprinted in International Legal Materials, vol. 35 (1996), p. 32 and ICTY Prosecutor vs Kovac, Appeals Chamber, (12<sup>th</sup> of June 2002), §50. Besides, we also consider the Report of the International Law Commission (A/63/439) on the work of its Sixth Committee "Effects of armed conflicts on treaties": "Armed conflict means a state of war or a conflict which involve armed operations which by their nature or extent are likely to affect the operation of treaties between States parties to the armed conflict or between States parties to the armed conflict and third States, regardless of a formal declaration of war or other declaration by any or all of the parties to the armed conflict (A/RES/63/123, 11<sup>th</sup> of December 2008)". This definition is based on the proposal adopted by the Institute of International Law (28<sup>th</sup> of August 1985).

## A Glimmer of Hope Paves the Modern Legal Challenges to Contemporary Peacekeeping



For the benefit of the present analysis and regardless of all different generations of PK operations, we consider that the employment of PK forces by the United Nations in a theatre of operations is based either on the consent of the warring parties (PK) or based on the threat to international peace (PE)<sup>10</sup>. Consequently, taking into account on one hand the nature of the international mandate, the existence of a SOFA/SOMA<sup>11</sup> and bearing in mind the article 43° PA I to the GC<sup>12</sup>,

<sup>10</sup> PE – Peace enforcement forces under United Nations Charter – Chapter VII - Action with respect to threats to the peace, breaches of the peace, and acts of aggression.

<sup>11</sup> Status of Forces (Mission) Agreement is an international agreement between a host country and a foreign nation or international organization stationing forces in that country. This agreement that defines the legal position of a visiting military force deployed in the territory of another State - Rules of Engagement Handbook, International Institute of Humanitarian Law, (2009), Annex D. The practice of United Nations, NATO, African Union and European Union is to render immune from local jurisdiction the members of peacekeeping forces launched under UN Chapter VI.

<sup>12</sup> Additional Protocol of 1977 of Geneva Convention of 1949 - Section II - Combatants and Prisoners of War Status - Article 43° - Armed forces: 1. The armed forces of a party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict. 2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33° of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities. 3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict. Article 44° - Combatants and prisoners of war: 1. Any combatant, as defined in Article 43°, who falls into the power of an adverse Party shall be a prisoner of war. Is also relevant to consider the article 2°, 2 of the Convention on the Safety of United Nations and Associated Personnel (A/RES/49/59, 9<sup>th</sup> December 1994) - This Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies. Also in the International Crime Court Statute there is a provision (article 2°, b), iii) which criminalizes intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.

## A Glimmer of Hope Paves the Modern Legal Challenges to Contemporary Peacekeeping

the legal status of PK forces members might be defined as follows:

- State actors mandated by United Nations<sup>13</sup>;
- Protected personnel holding special duties (they are not part to the armed conflict<sup>14</sup>).

On the other hand, the legal status of PE forces might be defined as follows:

- State actors mandated by United Nations;
- Lawful combatants (they do not have the consent of the warring parties, they carry out an enforcement of the tasks assigned by the UN mandate and are organized according to article 43° PA I to GC).

The United Nations, Secretary-General's Bulletin, ST/SGB/1999/13 - dated of 6<sup>th</sup> August 1999, further clarifies the issue by stating that:

*"1.1 The fundamental principles and rules of IHL... are applicable to United Nations forces when... they are actively engaged therein as combatants... They are accordingly applicable in enforcement actions or in peacekeeping operations when the use of force is permitted in self-defence.*

*1.2 The promulgation of this bulletin does not affect the protected status of members of peacekeeping operations under the Convention on the Safety of United Nations and Associated Personnel or their status as non-combatants, as long as they are entitled to the protection given to civilians under the international law of armed conflict".*

---

<sup>13</sup> "... unable to set up the UN armed forces envisage in the articles 43° of the UN charter, ..., the UN has gradually confined itself to authorizing the use of force by member States." Antonio Cassese, *International Law*, Oxford Press, 2<sup>nd</sup> edition (2005), p. 346.

<sup>14</sup> In the category of peacekeeping forces and considering either the so called classical tasks or the tasks of second generation, we foresee the use of armed force by the State limited to self-defence and in the context of the mission assigned by the United Nations Security Council or other regional body under its authorization.

## A Glimmer of Hope Paves the Modern Legal Challenges to Contemporary Peacekeeping

### 3. Jus in bello: Applicability & Complementarities of the International Humanitarian Law

*"War will remain cruel...  
will never be adequate compliance...  
aimed at curbing that cruelty."*

Yves Sandoz<sup>15</sup>

Taking into consideration the following two diagrams the problem of law applicability to PK forces during an operational deployment might be structured in three different areas of concern:

a) It is widely accepted that general customary law binds States that have no persistently and openly dissent in relation to a rule<sup>16</sup>. In addition, States are greatly encouraged to adopt national laws incorporating these rules into their domestic legislation to ensure adequate national compliance. Therefore, regardless the international treaty law «acquis» binding the sending State, general customary law applies in principle to PK forces members belonging to that State<sup>17</sup>.

b) The applicability<sup>18</sup> of IHL and IHRL by PK forces members, recalls simultaneously the type of armed conflict, and the ultimate scope of preservation of values. On one hand, IHL regulates between field armed adversaries, directed towards the protection of individuals and limitation of human suffering. On the other hand, IHRL rules within a State, and regulates the relationship between that State and the individuals under its jurisdiction, attempting to prevent abuse of power by the State.

---

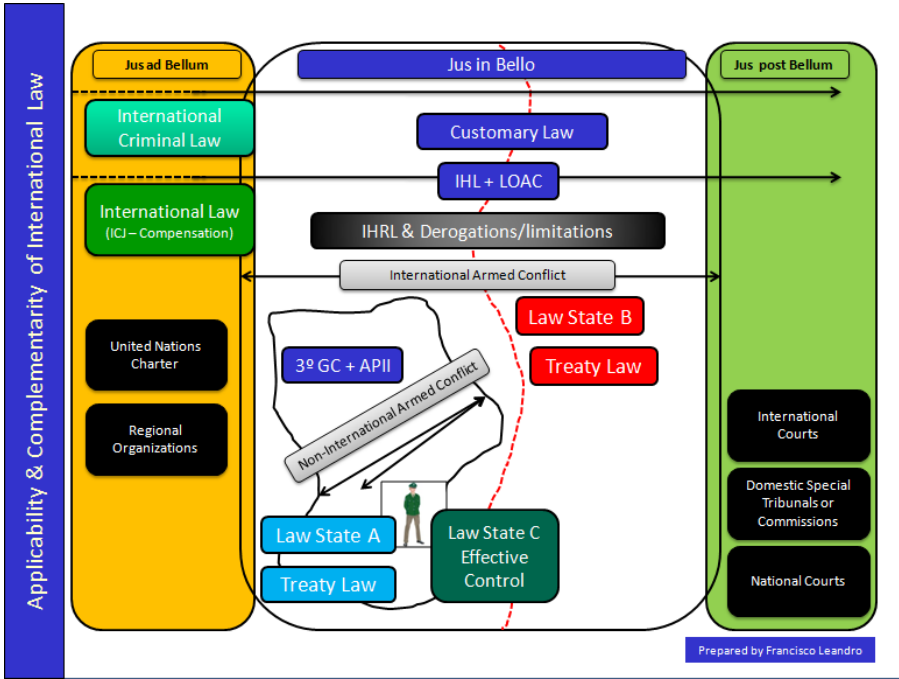
<sup>15</sup> Customary International Law, Jean-Marie Henckaerts & Louise Doswald-Beck, Volume I, ICRC 2009, p. xxi.

<sup>16</sup> Abdul G. Koroma, Customary International Law, Jean-Marie Henckaerts & Louise Doswald-Beck, Vol I, ICRC 2009, p. xix.

<sup>17</sup> There are many examples of customary rules. The following three examples are considered customary law, applicable in international conflicts and non-international conflicts: Rule 59 - The improper use of the distinctive emblems of the Geneva Conventions is prohibited; Rule 86 - The use of laser weapons that specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision is prohibited; Rule 90 - Torture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment are prohibited. Customary International Law, Jean-Marie Henckaerts & Louise Doswald-Beck, Vol I, ICRC (2009), pages 207, 292 and 315.

<sup>18</sup> And possible complementarity between IHL and IHRL.

# A Glimmer of Hope Paves the Modern Legal Challenges to Contemporary Peacekeeping



Applicability & Complementarity of International Law

Type of Conflict	Mission	Status	Features	IHL	IHRL (limitations & derogations)
International Armed Conflicts	PK	Protected Personnel	Self Defense	<b>Lex specialis</b>	<b>Lex generalis</b>
	PE	Combatants	Combat Tasks	<b>Lex generalis</b>	<b>Lex specialis</b>
Non-International Armed Conflicts	PK	Protected Personnel	Self Defense	<b>Lex specialis</b> (limited to NIAC)	<b>Lex generalis</b>
	PE	Combatants	Combat Tasks	<b>Lex generalis</b> (limited to NIAC)	<b>Lex specialis</b>

Prepared by Francisco Leandro



## A Glimmer of Hope Paves the Modern Legal Challenges to Contemporary Peacekeeping

Consequently, according to the extraterritorial jurisdiction regime in international conflicts, IHRL is binding upon military PK personnel<sup>19</sup>, as *lex generalis*, in their relation with individuals taking no active part in the hostilities and in their effective control. Likewise, IHL is also binding upon military PK personnel, as *lex specialis*, in line with their State treaty law<sup>20</sup> and in their relation with the opposing forces, every time that armed force is used in self-defense. Besides, in these type of conflicts, IHL binds PE personnel as *lex generalis* and in their "armed relation" with the opposing forces (combat actions), and IHRL is binding as *lex specialis* in their relation with individuals taking no active part in the hostilities and in their effective control.

Furthermore, in non-international armed conflicts, the applicable provisions of the sending State treaty law IHL<sup>21</sup> applies to PE forces as *lex generalis* and IHRL<sup>22</sup> provisions in force within the jurisdiction of the sending State are also binding as *lex specialis*<sup>23</sup>, every time they act as public authority and not as combatants. Likewise, IHL binds PK forces as *lex specialis* and IHRL as *lex generalis*<sup>24</sup>.

---

<sup>19</sup> The legislative powers of the sending State might impose derogations and the limitations on IHRL. These derogations and limitations shall be considered accordingly. Article 15° of the European Convention on Human Rights foresees the establishment of the derogation measures in time of war and other public emergencies.

<sup>20</sup> Here in this context we consider the volunteer treaty law. Thus, the application of this law, calls for an evaluation of the international treaties reserves made by the State.

<sup>21</sup> IHL in non-international conflicts is mainly associated to Article 3° Common to the four Geneva Conventions, and it's Additional Protocol II.

<sup>22</sup> Juan Carlos Abella v. Argentina, Case 11.137, Report n° 55/97, Inter-American CHR, OEA/Ser.L/V/II.95 Doc. 7 rev. at 271 (1997), §244 – "... The exercise of public authority has certain limits which derive from the fact that human rights are inherent attributes of human dignity and are, therefore, superior to the power of the State..." Nicaragua v. United States of America, International Court of Justice, June 27, (1986), §115 - United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State; §255 - By virtue of such general principles, the United States is bound to refrain from encouragement of persons or groups engaged in the conflict in Nicaragua to commit violations of Article 3°, which is common to all four Geneva Conventions of 12<sup>th</sup> of August 1949.

<sup>23</sup> ICJ, Advisory Opinion and Orders, legality of the threat or use of nuclear weapons - 8<sup>th</sup> of July (1996), p. 240, §25 - The Court observes that the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4° of the Covenant, whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus, whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6° of the Covenant can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.

<sup>24</sup> The Isayeva v. Russia Case Law (2005) before the ECtHR shows the applicability of the IHRL to a situation where one of the parties (Russia) used armed force, against civilians not involved in armed actions, employing military means as it was facing an armed conflict. Similar is the situation of PK forces in non-international armed conflicts in their relation with civilians not involved in military operations, bearing in mind that their presence is based on the consent of the warring factions.



## A Glimmer of Hope Paves the Modern Legal Challenges to Contemporary Peacekeeping

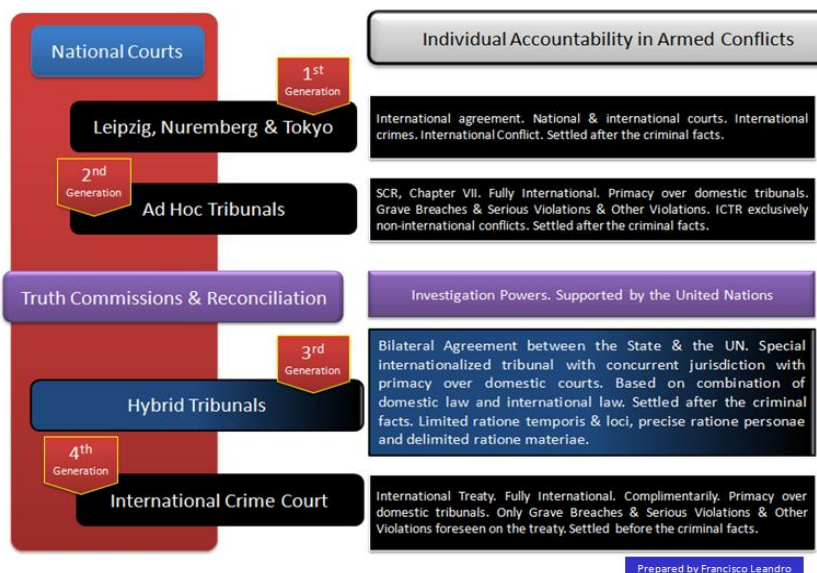
c) Non-treaty standards – Besides the issues associated with treaty application, other instruments must be taken into account. In fact, regardless of the status of peace forces members and the type of conflict they are involved, these individuals have to comply with bilateral and multilateral agreements such as the SOFA, with the profile of ROE<sup>25</sup>, which are functioning as *lex specialis*<sup>26</sup> under the scope of IHL/IHRL application. Moreover, in certain exceptional cases local law might also apply. Finally, the UNSC Resolutions override IHL/IHRL provisions, except in issues of *jus cogens*.

### 4. Jus post bellum: The Remedies of Individual Accountability

*"The doctrine of superior responsibility is an extraordinary legal and prosecutorial instrument."*

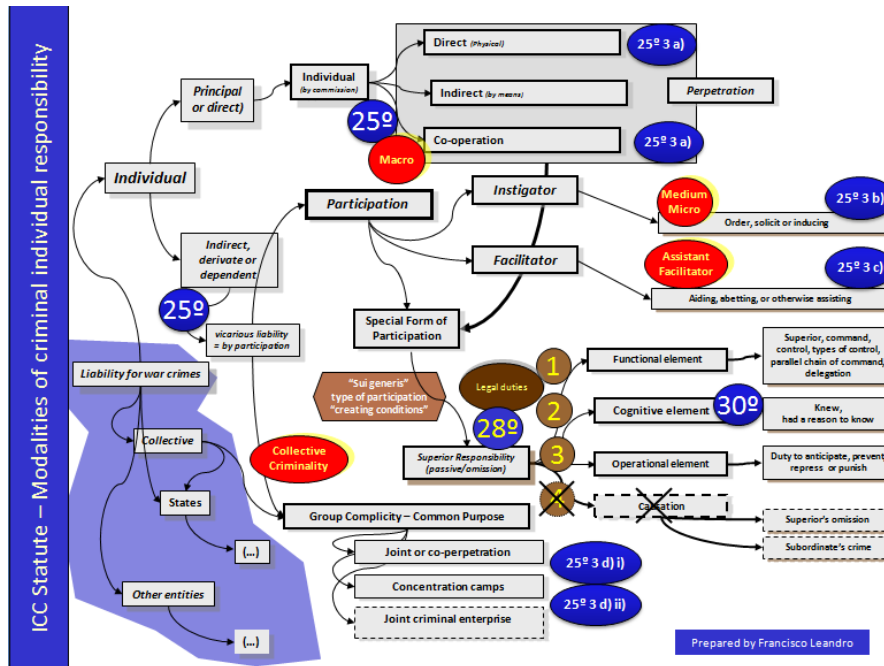
Guéanael Mettraux<sup>27</sup>

In view of the following two diagrams, this paragraph addresses the judicial remedies for the violation of IHL/IHRL by PK forces members. Different types of responsibility are at stake: concurrent State responsibility, United Nations responsibility and individual criminal responsibility. Both States and peacekeepers are accountable but in different perspectives. States are accountable before other States (in case of violation of international treaty law by a State official or for their own behavior) and the aim is in principle to obtain compensation or reparation. Besides, we should bear in mind that State responsibility does not preclude individual responsibility and vice-versa. Thus, peacekeepers are criminally accountable for their acts as combatants and for their individual actions as State agents (in their official relation with other individuals under their State jurisdiction). In this case the aim is to obtain individual punishment as a deterrent to prevent future violations. Individual accountability plays a key role in terms of applicability of international law by peacekeepers.



<sup>27</sup> *The Law of Command Responsibility*, Oxford University Press, (2009), p. 272.

## A Glimmer of Hope Paves the Modern Legal Challenges to Contemporary Peacekeeping



However, the standard SOFA provides that peacekeepers are subject to exclusive jurisdiction of their contributing State in respect of any criminal offenses, which may be committed by them in the host nation territory<sup>28</sup>. In return for an absolute immunity from local jurisdiction, the State of nationality is expected to prosecute offenders before national courts<sup>29</sup>, based on their extraterritorial responsibility to prosecute. The latest decisions of the European Court of Human Rights have significant consequences on the protection of human rights in peace operations, especially the argument of the «effective control» in *Behrami & Saramati* case law<sup>30</sup>.

<sup>28</sup> Or using other words *Host State immunity from jurisdiction*.

<sup>29</sup> Daphana Shraga, *The applicability of international humanitarian law to peace operations, from the rejection to acceptance*, International Humanitarian Law, Human Rights and Peace Operations – 31<sup>st</sup> Round Table on Current Problems of IHL, Sanremo 4-6<sup>th</sup> September (2008), IIHL (January 2009), p. 87.

<sup>30</sup> The European Court of Human Rights (ECtHR) has recently established few interesting case law in order to understand when can a State be held accountable for HR violations committed by members of its armed forces deployed as international peacekeepers? In the case *Banković and Others v Belgium and Others and Marković and Others v Italy*, the ECtHR addressed complaints relating to NATO's use of armed force against the Federal Republic of Yugoslavia (FRY) in 1999. The cases *Behrami and Behrami v France* and *Ruzhdi Saramati v France, Germany and Norway* arose out of events relating to the international territorial administration of Kosovo. On the *Banković* case the ECtHR held that it was incompetent *ratione personae* to review the conduct of these international presences and therefore declared the case inadmissible. On the *Behrami and Saramati* the Court concluded that the alleged human rights violations were attributable to the United Nations (effective control criteria) and not to the individual troops contributing nations (TCN), and therefore the Court was not competent *ratione personae* to examine the relevant actions.

## A Glimmer of Hope Paves the Modern Legal Challenges to Contemporary Peacekeeping

The glimmer of hope, however, was given by the same tribunal on *Al-Saadoon and Mufdhi v. United Kingdom*<sup>31</sup> by accepting the jurisdiction over British troops deployed in Iraq on an IHRL related case law. That is why national courts and as last resort the 3<sup>rd</sup>/4<sup>th</sup> generation tribunals<sup>32</sup> are essential to bring justice to the victims and deterrence to impunity.

Nevertheless, it is the modern criminal law doctrine of superior responsibility that provides a remarkable opportunity to held accountable individuals who are acting as States agents. The adherence to these legal instruments and their incorporation into State domestic legislation is paving the way to defeat criminal impunity. In this context, the doctrine of command responsibility<sup>33</sup> applicable by the law of the sending State, together with the United Nations mechanisms of inquiry and denounce, are the right leverage to prevent or at least deter individual breaches of international law.

---

<sup>31</sup> *Al-Saadoon and Mufdhi v. United Kingdom* (n°. 61498/2008) judgment by a Chamber of the European Court of Human Rights where the questions was related to the transfer by the UK of the applicants who were in the custody of UK troops in Iraq to Iraqi authorities for trial violated the applicants ECHR rights, specifically the non-refoulement principle established by the Court in *Soering v. United Kingdom*, inter alia because there was serious risk of them being subjected to the death penalty. Trial § 165 - In conclusion, the Court does not consider that the authorities of the Contracting State took all steps which could reasonably have been taken in order to comply with the interim measure taken by the Court. The failure to comply with the interim measure and the transfer of the applicants out of the United Kingdom's jurisdiction exposed them to a serious risk of grave and irreparable harm. § 171 - In the present case, the Court has found that through the actions and inaction of the United Kingdom authorities the applicants have been subjected to mental suffering caused by the fear of execution amounting to inhuman treatment within the meaning of Article 3°. While the outcome of the proceedings before the IHT remains uncertain, that suffering continues. For the Court, compliance with their obligations under article 3° of the Convention requires the Government to seek to put an end to the applicants' suffering as soon as possible, by taking all possible steps to obtain an assurance from the Iraqi authorities that they will not be subjected to the death penalty.

<sup>32</sup> The issue of prosecution of peacekeepers before international jurisdictions started in 2002 by the United States, expressing concerns regarding the jurisdiction of the ICC. On 12<sup>th</sup> of July 2002 the UNSC passed the Resolution 1422 under Chapter VII of the UN Charter and referring to the article 16° of the Rome Statute, not to commence or proceed with the investigation or prosecution of any current or former member of UN Operation. This deferral was valid for 1 year, and was extended by the Resolution n.° 1487 of 12<sup>th</sup> of July 2003. Daphana Shraga, *The applicability of international humanitarian law to peace operations, from the rejection to acceptance*, *International Humanitarian Law, Human Rights and Peace Operations – 31<sup>st</sup> Round table on Current Problems of IHL, Sanremo 4-6<sup>th</sup> September (2008), IIHL (January 2009)*, p. 88.

<sup>33</sup> Besides the individual criminal responsibility, each military commander is entrusted with a responsibility to control his forces and to prevent, repress and punish criminal acts.

## A Glimmer of Hope Paves the Modern Legal Challenges to Contemporary Peacekeeping

### 5. Conclusions

*"Individuals have international duties, which transcend the national obligations..."*

International Military Tribunal at Nuremberg  
quoted by ICTY in Furundžija<sup>34</sup>

States commit military forces to the United Nations<sup>35</sup> to protect the basic rights of the weak, defenseless, elderly, children, women, lame, innocent, and all victims in general, from brutal living conditions and inhumane acts of unspeakable violence. Thus, it seems quite obvious that the only way to defend rights is to abide by the law that protects precisely the same rights.

However, in spite of the lack of clarity of the European Court of Human Rights on the recent cases involving peacekeeping forces, and the absence of case law before other international courts directly involving peacekeepers, the IHL and IHRL are binding the PE forces acting as State actors engaged as combatants and when the PK forces are acting as protected personnel, both in international and non-international armed conflicts. Additionally, general customary law binds at any time and national State law travels with peacekeeping forces everywhere. The glimmer of hope that paves modern legal challenges to contemporary peacekeeping lies with responsible States together with deeper clarification of the United Nations accountability departing from the duties mentioned on UNSG bulletin. For the time being, sending States must be surveying from the Armageddon<sup>36</sup> of their domestic law, in close coordination with the United Nations inquiry mechanisms. States should also empower their willingness to adopt international standards and to prosecute their individuals accordingly, who instead of defending essential values failed to act according to the international well accepted rules.

LTCOL Francisco José Bernardino da Silva Leandro  
Legal Adviser at National Defence Institute of Portugal

[eurofor1152@gmail.com](mailto:eurofor1152@gmail.com)

---

<sup>34</sup> IMT - Vol. 1, p. 223 - Furundžija (IT-95-17/1) 10<sup>th</sup> December 1998, "Lašva Valley" Trial, §155.

<sup>35</sup> Or to other regional organizations to act on behalf of the United Nations.

<sup>36</sup> The Mount Armageddon is the site of an epic battle associated with the end time prophecies of the Abrahamic religions. The word Armageddon appears only once in the Greek New Testament and comes from Hebrew meaning "Mountain of Megiddo". Megiddo was the location of many decisive battles in ancient times. Thus, the word Armageddon is used to express the idea of a place where decisive battles were fought. The compliance with international law by peace forces is indeed an extremely important battle to conquer action legitimacy.

## Cyber Defense and Counterintelligence

Mr. Richard Pregent, ACCI

In August 2011 it was disclosed that a massive series of cyber attacks had been taking place for five years targeting over 72 national governments, international organizations including the United Nations, and private businesses, particularly military contractors.<sup>1</sup> An information assurance company traced the attacks to a common (command and control) internet server. These attacks were not intended to block the victim's ability to use the global internet (denial of services) such as the 2007 attack on Estonia<sup>2</sup>. Rather, they were intended to surreptitiously steal information. The attacks were said by many experts to be state sponsored, although no technical evidence proving attribution has been produced. The cyber attacks were described as the largest in history; the amount of data that was taken was extraordinary. It could also be described as the largest act of cyber espionage in history.

In June 2010 the Stuxnet worm was discovered. This was a very different kind of cyber attack. Experts have concluded that it was specifically designed to attack an Iranian nuclear facility.<sup>3</sup> This was not a denial of services attack or an effort to steal information. Here the malware was specifically designed to destroy the centrifuges Iran was using to enrich uranium by manipulating the power sent to them and overriding the safety systems in place. It was an extraordinarily complex and narrowly targeted attack. Experts stated that over 15,000 lines of code were in the payload and that the worm itself did not cause damage to control systems other than those at the Iranian nuclear facility. The attack targeted "dumb" switches, programmable logic controllers (PLC). The worm disabled the safety system by playing back information indicating all systems were function properly while the PLCs continued to power the centrifuges as they destroyed themselves. The targeted "dumb" switches are literally everywhere; they are part of the fabric of every nation's infrastructure including manufacturing, energy, and transportation sectors. The Stuxnet attack proved how extraordinarily vulnerable every nation's critical infrastructure is to cyber attack.

Cyber threats are not new but have grown exponentially in the asymmetric nature of the damage they may cause. Yesterday, the greatest cyber concerns were threats to individual privacy and the disruptions caused by lone-wolf hackers. Today, the greatest cyber concerns include the state-sponsored theft of massive amounts of intellectual property, the compromise of enormous classified databases, and the potential for terrorist attacks on a nation's critical infrastructure. Unfortunately, the international and domestic legal regimes involved in the cyber realm have not progressed as the threat has. In fact, those legal regimes provide neither clarity nor any effective enforcement mechanisms for violations of law committed in the cyber world. There has been some international cooperation in the law enforcement arena to identify and prosecute particularly egregious identity theft and child pornography cases but these are the exception rather than the rule.

---

<sup>1</sup> [http://www.msnbc.msn.com/id/43998147/ns/technology\\_and\\_science-security](http://www.msnbc.msn.com/id/43998147/ns/technology_and_science-security);  
<http://www.telegraph.co.uk/technology/news/8679658/China-chief-suspect-in-major-cyber-attack.html>

<sup>2</sup> [http://www.google.de/gwt/x?q=cyber+attack+on+estonia&ei=5FA6ToDnMcK\\_8APcw66bAQ&ved=0CAsQFjAB&hl=de&source=m&rd=1&u=http://www.guardian.co.uk/world/2007/may/17/topstories3.russia](http://www.google.de/gwt/x?q=cyber+attack+on+estonia&ei=5FA6ToDnMcK_8APcw66bAQ&ved=0CAsQFjAB&hl=de&source=m&rd=1&u=http://www.guardian.co.uk/world/2007/may/17/topstories3.russia)

<sup>3</sup> <http://www.ccdcoe.org/280.html>, see Ralph Langer keynote speech at the Third International Conference on Cyber Conflict

## Cyber Defense and Counterintelligence

As a result, cyber defense has been primarily a commercially driven, reactive discipline. Large service providers identify new malware, worms, and viruses. They then develop patches to be uploaded by information assurance managers and individual computer users around the world. Cyber defense has become an extremely complex game of tennis. On one side are the hackers, some lone wolves but more and more apparently sponsored by states, organized crime, or even international terrorist organizations. The hackers, unconstrained by law, devise innovative ways to defeat the latest cyber defenses. Opposing the hackers is the information assurance community. They are trying to detect and defeat the latest malware. Bound by domestic and international laws, they are unable to attribute attacks to a given actor making law enforcement or any other form of deterrence impossible. Although the industry tries to anticipate threats, it frequently suffers an attack, tries to limit the damage, and designs and installs protective measures to defend against a repeat of the same assault.

And how does all this affect NATO?

### An Alliance Cyber Strategy

Like every other organization in the world, NATO grew to rely upon the cyber world for virtually every aspect of its activities including data management, communications, logistics, planning, and command and control. And like all of its member nations, the Alliance's reliance on the cyber world made it vulnerable to cyber espionage and attacks. Initially, the Alliance followed the nations' and private industry's leads and invested in commercially available solutions to detect malware and patch their systems. While the Alliance continues to do this, it has now adopted a more proactive approach to its cyber defense.

The massive denial of services cyber attack on Estonia in 2007 was described by the Commander of Allied Command Transformation as a "wake up call for NATO."<sup>4</sup> One response to these attacks was the establishment of the NATO Cooperative Cyber Defence Centre of Excellence (CCD COE) in May 2008. Estonia is the Framework Nation and hosts the centre in Tallinn.<sup>5</sup> The mission of the Centre is to "enhance the capability, cooperation, and information sharing among NATO, NATO nations and partners in cyber defense." Among several other initiatives, the CCD COE hosts an annual international cyber conflict conference and is sponsoring the development of a Manual on International Law Applicable to Cyber Warfare.

In November 2010 the Alliance Heads of State and Government adopted a broad "Strategic Concept for the Defence and Security of the Members of the North Atlantic Treaty Organization."<sup>6</sup> The Strategy recognized the threats created by cyber attacks and stated that the Alliance would "develop further our ability to prevent, detect, defend against and recover from" such attacks.

---

<sup>4</sup> [http://www.nytimes.com/2011/02/28/opinion/28iht-edabrial28.html?\\_r=1](http://www.nytimes.com/2011/02/28/opinion/28iht-edabrial28.html?_r=1)

<sup>5</sup> <http://www.ccdcoe.org/11.html>, Sponsoring nations include Latvia, Lithuania, Germany, Hungary, Italy, Slovakia and Spain.

<sup>6</sup> <http://www.google.com/gwt/x?source=m&u=http%3A%2F%2Fwww.nato.int/lisbon2010/strategic-concept-2010-eng.pdf&wsi=fcc22aa7f102f7e3&ei=2M2TrqMsyPsgb95MywBQ&wsc=bk>



## Cyber Defense and Counterintelligence

The Lisbon Summit Declaration provided more detail:<sup>7</sup> creation of the NATO Computer Incident Response Capability (NCIRC) was accelerated to 2012; all NATO bodies will be brought under centralized protection; cyber defense will be included in the defense planning process; and the North Atlantic Council was directed to devise a specific action plan to implement the cyber strategy.

NATO is particularly challenged by the complex and, at times, conflicting legal regimes involved in cyber defense. Each Alliance nation has domestic laws that protect the privacy of its citizens including their use of personal computers, communications over the internet, and real-time and stored communications. Each Alliance nation also limits the authority of both law enforcement and intelligence agencies to intrude into or manipulate computers and servers used by service providers.

The United States relies upon a confusing patchwork quilt of Federal statutes<sup>8</sup> to protect the privacy interests of its citizens and enable law enforcement and intelligence authorities to collect the information they require. European Union members of the Alliance each have domestic statutes that implement the EU Data Privacy Directive of 1995<sup>9</sup>, an effort to provide a comprehensive approach to protecting individual privacy from both government and industry intrusions. Those members have also implemented EU Data Retention Directive<sup>10</sup>, an effort to maintain data in support of civilian law enforcement.

Some Alliance partners require judicial authorizations even in the context of an ongoing criminal or counterintelligence investigation. Others have established independent commissions to oversee evidence collection during state sanctioned investigations. Still others rely upon an administrative oversight process with varying levels of approval authorities depending upon the intrusiveness of the investigative activity. For some alliance members simply sharing Internet Protocol (IP) addresses with a non-EU nation may be a prohibited dissemination of "personal data."<sup>11</sup>

---

<sup>7</sup>[http://www.google.com/gwt/x?source=m&u=http%3A%2F%2Fwww.nato.int/cps/en/natolive/official\\_texts\\_68828.htm&wsi=fcc22aa7f102f7e3&ei=nr87TuKsOIW\\_1AaQaoSABw&wsc=eb&whp=3Acyber](http://www.google.com/gwt/x?source=m&u=http%3A%2F%2Fwww.nato.int/cps/en/natolive/official_texts_68828.htm&wsi=fcc22aa7f102f7e3&ei=nr87TuKsOIW_1AaQaoSABw&wsc=eb&whp=3Acyber)

<sup>8</sup> Electronic Communications Privacy Act of 1986, Pub. L. No 99-508, 100 Stat. 1848 (1986); Wiretap Act, 18 U.S.C. sects. 2510-2522 (1968); Stored Communications Act 18 U.S.C. 2701; Pen Register/Trap and Trace Statute, 18 U.S.C. 3121-3127; Computer Fraud and Abuse Act, 18 U.S.C. 1030; Patriot Act, LL 107-65; Foreign Intelligence Surveillance Act, Pub. L. 95-511, 92 Stat. 1783, 1978; Homeland Security Act, Pub. L. 107-296, including the Cyber Security Enhancement Act of 2002, sect 225; Privacy Act, 5 U.S.C. 552a.; N.B. this is not an exhaustive list.

<sup>9</sup> Directive 95/46/EC

<sup>10</sup> Directive 2006/24/EC

<sup>11</sup>[http://www.ccdcoe.org/publications/legalproceedings/Tikk\\_IPAddressesSubjecttoPersonalDataRegulation.pdf](http://www.ccdcoe.org/publications/legalproceedings/Tikk_IPAddressesSubjecttoPersonalDataRegulation.pdf).



## Cyber Defense and Counterintelligence

Based upon the Paris Protocol and the Ottawa Agreement NATO, its "subsidiary bodies" and International Military Headquarters, are not subject to the EU Directives.<sup>12</sup> Internally, NATO is able to manage its information technology communications systems and databases as NATO sees fit. The Alliance is, however, impacted by each individual nation's domestic laws governing privacy and criminal and intelligence investigations. Cyber defense cannot be accomplished unilaterally by any individual commercial entity, national government, or regional alliance; it must be a cooperative effort amongst all IT users. To be effective NATO's cyber action plan must be synchronized with the Alliance's 28 different national legal regimes and international standards.

### Alliance Counterintelligence

Within the Alliance cyber defense is not the exclusive province of information assurance organizations or security offices. As noted by one expert, "to establish a robust and efficient cyber defence regime, legal and policy frameworks must have a multidisciplinary approach..."<sup>13</sup> The Alliance's leadership has taken care to involve all interested parties in the development of the NATO Cyber Action Plan. One discipline that will play a crucial role in the Alliance's cyber defense is counterintelligence (CI). When cyber defense was seen as primarily a law enforcement problem, the counterintelligence community had a very limited role. This has changed with the advent of cyber attacks that compromise classified databases, steal enormous amounts of intellectual property, and threaten the critical infrastructure of a nation.

Attribution is one of the most difficult issues in cyber attacks. Rarely is it possible for information assurance authorities to determine who launched a given attack. The reasons for this are both legal and technical. Virtually every nation has statutes that forbid the unauthorized access into personal computers and internet service providers' servers, actions that would be necessary to trace back (hack back) the attack to its origins. The process to seek judicial authorization is time consuming and burdensome; by the time it is granted the evidence is gone. And this presumes that this action is even possible. The use of anonymizers that successfully mask the origins of a given attack is widespread.

Despite the fact that attribution is difficult, evidence must be preserved. Forensic analysis of cyber attacks can disclose both technical and tactical activities of a given cyber attacker. How was the attack mounted? What was compromised? Is there an insider threat? If the attack was an effort to steal information, what information did the attacker seek to collect? Was a hostile intelligence service involved? An international terrorist organization? What was the motivation behind the attack? Developing these questions, seeking answers, and collecting evidence that would be admissible in a criminal prosecution is doctrinally a role for counterintelligence (CI).

<sup>12</sup> Agreement on the Status of the North Atlantic Treaty Organisation, National Representatives and International Staff [The Ottawa Agreement], September 1951, Article V.

<http://www.nato.int/docu/basicxt/b510920a.htm>; Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty [The Paris Protocol], August 1952 Article 13, <http://www.nato.int/docu/basicxt/b520828a.htm>

<sup>13</sup> Maeve Dion, Center for Infrastructure Protection, Preface to International Cyber Incidents, Legal Considerations, Cooperative Cyber Defence Centre of Excellence, 2010

## Cyber Defense and Counterintelligence

While every nation conducts CI activities, each nation has a slightly different definition of the term. Within the Alliance CI is defined as:

**Those activities concerned with identifying, assessing, exploiting or neutralizing existing and emerging threats to the Alliance posed by terrorism, espionage, sabotage, and subversion.<sup>14</sup>**

The Alliance CI mission is very similar to the Alliance cyber defense mission. Both must identify and assess threats to the Alliance. Both seek to identify emerging threats. Both seek ways of countering those threats. Included in the CI mission is the development and preservation of evidence to support criminal prosecutions. Unique to Alliance CI is that it is designed to be a multilateral effort. NATO CI is never unilateral; by definition it is an Alliance defensive intelligence activity.<sup>15</sup> Like Alliance cyber defense, Alliance CI activities must respect both the host nation's and the sending state's legal regimes.

Allied Command Counterintelligence (ACCI), NATO's only CI organization, is part of the Allied Command Operations (ACO) command structure but provides CI support to Allied Command Transformation (ACT) and other designated NATO related entities. Within ACCI there is a Cyber Counterintelligence Activity (CCA). This organization provides cyber forensic support to CI investigations helping to determine what was compromised and by whom. CCA also supports damage assessments and security doctrinal and policy changes to improve the Alliance's security posture.

Investigations of cyber attacks are extremely important but, like cyber defense, an effective counterintelligence program is not simply reactive. Allied CI agents work closely with host nation and sending nation intelligence and security authorities to discover threats to the Alliance. They also work closely with Alliance personnel, training them in how to recognize efforts to elicit Alliance information and how to deal with them. These activities are key to preventing espionage and terrorist threats to our Alliance and apply equally to the physical and cyber worlds.

An initial step in building a partnership between the information assurance and CI worlds is to identify cyber threats from the CI perspective. Allied agents through their coordination with Alliance national intelligence and security authorities can help identifying websites used by terrorist organizations to radicalize, recruit, communicate, and control. Allied agents can help Alliance information assurance develop protocols that instantly recognize, preserve evidence, and give notice of the misuse of Alliance communications systems to compromise secure information or communicate with hostile intelligence or terrorist organizations.

---

<sup>14</sup> SACEUR's Mission Directive for Allied Command Counter Intelligence, 5 July 2011.

<sup>15</sup> Id; see also ACE Directive 65-3, Counterintelligence Policy, Allied Command Europe, 6 June 2000.

## Cyber Defense and Counterintelligence

Similarly, all evidence of efforts to gain unauthorized access to any Alliance cyber systems must be detected and preserved for security and CI analysis. From the information assurance perspective, cyber attacks are dangerous assaults upon the integrity of the Alliance's ability to communicate and manage its data. From a CI perspective these attacks are threats but also opportunities to better understand the threat and enable the leadership to counter it and future threats. Information assurance officials' immediate efforts to maintain the integrity of Alliance cyber systems (stop the intrusion and limit the damage) must be taken in such a way that evidence is preserved. Different technical activities may be available to accommodate both the information assurance interests as well as the CI interest in exploiting cyber activities for their intelligence value and evidence development.

### Conclusion

"In the millisecond sectors of communications and information technology, there is often little time to orchestrate response and mitigation efforts. Cyber security defence and response options must therefore be predetermined at numerous levels within information and communications technology companies, law enforcement and intelligence offices, military and security departments , foreign affairs agencies, and international alliances and organizations."<sup>16</sup>

As NATO develops its detailed cyber action plan it must ensure that authorities are in place for the Alliance to be disciplined, agile and adaptive in its management of IT resources and capabilities. Alliance cyber defense actions must also be synchronized with the legal regimes of the Alliance partners and the host nations involved. And evidence collected must comply with the prosecuting state's criminal procedural codes. This has been the established practice of Alliance counterintelligence operations for sixty years. The cyber action plan should take advantage of these existing CI procedures and relationships.

*Mr. Richard Pregent*  
*Legal Adviser Allied Command Counterintelligence*

[Richard.Pregent@650mi.shape.army.mil](mailto:Richard.Pregent@650mi.shape.army.mil)

---

<sup>16</sup>Note 8 at page 7

## **“The Necker Cube” and Human Rights: Again on Joint Actions as a(n) (in)sufficient stand-alone legal basis for the detention and transfer of individuals within the (Floating) territory of Member States**

**CDR Jean-Paul Pierini<sup>(2)</sup>**

### **Introduction**

In general, replying to a reply may be deemed inconvenient. Nevertheless, sometimes this is required for the sake of clarity. Some months ago, in my article “Is the Grass Always Greener on the other side?”<sup>3</sup>, I argued that the current EU legal framework for apprehension, detention, prosecution and hand over of pirates – based on EU non-legislative acts<sup>4</sup> - is not by itself – namely without a proper implementing legislation by Member States - sufficient to satisfy the dictates of human rights law, nor is such a legal machinery fully established in the context of the powers and competencies conferred to the EU according to its founding treaties. My article raised the doubts of Gert-Jan Van Hegelsom and Frederik Naert – two of the most talented EU legal advisers - who challenged my conclusions in their “Of Green Grass and Blue Waters”<sup>5</sup>. This paper addresses a number of key arguments put forward in their writing.

### **1. The Legal Nature of EU Legal Instruments Adopted within the CFSP**

In their response, Messrs Van Hegelsom and Naert - moving from the consideration that the EU “legislative acts” have a very narrow meaning – argue that: «in non-CFSP matters there are inter-alia decisions and implementing acts, which may bind or otherwise create legal effects for individuals», whilst in CFSP matters «Union positions [are] laid down in Council decisions which define the approach of the Union to a particular matter of a geographical or thematic nature». They further assert that such decisions «may clearly be legally binding and may affect individuals», and «when such decisions provide for restrictive measures against natural or legal persons (usually referred to as sanctions), their legality may be reviewed by the Court of Justice, even though this court has, as a rule, no jurisdiction in the area of the CFSP».

---

<sup>1</sup> Maurits Cornelis Escher (17 June 1898 – 27 March 1972): Dutch graphic artist known for drawing “impossible constructions” and “impossible objects”, such as the “Necker cube” and the “Penrose triangle”. In his works he explored the concept of infinity, the limits of architecture, tessellations and geometric distortions (Source: Wikipedia).

<sup>2</sup> Commander, Italian Navy. Currently serving as Legal Adviser and Head of Legal Section at the Italian Fleet Command, Rome. Opinions and views expressed reflects exclusively the personal understanding of the author and may not be attributed to the Italian Navy and to the Italian Defence.

<sup>3</sup> *Is the Grass Always Greener on the other side?*, NATO Legal Gazette, No. 23 of 25 October 2010.

<sup>4</sup> *The EU Atalanta Mission was initially established by a CFSP Joint Action (Council Joint Action 2008/851/CFSP, 10 November 2008), which was further amended by three Council decisions (Council Decision 2009/907/CFSP, 8 December 2009; 2010/437/CFSP, 30 July 2010; 2010/766/CFSP, 7 December 2010).*

<sup>5</sup> Reference is to Mr. GERT-JAN VAN HEGELSOM and Mr. FREDERIK NAERT's, *Of Green Grass and Blue Waters: A Few Words on the Legal Instruments in the EU's Counter-Piracy Operation Atalanta*, on the NATO Legal Gazette, n. 25 of 5 May 2011, p. 2 – 10..

## **“The Necker Cube” and Human Rights: Again on Joint Actions as a(n) (in)sufficient stand-alone legal basis for the detention and transfer of individuals within the (Floating) territory of Member States**

Actually, non-legislative binding acts, such as decisions, in other than CFSP matters, have a direct or indirect (when delegated) foundation in either the Treaties or derived legislation, whilst binding effects attributed to common positions are limited to imposing a coherent posture to Member States either within the EU or when acting nationally.

The aforesaid reference to restrictive measures and sanctions<sup>6</sup> appears to be rather deceptive and misleading; nevertheless, such a reference may be of help in highlighting the intrinsic limits of the CFSP legal framework.

Indeed, according to the EU Council: “The purpose of the CFSP legal instrument is to state which restrictive measures are considered necessary to meet its objectives”<sup>7</sup>. In light of this, these measures are first included in a Common Position - adopted by the Council itself - then they are implemented at the (former) EC or national level, being generally aimed at establishing or enforcing embargoes, travel bans and/or the freezing of financial assets: namely measures falling within the competencies expressly attributed to the EU (formerly EC) by the Treaties. On the whole, “the current legislative procedure requires the adoption of a CFSP legal instrument and an implementing Council Regulation based on the EC Treaty, based on a Commission proposal”<sup>8</sup>. Only the Regulation – i.e. a fully legislative act - and not the “CFSP legal instrument” – i.e. a non-legislative act - may directly affect individual rights, being also subject to review by the Court of First Instance (CFI) and the Court of Justice (ECJ). Where the “Community” (now the EU) has no competence ... it is up to each of the Member States to adopt the necessary legislation or implementing measures. This way the legislative act in question remains under the scrutiny of a judicial authority (either European or national). The principle of the “rule of law” is thus preserved, as well as the right of access to justice for those who are targeted by the sanctions.

---

<sup>6</sup> To this aim, see gen. A. BORGHI, *La législation de l'Union Européenne en matière de sanctions internationales et sa compatibilité avec les droits fondamentaux*, in *Rev. trim. des droits de l'Homme*, 76/2008, p. 1095ff.; and M. NETTESHEIM, *U.N. Sanctions against individuals – A Challenge to the Architecture of European union Governance*, in *Common Market Law Rev.*, n. 44, 2007, p. 567ff.

<sup>7</sup> COUNCIL OF THE EUROPEAN UNION, 2 DECEMBER 2005, 15114/05 PESC 1084 FIN 475, *Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy*, p. 5.

<sup>8</sup> 15114/05 PESC 1084 FIN 475, p. 13. See also 10198/1/04 Rev.1 PESC 450, *Basic Principles on the use of Restrictive Measures (Sanctions)*.

## **“The Necker Cube” and Human Rights: Again on Joint Actions as a(n) (in)sufficient stand-alone legal basis for the detention and transfer of individuals within the (Floating) territory of Member States**

In this respect, see the “Kadi decision” of the ECJ<sup>9</sup>. Unsurprisingly, in their initial application before the CFI, the applicants challenged the EC Regulation – not the CFSP Common Position, asserting, *inter alia*, the EC lack of competence, as the sanctions were not “State-linked”. They later brought an appeal before the ECJ against the CFI decision. In this second judgement, “the CFI, the Advocate General, and the Grand Chamber all noted that the new CFSP pillar, along with the duty of coherence, cannot constitute the wholesale importation of the CFSP’s substantive objectives as freestanding Community objectives”<sup>10</sup>. Readers know that “Bridges” (or “passerelles”) between the CFSP and the EC were theorized in order to implement CFSP positions through EC measures, as otherwise Member States should have taken care of them. Accordingly such “bridges” are the evidence that CFSP decisions need to be implemented through legal mechanisms allowing them to legally affect individuals.

So far, the right to judicial review of non-EC measures affecting individual rights has been granted by the ECJ in a case concerning the former “Justice and Home Affairs” area (JHA)<sup>11</sup>, not the former CFSP Pillar.

In addition, it has to be considered that the apprehension, detention and handover of captured pirates at sea happen in a legal dimension which mostly reflects the one of the sending states’ home territories, individuals<sup>12</sup> are afforded with Constitutional and statutory rights. Within such a legal framework, CFSP decisions require proper implementing measures by Member States, through the enactment of dedicated statutory laws (i.e. acts passed by Parliaments which may affect the fundamental rights of the people). Joint actions may clearly not represent by themselves a suitable and sufficient legal basis for authorising the derogation from basic human rights (such as, for instance, the right to liberty) and may certainly not surrogate lacking national implementing measures.

---

<sup>9</sup> European Court of Justice, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission (Joined Cases C-402/10 P and C-415/10 P)* Judgement of 3 September 2008, §§ 121ff.

<sup>10</sup> A. HALBERSTAM – E. STEIN, *The United Nations, the European Union and the King of Sweden: Economic Sanctions and individual Rights in a plural world order*, in *Common Market Law Review*, n. 46, 2009, p. 13ff.. P. 40.

<sup>11</sup> ECJ, *Gestoras Pro Amnistía and Segi*, Case 354-04P, Judgement of 27 February 2007. At this purpose, See also S. CARRUTHERS, *The Treaty of Lisbon and the Reformed Jurisdictional Powers of the European Court of Justice in the Field of Justice and Home Affairs*, in *E.H.R.I.R.*, n. 6, 2009, p. 786ff.. AFSJ. p. 786; A. ROSAS, *Justice in Haste, Justice denied? The European Court of Justice and the Area of Freedom, Security and Justice*, in *Cambridge Yearbook of European Legal Studies*, 2009, 1ff. On the CFSP, See M.G. GARBAGNATI, *The Jurisdiction of the European Court of Justice in respect of the Common Foreign and Security Policy*, in *ICLQ*, 55, p. 2006, p. 77ff.. P. 88; A. HINAREJOS, *Judicial Control of CFSP in the Constitution: a Cherry with Picking?* In *Yearbook of European Law*, 2006, p. 363ff.

<sup>12</sup> Individuals, however, are deprived of a number of rights under EU Law, as warships are usually not considered “entry points” to the territory of the Union for the purposes of the Dublin II Regulation (Council Regulation (EC) No [343/2003](#) of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national).

## **“The Necker Cube” and Human Rights: Again on Joint Actions as a(n) (in)sufficient stand-alone legal basis for the detention and transfer of individuals within the (Floating) territory of Member States**

The analysis of the legal nature of CFSP instruments also raises questions on the EU competencies in the criminal law domain (including issues of criminal procedure law), although – in the case of pirates – jurisdiction is to be exercised by third States. Such competencies, once shared between the EC and the JHA Pillar<sup>13</sup> (“although, as a general rule, neither criminal law nor the rules of criminal procedure f[e]ll within the Community's competence”<sup>14</sup>), have now been established within the Treaty on the Functioning of the European Union (TFEU) and need to be exercised by means of acts adopted following a “legislative procedure”<sup>15</sup>. Undoubtedly, such competencies have never been allocated within the CFSP area.

Messrs Van Hegelsom and Naert also highlight that «detention with a view to criminal prosecution ... occurred in other operations, e.g. IFOR/SFOR». However, the cooperation of IFOR/SFOR forces with the ICTY had its legal basis in the Dayton Agreement itself<sup>16</sup>, as well as in the ICTY Rules of Procedure and Evidence (RPE, Article 59-bis). Arrests and detentions were carried out according to arrest warrants issued by the ICTY prior to the apprehension of suspects. In addition, in the current legal debate, there is no contention as to the guarantees offered by the ICTY to the people arrested<sup>17</sup>.

---

<sup>13</sup> Recently, See N. NEAGU, *Entrapment between Two Pillars: The European Court of Justice Rulings in Criminal Law*, in *Eur. Law. Jr.*, n. 4, 2009, p. 556ff. Former “inter-Pillar litigations” are an intriguing topic, as confirmed by the following ECJ case law: C-176/03, judgment, 13 September 2005 (Framework Decision on criminal sanctions applying to environmental protection struck down, the competence belonging to the EC); C-440/05, judgment, 23 October 2007 (Framework decision on sanctions for Ship source pollution struck down, the competence belonging to the EC). In Joint Cases C-317 and 318/04, *Parliament v Council and Parliament v Commission*, judgment of 30 May 2006, the ECJ struck down the Council decision as to the conclusion of an agreement with the United States on the transfer of passengers' personal data, because existing Data Protection Directives found their legal base in (former) art. 95 of the Treaty on European Community (TEC). Perhaps these decisions may also be taken into consideration when assessing the legitimacy of CFSP Joint Actions' provisions on the transfer of pirates' personal data. In C-95/05 the Commission challenged the competence of the Council Decision implementing a Joint Action under the CFSP concerning an EU contribution to ECOWAS in the framework of the Moratorium on Small Arms and Light Weapons.

<sup>14</sup> ECJ, Case No. C-176/03, 13 Sept. 2005.

<sup>15</sup> Reference is to be made especially to Articles 82 and 83. Furthermore, the tasks which may be determined for EUJUST by means of Regulations adopted with the ordinary legislative procedure under article 85, should be compared with the detain and transfer powers conferred to EUNAVFOR by way of transfer agreements with third States.

<sup>16</sup> Annex 1-A. At this purpose, see N. FIGÀ TALAMANCA, *The role of the NATO in the Peace Agreement for Bosnia*, in *Eur. Jr. of Intern. Law*, 1996 p. 2 and J. JONES, *The Implications of the Peace Agreement for the International Criminal Tribunal for the former, there*, n. 212.

<sup>17</sup> It should be mentioned that in the case of Mr. Naletilić (*Naletilić v. Croatia*, decision, 4 May 2000, Appl. N. 51891/99, § 1.b) quoted by Van Hegelsom and Naert, the applicant was handed over to the ICTY by order of the Zagreb County Court and not by SFOR. Other suspects were arrested by SFOR and then handed over to the ICTY. However, in their claims lodged with ECtHR they never raised any complaint on the circumstances of their apprehension (See, e.g., ECtHR, III, *Galić v. The Netherlands*, Decision of 6 June 2009, Appl. N. 22617/07; ECtHR, III, *Blagojević v. The Netherlands*, Decision of 6. June 2009, Appl. N.



## **“The Necker Cube” and Human Rights: Again on Joint Actions as a(n) (in)sufficient stand-alone legal basis for the detention and transfer of individuals within the (Floating) territory of Member States**

### **2. What is a “law” under the ECHR and the question of remedies.**

Another observation contained in Messrs Van Hegelsom and Naert's article is that the Grand Chamber's 2010 judgment in *Medvedyev*<sup>18</sup> confirms the sufficiency of Joint Actions as legitimate legal bases for detention under article 5.1 of the ECHR. In their opinion, such a decision would support a broad conception of what must be regarded as a “law” for the purpose of limiting people's liberty, based on the accessibility and foreseeability requirements.

However, the “flexibility” of the ECtHR as to what can be regarded as a “law” under article 5.1 of the ECHR reflects the differences in the various ECHR member states' legal systems. Such countries would refer only to their national legislation for the establishment of criminal offences, as certainly the EU cannot establish criminal offences by itself and then demand the punishment and detention of individuals. On the other hand, an excessively formal approach by the ECtHR would have determined an unacceptable invasion of members states' constitutional and legal orders. Indeed, in order to solve the question of what fulfils the requirement of a criminal law, the ECtHR usually holds a cautious approach. See for instance the cases concerning detention despite amnesty,<sup>19</sup> or detention “at the disposal of a Court”, based on court practice only and in the absence of any statutory provision<sup>20</sup>. In all these cases, a violation of article 5.1 was found. Other decisions address the unique legal tradition of the United Kingdom's common law legal system<sup>21</sup>, with mixed results.

On the whole, the jurisprudence of the ECtHR can impose stricter requirements in the subject matter of detention to meet the canons of the rule of law principle, but by no means it can weaken the principles - contained in the constitutions of member states - concerning the formation of substantive criminal law norms or otherwise alter the geography of powers within the EU institutions or confer the authority to detain to the EU or its member states per se.

---

<sup>18</sup> ECtHR, GC, *Medvedyev v. France*, judgment of 29 March 2010, Appl. N. 3394/03.

<sup>19</sup> ECtHR IV, *Lexa v. Slovakia*, Judgment of 28 September 2008, Appl. No. 54334/00.

<sup>20</sup> ECtHR, I, *Kawka v. Poland*, Appl. No. 25874/94, Judgment of 9 January 2001 and ECtHR, I, *Baranowsky v. Poland*, Appl. No. 28358/95, 28 March 2000.

<sup>21</sup> See, *Inter alia*, ECtHR, *Benham v. the United Kingdom*, Judgment 10 June 1996, Rep. 1996-III, 10, on Community Charge Regulations and commitment to prison for wilful refusal to pay or culpable neglect (no violation of article 5.1); ECtHR IV, *H.L. v. the United Kingdom*, Appl. No. 45508/99, Judgment of 5 October 2004, on deprivation of liberty while under psychiatric care based on “common law doctrine of necessity” (violation of article 5.1 due to the lack of procedural safeguards, § 124); *S.W. v. the United Kingdom*, judgment of 22 November 1995, Series A no. 335-B, on a case law overruling marital immunity in rape cases (no violation of article 7.1); *Steel and Others v. the United Kingdom*, judgment of 23 September 1998, Reports 1998-VII, p. 2735, on the arrest and detention of protesters for breach of peace (no breach of article 5.1 due to factual and procedural reasons); *Halford v. the United Kingdom*, judgment of 25 June 1997, Reports 1997-III, p. 1017, § 49, on phone taping in the absence of provision in domestic law (violation of article 8).

## **“The Necker Cube” and Human Rights: Again on Joint Actions as a(n) (in)sufficient stand-alone legal basis for the detention and transfer of individuals within the (Floating) territory of Member States**

If Joint Actions do not meet the requirements of Member States' constitutions and statutes in the criminal law domain – as it is normally the case – and if they are not implemented at national level, they cannot represent a valid legal basis to authorise the detention of individuals. In summary, even if they are very accurate as stand-alone provisions, the EU Joint Actions lack any normative character and even the Grand Chamber cannot make out of a Joint Action something different from a Joint Action...

Furthermore, I would clarify that the “foreseeability” requirement is not a surrogate of a proper legal basis but rather an attribute of such a legal basis. In Messrs Van Hegelsom and Naert's article, it is argued that joint actions meet the requisites of precision, accessibility and foreseeability «in combination» with the UNCLOS (which contains a definition of the crime of piracy) and the relevant UNSCRs, taking into account the circulation of information through the media, and thus the likelihood that pirates knew or should have known that if caught by EU forces, they would have been arrested. No doubt that pirates may have felt that something was going on in the waters around Somalia. But can one really affirm that the «combination» of all the international efforts against piracy (including the draconian measures carried out by the Russian fleet) has made the EU Joint Action meet the requirements of a “law” under article 5.1 of the ECHR? Besides, UNCLOS is a “mixed agreement” under EU law and the purpose of (former) EC competence is clarified in the declarations made upon signature and does not encompass the fight against piracy<sup>22</sup>.

Ultimately, when addressing the special circumstances of maritime operations the Grand Chamber in *Medvedyev* has, by no means, granted leave to the outsourcing of Art. 5.3 functions to the jurisdictions of a third State non-member to the ECHR.

### **3. The Role of Member States' Courts and the EU Immunity**

In Messrs Van Hegelsom and Naert's paper it is further affirmed that «remedies require the involvement of Member State courts given the lack of jurisdiction of the ECJ on CFSP issues», and that under the horizontal provision of Art. 19(1), second subparagraph of the TFEU, «Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law». In my opinion, this is absolutely true. Nevertheless, the obligation of Member States to set up effective legal remedies for suspects does not seem a good reason to assert that the *Atalanta* Joint Action may directly affect the fundamental rights of individuals, without a proper implementation by Member States.

---

<sup>22</sup> Purpose of the EC accession to UNCLOS is further clarified in the *Mox Plant* decision of the ECJ, Case No. C-459/03, concerning settlement mechanisms under the UNCLOS exploited by Member States. See T. Lock, *The European Court of Justice: what are the limits of its exclusive jurisdiction?*, in M.J., n. 3, 2009, p. 292ss. P. 296.

## **“The Necker Cube” and Human Rights: Again on Joint Actions as a(n) (in)sufficient stand-alone legal basis for the detention and transfer of individuals within the (Floating) territory of Member States**

Last but not least, Messrs Van Hegelsom and Naert argue that the 1965 Protocol on the Immunities of the EU, as contained in Article 343 of the TFEU, does not explicitly grant to the EU the immunity from the jurisdiction of Member States' Courts. However, as pointed out by the CoE Committee of Legal Advisers on Public International Law (CAHDI), “[t]he European Commission knows of no case in which non-EU courts have pronounced expressly on questions relating to the jurisdictional immunity of the EU. Put differently, there is no indication that there is a single instance in which a non-EU court has denied the jurisdictional immunity of European Union (or its predecessor, the European Community) from legal process”<sup>23</sup>. Currently, legal remedies in matters of detention and transfer of detainees are not of a preventive nature and - unless a Member State has adequately implemented the Atalanta Joint Action establishing full judicial oversight by national authorities - almost constantly do not allow the submission of a claim in order to review detention and/or prevent the handover of detained persons to third countries.

### **4. Conclusion.**

Messrs Van Hegelsom and Naert's article raised several very interesting issues, which deserved to be further addressed. In this respect, I put forward some clarifications as to the reach and legal value of the acts adopted within the ESDP, including the adoption of restrictive measures, in order to better specify the rules governing the external action of the EU and strengthen my conclusions on the insufficiency of Joint Actions as stand-alone legal bases for the apprehension of pirates under article 5.1 of the ECHR.

CDR Jean-Paul Pierini

ITA Navy

[jeanp.pierini@marina.difesa.it](mailto:jeanp.pierini@marina.difesa.it)

---

<sup>23</sup> Opinion of March 2010, available at [http://www.coe.int/t/t/dlapil/cahdi/State\\_Immunities/documents/EU%20Immunities.pdf](http://www.coe.int/t/t/dlapil/cahdi/State_Immunities/documents/EU%20Immunities.pdf).

## Book Review: Prosecuting Heads of State<sup>1</sup>

Mr. V. Roobaert, Assistant Legal Adviser NC3A(\*)

The prosecution of Heads of State and of governments has been a recurring topic of the legal literature for a long time. For long, however, authors concluded that impunity remained too often the rule.

This has drastically changed. According to the authors of *Prosecuting Heads of State*, while there were few successful prosecutions of Heads of State before the 1990s, around 70 Heads of State has since been charged with various international crimes, mostly related to grave human right abuses and corruption.

As an introduction, the editors briefly review past attempts to prosecute Heads of State and of governments and underline the various factors that have contributed to an increasing number of prosecutions, namely a trends in civil society towards greater accountability, increased challenges to amnesty laws and the creation of international tribunals and the international criminal court.

The subsequent contributions review prosecutions based on a geographical approach.

The first of these contributions reviews the European situation, where there were discussions on the establishment a permanent international court as early as 1919. This was followed by the establishment of the Nuremberg trials after WWII and domestic trials of nazi criminals and collaborators. More recent examples include the international criminal tribunal for the former Yugoslavia and national legislation on universal jurisdiction such as those of Spain and Belgium.

The three following contributions deal with Latin America. The first two contributions dealing respectively with the prosecutions of heads of state in Latin America and the prosecutions of Augusto Pinochet are offered by Mrs. Roht-Arriaza, an expert in the field. Mrs. Roht-Arriaza also points out to increasing prosecutions in a region which was previously known for impunity and blanket amnesty laws. This change in trends is explained by new political will but also by the influence of prosecutions or procedures abroad (e.g., the role of the Inter-American human right courts in disputing some amnesty laws). She provides a very good overview of the situation in Latin America underlining the remaining legal and political hurdles to prosecution. While a lot of attention is devoted to well known trials, this chapter is also interesting as it shed some light on other cases that have not been mediatised outside of Latin America, mostly in relation to corruption. The other two chapters dealing with Latin America review the Pinochet and Fujimori trials.

---

(\*) This review does not represent the views of NATO, NC3A and/or the NATO Member nations.

<sup>1</sup> Ellen L. Lutz and Caitlin Reiger (eds), *Prosecuting Heads of State*, Cambridge University Press, 2009 (ISBN 978-0-521-49109-9).

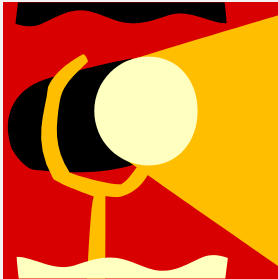
## Book Review: Prosecuting Heads of State

The following chapters move away from this geographical approach to cover specific trials, namely that of President Estrada of the Philippines, Frederick Chiluba in Zambia, Charles Taylor, Slobodan Milosevic and, finally, the trials that took place in Iraq.

Prosecuting Head of State is an excellent contribution to the literature covering international criminal justice. For those that have been following this topic, it also brings some fresh air by underlining the successes of international criminal justice after years of impunity.

Mr. Vincent Roobaert  
BEL CIV  
[vincent.roobaert@nc3a.nato.int](mailto:vincent.roobaert@nc3a.nato.int)

## Spotlight



**Captain Audun  
Westgaard,  
Legal Adviser  
Joint Warfare  
Centre (JWC)**



Name: Audun Westgaard

Rank/Service/Nationality: Captain/Navy/NOR

Job title: JWC Legal Adviser

Primary legal focus of effort: Legal oversight and support to JWC exercise and training activities as well as real life issues.

Likes: Jazz, golf and hunting.

Dislikes: Very hot days (the cold ones I'm used to). Aggressive driving.

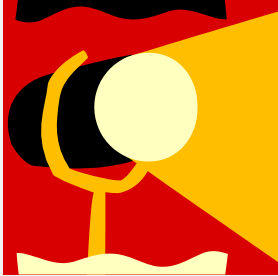
When in Stavanger, everyone should: Visit the old down town pedestrian area and overlook the Lysefjord from the "Pulpit rock".

Best NATO experience: My present one, being my first NATO assignment.

My one recommendation for the NATO Legal Community: Come to JWC and take part in our exercises or training, and help us bring in your national colleagues for predeployment training.

[Audun.Westgaard@jwc.nato.int](mailto:Audun.Westgaard@jwc.nato.int)

## Spotlight



**Mr. Richard Pregent,**  
**Legal Adviser,**  
**Allied Command**  
**Counterintelligence**  
**(ACCI)**



Name: Richard Pregent

Rank/Service/Nationality: GS 14/US

Job title: Allied Command Counterintelligence Legal Adviser

Primary legal focus of effort: Intelligence Law

Likes: Biking, Italian Red Wine, Belgian Beer, and NATO collegiality.

Dislikes: American Beer and NATO Bureaucracy.

When in Mons, everyone should: enjoy the chocolate.

Best NATO experience: Serving as the KFOR LEGAD.

My one recommendation for the NATO Legal Community: maintain the collegial approach to the practice of law; none of us can do anything individually as well as all of us can do it together.

[Richard.Pregent@650mi.shape.army.mil](mailto:Richard.Pregent@650mi.shape.army.mil)





**HAIL**

**&**

**FAREWELL**

## Hail

**Joint Warfare Centre** : Captain Audun Westgaard (NOR N) joined in June 2011.

**STRIKFORNATO** : LCDR Luke Whittemore (USA N) joined in August 2011

**SHAPE** : Captain Kirby Abbott (CAN N) joined in August 2011.

**HQ SACT**: LTC Frederic Tuset Andres (FRA A) joined in August 2011.

## Farewell

**SHAPE** : Captain Sheila Archer left in June 2011.

**SHAPE** : Mr. Christoph Mueller (DEU CIV) left in July 2011.

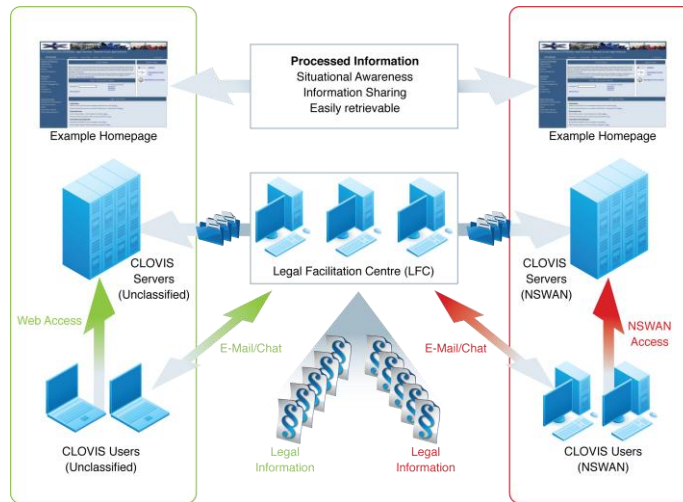
**Allied Force Command Heidelberg** : Col Steve Weedman left in July 2011.

**ACT/SEE** : LTC Zoltan Hegedus left in July 2011.

## GENERAL INTEREST/NATO IN THE NEWS

### CLOVIS (Comprehensive Legal Overview Virtual Information System)

The North Atlantic Alliance requires the capability to reliably access legal documents and knowledge in an era where rapid responses are vital, versatility is critical, and resources are constrained. To move beyond traditional approaches of knowledge sharing Allied Command Transformation is pursuing ways to encourage an interactive professional dialogue among legal advisers within NATO that ultimately may involve outside partners and civil society actors.



The Comprehensive Legal Overview Virtual Information System (CLOVIS) concept is part of an experiment to improve the maintaining, sharing and use of collective legal knowledge that is valuable to NATO, its member and partner nations, and potentially other international organizations and selected non-government organizations. CLOVIS is a tool to improve institutional awareness of controlling law and legal guidance, encourage collaboration for problem-solving.

The experiment intends to be a highly customized answer to the unique challenges facing the NATO legal community by connecting resources that better enable the NATO legal community to support Alliance goals, activities, and operations.

A repository of legal documentation and knowledge will be an important element of the community support; however, the central element of the portal will be the creation of a coherent community that actively engages together on the common issues it addresses.

The portal will facilitate a move from static knowledge collecting and mere display of information, to a dynamic tool that will facilitate interactive information sharing, interoperability and user centered approach. Users themselves will be invited to contribute to the content of the portal, to discuss contemporary legal issues relevant to the community and add value for the benefit of the entire community.

If you have any questions or comments about CLOVIS, please contact:

Lewis Bumgardner, [Sherrod.bumgardner@shape.nato.int](mailto:Sherrod.bumgardner@shape.nato.int), (+32) 65 44 5499; or  
 Laurent Zazzer, [Laurent.zazzer@act.nato.int](mailto:Laurent.zazzer@act.nato.int), (+1) 757 747 3684

## GENERAL INTEREST/NATO IN THE NEWS

- An article on the “New Directions in Responsibility: Assessing the International Law Commission's Draft Articles on the Responsibility of International Organisations” was published in the Yale Journal of International Law:

<http://www.yjil.org/online/volume-37-spring-2011/new-directions-in-responsibility-assessing-the-international-law-commissions-draft-articles-on-the-responsibility-of-international-organizations>

- Information on status, privileges and immunities of international organisations, their officials, experts etc. can be found at the following link:

[http://untreaty.un.org/ilc/guide/5\\_2.htm](http://untreaty.un.org/ilc/guide/5_2.htm)

- On June 16, 2011, the United Nations Human Rights Council endorsed Guiding Principles on Business and Human Rights. This *Insight* describes the background to the Guiding Principles, the Principles themselves, and the Council's decision to endorse them.

<http://www.asil.org/insights110801.cfm>

- Article on “Building a Better “Cyber Range” can be read at:

<http://www.isn.ethz.ch/isn/Current-Affairs/ISN-Insights/Detail?lng=en&id=131577&contextid734=131577&contextid735=127714&tabid=127714&dynrel=4888caa0-b3db-1461-98b9-e20e7b9c13d4,0c54e3b3-1e9c-be1e-2c24-a6a8c7060233>

- The International War Crimes Trial Blog can be found at:

[http://law.case.edu/saddamtrial/entry.asp?entry\\_id=382](http://law.case.edu/saddamtrial/entry.asp?entry_id=382)

## UPCOMING EVENTS

*"It is not necessary to  
understand things in  
order to argue about  
them."*

Pierre de

Beaumarchais

- The next NATO Legal Conference will take place in Lisbon, Portugal from October 24 to 28, 2011. Host is Joint Force Command Lisbon. For more information, please contact Mr. Lewis Bumgardner at [sherrod.bumgardner@shape.nato.int](mailto:sherrod.bumgardner@shape.nato.int) or Mrs. Dominique Palmer-De Greve at [Dominique.degrev@shape.nato.int](mailto:Dominique.degrev@shape.nato.int)

- The next Operational Law course will be held at the NATO School from April 16 to 20, 2012.
- The next Legal Advisers Course will be held at the NATO School from May 21 to 25, 2012.

For more information on courses and workshops, please visit

<http://www.natoschool.nato.int>

- A colloquium organised by the International Committee of the Red Cross and the College of Europe will take place in Bruges, Belgium on October 20-21. Subject is "International Organisations" Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility. To Register and for more information please go to [www.coe-icrc.eu](http://www.coe-icrc.eu)
- On November 7 in Brussels the Security and Defence Agenda will have a one-day workshop on "Re-thinking Europe's Security Priorities". More information on <http://www.securitydefenceagenda.org/Contentnavigation/Activities/Activitiesoverview/tabid/1292/EventType/EventView/EventId/1082/SecDef11RethinkingEuropesecuritypriorities.aspx>

## UPCOMING EVENTS

- The Geneva Academy of International Humanitarian Law and Human Rights launches a New Executive Master in International Law in Armed Conflict.

It is a new diploma tailored for professional participants including practicing lawyers, corporate counsel, diplomats and officials from international organizations. More info can be found at

[www.adh-geneva.ch](http://www.adh-geneva.ch)

*"An investment in  
knowledge always  
pays the best."*

Benjamin Franklin

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

Disclaimer : The NATO Legal Gazette is published by Allied Command Transformation/Staff Element Europe and contains articles written by Legal Staff working at NATO, Ministries of Defence, and selected authors. However, this is not a formally agreed NATO document and therefore may not represent the official opinions or positions of NATO or individual governments.