

# **Report of the Third ‘Silent Leges Inter Arma?’ International Conference held in Bruges from 18 to 20 September 2019**

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## **I. Introduction**

The third edition of the ‘*Silent Leges Inter Arma?*’ international conference, organised by the Belgian Group of the International Society for Military Law and the Law of War (ISMLLW), took place from 18 to 20 September 2019. As in the first two editions, the conference was hosted at the Grand Hotel Casselbergh, in the historic centre of Bruges. The objective of the conference was to bring together legal practitioners and academics from all around the world to discuss current legal developments and challenges in the field of military law and the law of armed conflict. The presence of eminent speakers and an active audience of nearly 100 participants made the conference a success, providing for stimulating and high-quality discussions. This report summarises the events of the conference and its main discussions.

## **II. Conference Overview**

### **1. Wednesday 18 September 2019**

#### **Opening of the Conference**

#### **Keynote speech: “The Need for Borders in a EU without Borders”**

Mr. Pieter De Crem, Minister of Security and the Interior of Belgium and former Belgian Minister of Defence, opened the conference with a keynote speech on the need for borders in a European Union (EU) without borders. He was introduced by Mr. Ludwig Van Der Veken, President of the Belgian Group & Secretary-General of the ISMLLW.

In his introduction, Mr. De Crem emphasised the value of the conference and the commitment of the ISMLLW to be a relevant partner in the field of military law and the law of war, even more perceptible since the *‘Leuven Manual on the International Law Applicable to Peace Operations’* was published in 2017.

Moving to the heart of his presentation, Mr. De Crem stated that, as a result of the changes and challenges of the last decades, the EU has to deal with thousands of people moving illegally within its borders. The massive influx of refugees has to be managed in a context in which many EU citizens feel that their standard of living has been dropping year after year because of the financial crisis. The radical, populist and nationalist parties have consequently been the biggest winners of the most recent EU elections.

The issue of migration to the EU has been high on the political agenda for some years now. Mr. De Crem submitted that both the causes of migration and the possible solutions are complex. Asylum and migration are mainly regulated by international and European sources, leaving little room for EU Member States to manoeuvre. The politically successful formula for telling citizens that the cake that they feel is getting smaller and smaller must be shared with more and more people has not yet been found.

“Quo Vadis Europe? What’s the plan?” asked Mr. De Crem. According to him, tackling the migration issue requires a phased approach: to deal with those outside our EU external borders; those within our external borders; and with the refugees moving within the EU or the Schengen Area.

On the first issue, Mr. De Crem emphasised the necessity to increase the budget for border controls. This would contribute to fighting human trafficking and developing high-quality accommodation for asylum seekers in safe countries outside the European borders. However, it is not easy to find countries that allow for such accommodation on their territory and respect human rights. Libya is clearly not one of these countries.

The Convention Relating to the Status of Refugees (Geneva, 1951) and the Convention determining the EU Member State responsible for examining an application for asylum lodged in one of the EU Member States (Dublin, 1990) define the contours within which EU Member States must shape their asylum policy. The transposition of the existing Dublin rules has been approved by the EU Parliament. Mr. De Crem underlined that a reform is crucial in order to push EU asylum policy in a different direction. That includes for instance processing asylum applications throughout the EU swiftly and uniformly, preventing asylum shopping and consolidating the responsibility of the first Member State entered of carrying out background checks upon the arrival of each asylum seeker in order to get the best possible idea of who is entering the EU. In fact, it is neither acceptable nor explainable that we do not know who is entering the EU and will move within the Schengen Area. The Schengen Area is a borderless zone in which people can move freely but it is not an area without borders in which we can adopt a passive attitude. We must cherish the freedom of movement of people but only of those whose identity and country of origin have clearly been established and who have a valid reason for staying there.

In this respect, Belgium can be proud of the results achieved by the Belgian Passenger Information Unit. Created in 2018, it screens data of airline passengers in case their name is linked to a case of terrorism or radicalism. In 2019, 54 men and women have already been intercepted. The intention is to extend its scope to the international railway and bus companies as well. Mr. De Crem strongly believes that this method is worth following. Belgium has already experienced what it means to be a transit country for refugees who want to flee to the United Kingdom, often adopting degrading practices—for instance, crossing the North Sea in small boats—that create an ideal context for human traffickers.

With the imminence of Brexit, these issues will of course become more complex: Belgium will become an external border of the EU, with all the consequences that this entails. Mr. De Crem is, however, optimistic. In recent months, Belgian agencies have prepared themselves for Brexit, acquiring new equipment and providing additional workforce. Finally, a position must be determined with the Belgian Coast Guard with regard to the phenomenon of refugees trying to cross to Britain using small boats. Belgium will discuss this vision, its methodology and the results achieved with the other EU Member States.

Mr. De Crem concluded by recognising that migration is a headache for politicians and policymakers all over the EU, opposing universal rights for all to the privileges for some. Competent politicians are

challenged to reconcile what is necessary with what is achievable, knowing that when the imbalance is too great, they run the risk of seeing more robust borders and higher walls being built within Europe and between Europeans. Under no circumstances do we need the latter. It does not seem like a good idea to turn 70 years of European integration into a period of disintegration. The removal of borders within the EU has given us 70 years of peace and economic progress. Choosing to rebuild borders and walls will not solve problems: it will create additional ones. The history of the European continent has shown that an increase in borders has repeatedly led to an increase in larger conflicts. The suggestion is to avoid that trap at all costs and look for solutions that are both necessary and achievable.

#### Panel 1: “Challenge of Evidence Gathering in Conflict Areas and Prosecution of Foreign Fighters”

The first panel of the third ‘Silent Leges Inter Arma?’ international conference dealt with the challenges encountered when gathering evidence in conflict areas and prosecuting foreign terrorist fighters. Three speakers with different backgrounds presented on this topic. Dr. Seyda Emek, adviser to the EU Counter-Terrorism Coordinator, focused on the judicial limits and opportunities of evidence gathering, as well as on the multinational initiatives led to improve the processes. Mr. Emmanuel Deisser, Director and Co-Founder of the Raidillon Associates SPRL—a company providing analytical and capacity development services on human rights, governance and security issues to national and international stakeholders—shared some insights of his personal experience with evidence gathering in Sinjar, Kurdistan Region of Iraq, from 2015 to 2017. Mrs. Ester Natus, who works as a federal magistrate at the counter-terrorism department of the Belgian Federal Prosecutor’s Office, then addressed the issue of battlefield evidence in Belgian criminal proceedings.

The Chairman, Mr. Hans Wanderstein, currently advises the Belgian Minister of Security and the Interior. He is a former Senior UN Police Planning Officer, member of the Rule of Law and Security Institutions Group (ROLSIG) and was involved in the UN Assistance Mission in Somalia (UNSOM). He commenced by saying that the topics of evidence gathering in conflict areas and of prosecution of foreign terrorist fighters are currently prominent on the international agenda. With the Syrian conflict coming to an end, a massive arrival of returnees is to be expected, and along with those comes the challenge of rendering justice in the best possible way by using the material collected on the battlefield to its fullest capacity.

The context of modern conflicts inherently brings about a multinational dimension in evidence gathering and prosecution of foreign terrorist fighters, requiring cooperation between various actors coming from different states. As it will be further elaborated on by the three speakers, the challenges of gathering battlefield evidence are multiple.

The first speaker, Dr. Seyda Emek, started her speech talking about the position of EU Counter-Terrorism Coordinator. She said it was established after the 2004 Madrid terror attacks with a view to coordinate the counter-terrorism policy of the EU in its different institutions as well as to support and evaluate the implementation of this policy.

Dr. Emek underlined that, since 2004, the terrorist threat has increased and became more diverse and complex. The role of the EU in counter-terrorism has evolved accordingly. Its role in the matter today is multiform and includes the tasks of developing common policies, assisting the Member States in their effort to counter terrorism, facilitating cross-border cooperation and engaging with third countries on this topic.

In reaction to the rising terrorist threat, the United Nations Security Council adopted Resolution 2178 (2014) of 21 September 2014. In that resolution, the Security Council notably imposed counter-

terrorism obligations upon Member States and provided a definition of ‘foreign terrorist fighters.’ The European Parliament and the Council also reacted by adopting Directive (EU) 2017/541 of 15 March 2017 on combating terrorism. This Directive is of particular importance because it requested EU Member States to identify, in their national law, some criminal offences as terrorist offences when they are carried out with a specific intention and to punish them accordingly. It also required EU Member States to take measures in order to criminalise some activities when those are conducted with a terrorist intention.

It is estimated that thirty thousand people travelled to Syria and Iraq in order to fight for the Islamic State (ISIS). Those foreign terrorist fighters should face justice in their state of origin for the crimes they are suspected of having committed abroad. In that view, collected enemy material is crucial although difficult to obtain and to ascertain as authentic.

Several multinational initiatives are ongoing in order to facilitate the collection of battlefield information and improve cooperation in that regard. First, Interpol currently collaborates with the EU Member States in order to promote a closer cooperation between those States and the United States of America (USA)—being the power that gathers most information and material on the ground—with the view of making battlefield information available to EU prosecutors and courts. The establishment by Europol of a ‘Terrorist Identification Taskforce’, meeting regularly and gathering prosecutors from the EU Member States, is a second example of multinational initiatives. Eurojust is also contributing to the common effort by drafting a memorandum on battlefield information and hosting the European judicial counter-terrorism register. The capacity building project for Iraqi military and officials managed by Interpol, in cooperation with the North Atlantic Treaty Organization (NATO), should also be mentioned. Finally, one last example is the draft proposals on electronic evidence suggested by the United States European Command (EUCOM).

Dr. Emek added that a workshop was organised in July 2019 that brought together professionals who deal with the use of battlefield information on a daily basis. During this workshop, several issues were highlighted. The first issue regards the availability (or, rather, the non-availability) of battlefield evidence—the so-called “collected enemy material.” Most EU Member States are not actively involved in military activities in conflict zones. Those states are unable to collect battlefield information themselves and therefore rely on evidence collected by other nations on the ground. The second issue has to do with authenticity and the difficulty encountered by prosecutors to prove the collected enemy material is real and reliable. The third and last issue regards the admissibility of the battlefield information in court. This problem is specifically apparent in terms of witness statements: some courts require that, for the statements to be valid, the witness must directly testify in front of the court.

The second speaker, Mr. Emmanuel Deisser, focused his presentation on a programme conducted in Sinjar, northern Iraq, from 2015 to 2017, that intended to understand and document the way ISIS prepares and wages war. World-renowned specialists in the field participated in the programme and were regularly deployed in the area. The programme allowed the specialists to highlight key-features of ISIS’s behaviour in combat as well as shortfalls in the Iraqi Government’s and the international community’s reaction to the threat. Hereafter is a summary of the conclusions of the experts’ analysis, as reported by Mr. Deisser.

The city of Sinjar was then occupied by the terrorists, who were able to act following a sophisticated procedure. They had the ability to deploy large units composed of men whose only goal was to die in battle, or to survive another day in order to pursue their fight. Their massive use of improvised explosive devices did not only indicate a capability to employ those weapons on the ground but also

demonstrated their capacity to make the weapons and to reuse them. ISIS also proved to have an extreme battle area control and the ability to move places quickly.

The Iraqi authorities, on the other hand, were heavily relying on the coalition to confront the terrorist group but it had to encounter a good amount of frustration due to the very high turnover of foreign personnel. The coalition, it showed, lacked understanding of the context in which the actions were taking place because it was especially difficult for them to gather reliable intelligence. Several reasons could explain this predicament. First, it was demonstrated that the best expertise is local, but the locals prefer to work with people they know and the foreign personnel did not stay long enough in the field as to sufficiently build up trust with the locals. In addition to this, the analysis by the experts revealed that the countries forming the coalition actually worked individually and were not keen on sharing the intelligence they could gather. Finally, capacity building of national and local authorities suffered from many technical problems.

Based on these observations, a few recommendations were issued by the specialists. In order to efficiently counter the terrorist threat in the area, there is a need to build a true multinational and long-term cooperation. The evidence must be handled as much as possible on the ground and in a way that will make it admissible for future judicial proceedings. This would help bring to an end the feeling of impunity that the terrorists have been using to their advantage. There is also a need to gather local law enforcement and military authorities around the table and to diminish the efficiency of the terrorist networks by targeting their finances.

The third speaker, Mrs. Ester Natus, introduced the issue stating that Belgium—with over 500 returnees from the conflict areas in Syria and Iraq—is one of the countries in Europe that is most affected by the return of foreign terrorist fighters. The Federal Prosecutor's Office, however, prosecutes all foreign terrorist fighters, whether they are returnees or not. If they are not physically present on the territory of Belgium, the foreign terrorist fighters will be convicted *in absentia*—with the possibility to oppose the judgement upon their return—and international arrest warrants will be issued.

Belgian criminal law does not criminalise the mere membership of a terrorist group. For a terrorist foreign fighter to be convicted, his or her participation in the activities of the group needs to be proven. Battlefield evidence is therefore critical for a good administration of justice since it will provide information on the exact role of the foreign terrorist fighter in the activities of the group and, thereby, contribute to the right conviction and sentence being imposed by the court.

Belgium heavily relies on the collaboration with partner nations better equipped to collect evidence on the battlefield. The USA, for example, deploy their troops together with the Federal Bureau of Investigation (FBI) and prosecutors in order to ensure that the military personnel are well advised with regard to evidence gathering. The material seized by the US military will then digitally transit through many different services before it reaches the Office of the Belgian Federal Prosecutor: it will first be transferred to the FBI; then, to the Belgian military intelligence services which will, in turn, transfer the information to the civil intelligence services; and, finally, it will reach the Federal Prosecutor's Office. It is important to note that Belgium will never possess the original items that were seized on the battlefield. Battlefield evidence is however essential to the prosecutors since it is the only link they have with the conflict zone. Two important documents were, for example, seized: the administrative register in which ISIS kept track of all the foreign fighters entering Iraq and Syria (mentioning names, phone numbers, date of entry and role within the terrorist group), and the ISIS payroll.

However, some difficulties have been encountered with the material. A first difficulty is due to the fact that armed forces tend to overclassify the information gathered. Yet, classified information cannot be used as evidence in court: the material must first be declassified and that takes time. A second issue is linked to the necessity to avoid scattering the information between different departments. As explained above, many different departments are interested in receiving the information but since the USA needs one and only one correspondent to send the material to, the information has to go through a long chain of services. Thirdly, raw material needs to be contextualised or it will not be considered as evidence in court. Military personnel are now more aware of that issue and try to enclose as much information as possible when gathering evidence. A fourth difficulty comes from Belgium's domestic legal framework, which does not allow for DNA to be shared automatically when detected by USA laboratories. Rather, the Belgian authorities have to request that information on a case-by-case basis. Finally, and sometimes as a result of the difficulties just cited, the enemy collected material often reaches the Federal Prosecutor's Office with delay, sometimes even after a conviction already took place.

### Visit to Flanders Fields

In the afternoon of the first day of the conference, the participants were brought to Passendale, in the province of West Flanders. The village of Passendale became infamous for being the theatre of the notorious Battle of Passchendaele, also known as the Third Battle of Ypres, during World War I. In the course of that hundred-day long battle, more than half a million men lost their lives for a territorial gain of only eight kilometres. Our guide for the afternoon, Mr. Franky Bostyn, Deputy Director-General of the Belgian War Heritage Institute, then gave the participants a tour of the Tyne Cot Cemetery, the largest military cemetery of the Commonwealth War Graves Commission on the continent. The visit continued with a walking tour in Ypres. A standing dinner was then offered at the Brasserie Kazematten, inside the city's ramparts, before attending the ceremony of the Last Post at the Menin Gate. Prior to the standing dinner, a speech was given by Mr. Sven Devroe, Senior Chemical Demilitarisation Officer at the Organisation for the Prohibition of Chemical Weapons.

## **2. Thursday 19 September 2019**

### Panel 2: "Recent Developments of Human Rights Jurisprudence in relation to the Armed Forces"

The second panel of the conference dealt with the most recent developments in the human rights case law in relation to armed forces. This session was chaired by Mr. Emmanuel Jacob, President of the European Organisation of Military Associations (EUROMIL). It included one keynote speech by Colonel Chris De Cock, Legal Advisor to the Director of the European External Action Service – Military Planning and Conduct Capability, and four further presentations. The first speaker after the keynote speech was Prof. Dr. Birgitta Nyström, Professor of Labour Law at the University of Lund (Sweden) and former member of the European Committee of Social Rights. The second one was Ms. Jonna Naumanen, Human Rights Officer at the Organization for Security and Co-operation in Europe (OSCE) Office for Democratic Institutions and Human Rights (ODIHR). The next speaker was Mr. Johan Van De Walle, Lieutenant Colonel in the Belgian Defence and Integrity Coordinator for the Armed Forces. Finally, Dr. Lauren Kierans, barrister-at-Law in Ireland and lecturer in 'Whistleblowing Law and Practice' at the University College Dublin closed the panel.

First, Mr. Jacob gave a brief introduction on how armed forces are subject to new human rights standards that affect its members and people deployed in operations, underlining how this creates a debate between those that assert that the new challenges posed by human rights law undermine the roles of armed forces and those that emphasise the importance of having freedoms and rights to be

respected by the military and within the military. Then, Mr. Jacob welcomed and introduced the speakers.

As first speaker, Colonel De Cock confronted the question of whether human rights and the conduct of military operations are compatible. His presentation revolved around two main topics: first, the responsibility of States in assisting, training, monitoring, mentoring and equipping armed groups and the implications for States if these groups violate human rights obligations; second, the interplay between the law of armed conflict (LOAC) and international human rights law (IHRL) in view of the European Court of Human Rights (ECtHR) case law.

Concerning the first topic, Colonel De Cock started by emphasising the need to distinguish the attribution of conduct by a State's own armed forces, regulated by art. 4 of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), and by other groups directed or controlled by a State, regulated by art. 8 ARSIWA. The attribution of the latter must be proven and the threshold of control of such attribution must be determined. However, Colonel De Cock proved that the issue of attribution is not an easy one. The case law of different international courts and tribunals have in fact pointed in different directions.

First and foremost, the International Court of Justice (ICJ) *Nicaragua* case stated that the "effective control" criterion must be adopted to attribute to a State the alleged violations committed by other groups. Therefore, the ICJ case seems to have aligned itself to the ARSIWA. The following ICJ *Genocide* case also confirmed this approach.

However, in its notorious *Tadić* case, the International Criminal Tribunal for the Former Yugoslavia (ICTY) introduced a new criterion, developing the "overall control" test. Similarly, the International Criminal Court case law recognised that non-international armed conflicts (NIACs) can be internationalised if there is a state's "overall control" on armed groups that are a party in the conflict.

The ECtHR had also to confront the issue with regard to extraterritorial jurisdiction in order to answer the following question: when does the European Convention on Human Rights (ECHR) apply outside the borders of the Council of Europe? The *Cyprus v. Turkey* case—the first case dealing with the issue—had developed a third test, based on the "effective overall control" criterion. Moreover, other tests have been adopted later on by the ECtHR: the test of the "effective control and decisive influence" in the *Catan* case and the "effective control" only in the *Chiragov* case. These tests have been developed and chosen on a case-by-case basis.

At the end of this overview, Colonel De Cock underlined that multiple tests have been developed, creating legal uncertainty on the test to apply and making unclear their real scope. Not even within the ECtHR is there consensus on the test to apply, making apparent a serious lack of consistency in the case law regarding the issue of attribution.

In conclusion of this first part, Colonel De Cock claimed the necessity of envisaging minimum standards based on which States can be held responsible: it is important to make these criteria clear to avoid to put too much responsibility on States for acts committed by armed groups. Colonel De Cock underlined also the need for States to be aware of their responsibilities and consequences as well as the legal and political issues involved. Initiatives to clarify the criteria of attribution are being undertaken by the International Committee of the Red Cross.

Concerning the second topic, Colonel De Cock stressed, from the very beginning, the different nature of IHRL and LOAC in terms of purpose and scope. IHRL has been developed to safeguard individuals within the jurisdiction of States. It is governed by the principles of strict proportionality and absolute

necessity. Conversely, LOAC safeguards civilians and other protected persons in armed conflicts and regulates these conflicts. It is governed by the principles of proportionality and military necessity. Although IHRL continues to apply in times of armed conflict (possibly with some derogations of non-absolute rights), LOAC is in these cases the *lex specialis*.

Colonel De Cock expressed the view that the ECtHR, in different cases concerning Chechnya (*Isayeva, Kerimova, Esmukhambetov*), missed an opportunity to apply the right legal regime. In fact, the Court ignored the presence in Chechnya of a NIAC and applied art. 2 of the ECHR concerning the right to life, even though IHRL was in those cases the *lex generalis*. Although Russia would, in any case, have been considered to violate the law (of IHRL or LOAC), the sole application of IHRL, completely ignoring LOAC, is in this case unacceptable from a legal perspective.

Thus, Colonel De Cock concluded that the relationship between IHRL and LOAC is still not clear. Although the issue is still debated, a trend attempting to humanise armed conflicts can be recognised in the activities not only of the ECtHR, but also of different NGOs, such as Amnesty International and Human Rights Watch. However, Colonel De Cock insisted on the necessity to find a balance between human rights and military necessities.

The second speaker, Prof. Dr. Nyström, focused her presentation on the European Social Charter and the trade union rights in the military. First, an introduction to the European Social Charter and its monitoring system were given. To sum up, the Charter is a Council of Europe (CoE) living instrument adopted in 1961 and revised in 1996 that deals mainly with social rights. Since States can decide to ratify only some articles of the Charter, it is a complex system.

Its monitoring body is the European Commission for Social Rights (the “Commission”): a semi-judicial body based in Strasbourg and composed by 15 independent experts that make a legal assessment of the Charter. Two complementary ways of monitoring the Charter are currently in place: first, the ordinary reporting system, according to which States that have accepted the Charter have to report to the CoE on how they implemented its provisions; second, the collective complaint procedure, which has been accepted so far by 15 States only and can be initiated against States for non-compliance with rules they accepted in the Charter. Trade unions, employers’ organisations and different kind of non-governmental organisations can make use of the procedure. There have been around 150 cases since its creation. The number of cases increased rapidly in the last years. The CoE Committee of Ministers makes recommendations to States based on the decision of the Commission, which has no power of its own.

After this introduction, Prof. Dr. Nyström shifted to the heart of the issue: 10% of these collective complaints dealt with by the Commission relate to trade union rights of policemen or military personnel.

According to art. 5 of the European Social Charter, all workers and employers have the right to organise themselves and national law shall not impair or be applied to impair this freedom. However, the extent to which this applies to the police and members of the armed forces shall be determined by national law. Moreover, art. 6 grants the right to bargain collectively to all workers and employers. States shall promote joint consultation between the two, and, when necessary, promote machinery for voluntary negotiations with a view to collective agreements, reconciliation and so forth. The same provision also recognises the right to strike for workers and employers. Each State may regulate the exercise of the right to strike by law, provided that restrictions can be justified under art. G. Art. G, which regulates restrictions in general, states that the rights and principles in the Charter shall not be subject to restriction, except for when they are prescribed by law, necessary in a democratic society



for the protection of the rights and freedoms of others or for the protection of the public interest, national security, public health or morals.

Three collective complaints were then described by Prof. Dr. Nyström. First, complaint 83/2012 (*European Confederation of Police v. Ireland*), in which the following violations were recognised: violation of art. 5, given the prohibition for police representative associations to join national employees' organisations; violation of art. 6 (right to bargain) since no means to effectively represent their members were provided to the police and both the legislation and practice failed to ensure sufficient access of police representative associations to pay agreement discussions; violation of art. 6 (right to strike), given that the absolute prohibition on the right to strike for members of the police force is not proportionate to the legitimate aim pursued and, accordingly, is not necessary in a democratic society.

Second, complaint 112/2014 (*EUROMIL v. Ireland*), in which the following violations were recognised: violation of art. 5, given the prohibition for military representative associations to join national employees' organisations; violation of art. 6 (right to bargain) given the fact that consultation of military representative associations in a parallel process to the public service agreements, without direct involvement in the negotiations, fails to ensure sufficient access of military representative associations to pay agreement discussions. However, no violation of art. 6 (right to strike) was found since, concerning the armed forces, the restriction pursues a legitimate aim in that it seeks to maintain public order, national security and rights and freedom of others by ensuring that the armed forces remain fully operational at all times. The statutory restriction is proportionate to the legitimate aim pursued and can be regarded as necessary in a democratic society.

Third, complaint 140/2016 (*CGIL v. Italy*), in which the following violations were recognised: violation of art. 5, given that the establishment of trade unions for the *Guardia di Finanza* (a police force subject to the code of military organisation being competent in economic and financial matters) is subject to the consent of the Minister of Defence and no remedies against arbitrary refusals are provided for; the Military Code restricts the right to organise in a manner that is not necessary in a democratic society for the protection of national security within the meaning of art. G; violation of art. 6 (right to bargain) since the procedure does not present the characteristics of a real negotiation between two parties, but rather a mere consultation, and representative bodies of employees are not provided with means to effectively negotiate terms and conditions of employment, including remuneration; violation of art. 6 (right to strike) given that the abolition of the right to strike by law affects one of the essential elements of the right to collective bargaining; although States have a wide margin of appreciation on how they restrict the right to strike of the armed forces, restriction of fundamental rights must be interpreted narrowly and comply with art. G; the absolute prohibition of the right to strike imposed on members of the *Guardia di finanza* is not proportionate to the legitimate aim pursued and, therefore, not necessary in a democratic society.

In conclusion, Prof. Dr. Nyström underlined that developments concerning trade union rights are occurring not only for police forces but also for militaries, thanks to the monitoring activity carried out by the European Committee of Social Rights on the European Social Charter.

The third speaker, Ms. Naumanen, first presented the OSCE Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel. The Handbook deals with diverse rights: civil and political rights; the right to equal opportunities and non-discrimination; procedural rights (for instance, military justice and oversight mechanisms) and rights related to military life (for instance, working and living conditions). A new version of the Handbook will soon be launched.

Second, she presented the OSCE Code of Conduct on Politico-Military Aspects of Security. The Code of Conduct deals with participating States' armed forces at both the domestic and international level, in peacetime and in war. Some of the relevant provisions are the following: the recruitment and conscription practices need to be consistent with human rights obligations; domestic legislation shall reflect the human rights of members of the armed forces; participating States will ensure the enjoyment and exercise of human rights by members of the armed forces, including appropriate legal and administrative procedures to protect their rights; the armed forces shall be politically neutral.

Third, Ms. Naumanen mentioned the CoE Council of Ministers Recommendation CM/Rec (2010) 4, according to which human rights of members of armed forces should be respected in national policy and legislation. It follows the so-called "citizens in uniform approach" inaugurated by the ECtHR in *Engel v. The Netherlands*, according to which the ECHR applies in principle to members of the armed forces as well; however, the ECtHR must bear in mind the particular characteristics of military life and its effects on the situation of individual members of the armed forces. It covers civil, political, economic and civil rights as well as enforcement, dissemination and training. Concerning political participation, the Recommendation states that any restrictions on the electoral rights of members of the armed forces which are no longer necessary and proportionate in pursuit of a legitimate aim should be removed. Member States may impose restrictions on membership in the armed forces during a member's candidacy or, following the elections, during the term of office. The separation of requirements that may be imposed deals with the eligibility to stand for election to parliament ("passive" aspect) and the eligibility to vote ("active" aspect). The landscape is however changing: previously, a wider margin of appreciation of restrictions justified by national security were allowed. The recent case law has lessened the possibility of restrictions.

The OSCE Office for Democratic Institutions and Human Rights sent a questionnaire to States on the matter of restrictions. However, not all States replied. Among those that replied, nine States reported applying restrictions on service in the armed forces for individuals holding extremist views that, if enacted, would undermine the established democratic or constitutional order. 8 States recognise the right to join a political party in their legislation, while 16 do not. The right to stand for election is recognised by 14 States, while 7 do not recognise it. Freedom of association is recognised by 14 States, while 6 do not recognise it.

Subsequently, some examples have been provided by Ms. Naumanen on restrictions. For example, in Romania, service personnel may not join or actively support political parties, organisations and candidates and they are not allowed to stand for local, parliamentary or presidential elections. In the UK, personnel are prohibited from holding political office but not from joining a political party. In Germany, they are not permitted to publicly advocate support for a political party but may otherwise join them and participate in political party events out of uniform.

Concerning military associations, variations exist with regard to the extent to which they are autonomous (for example, they are financed by membership fees in Germany or by the ministry of defence budget in Poland); their links with external professional unions or federations (for instance, in Sweden and The Netherlands); and whether they are legally permitted to engage in collective action (for instance, most of the State Parties prohibit strike actions).

In the end, some recent case law was mentioned, namely *Matelly v. France* and *ADEFDROMIL v. France*, which recognised that the right to organise in the armed forces can be restricted but not completely suppressed, and the already mentioned *EUROMIL v. Ireland*.

The fourth presentation, given by Lieutenant Colonel Van De Walle, focused on integrity at Belgian Defence, and more specifically on hazing and bullying, namely when a service member causes

another member to be exposed to cruel, abusive, humiliating, oppressive, demeaning or harmful activities, including also verbal or psychological actions designed to cause harm (for instance, forced activities for new recruits to “prove” their worth to join, enduring hardships, consuming alcohol or other substances, humiliation, isolation, beatings and illegal activities as well). In particular, he presented how Belgian Defence plans to deal with hazing and bullying, how and why integrity is currently implemented, the integrity policy plan and the way ahead.

In introducing the importance of the issue, Lieutenant Colonel Van De Walle gave some data about the occurrence of bullying and harassment at Belgian Defence: 114 cases have been reported in 2018, while only 63 in 2019 so far. Generally speaking, the figures have dropped, and this shows more awareness of the topic. In the future, an additional category regarding hazing will be added to the statistics.

Lieutenant Colonel Van De Walle gave an overview of who handles these cases. For instance, reports of bullying and hazing practices and support for victims are handled by the Directorate-General of Health and Well-Being or by the Complaint Service at the Inspectorate General Level; educational initiatives are dealt with within the Royal Military Academy and the Royal School for Non-Commissioned Officers while corrective measures are dealt with within the hierarchy through disciplinary measures. From January 2020, a new professional evaluation system that assesses the ethical behaviour of each member of the Belgian Armed Forces will be in place. People might be asked to leave the army if their behaviour has been reported as unethical on several occasions. Moreover, more focus on preventive measures will be given.

The focus on integrity in the armed forces is necessary to set examples: each military and civilian member of the Belgian Armed Forces is expected to act and behave in an ethical manner in all circumstances and in conformity with the norms and values accepted in the society, not only when carrying out its mission, but also while not “on duty”, both in Belgian soil and abroad. For example, Belgian media always mentions that a person belongs to the armed forces when any type of illegal conduct is reported.

The Belgian Armed Forces are applying legislation that grants military and civilian personnel direct access to a person of confidence for integrity matters, allowing them to report (whistleblowing) a suspected integrity breach. The internal control system is crucial in this respect. The Federal Internal Audit service is the new “watchdog” looking at the effectivity of the whistleblowing procedure for suspected integrity breaches.

A comprehensive integrity policy will be implemented from 2019 onward. The Belgian Armed Forces have chosen an integrated approach towards full implementation of all aspects related to integrity, which is visualised in a clear model. The policy is explained by means of the Policy Statement and Policy Plan for Integrity 2019–2022, which sets detailed action plans based on specific yearly goals. These policy objectives are: to ensure integrity within the armed forces as a whole and of each military or civilian member, in particular by means of enhanced promotion of the knowledge and application of all values of the Belgian Armed Forces; to deter non-ethical behaviours and correct them in an appropriate manner by means of structural and/or individual measures; and to help personnel in handling ethical dilemmas. The integrated approach has, at its centre, an integrity coordinator and integrity framework for organisation, guidance and assurance. Around it, the policy is planned by the Chief of Defence (CHOD) (plan phase) and the principles by the Directorate-General of Human Resources (DGHR); prevention is dealt with by each Assistant Chief of Staff (ACOS) and Director General (DG); leadership and discipline to impose integrity are dealt with by the DGHR; integrity breaches are handled by the IG and its external component (“do” phase); and monitoring integrity is conducted by the Integrity Coordinator and Framework (“check phase”).

At the moment, the new Policy Statements on Integrity is part of the Policy Handbook CHOD; integrity actors are in place and have a mandate to perform their tasks; and the website “Integrity@Defence” is operational and contains all relevant information. However, further goals are set for the future, for instance, to provide a referential framework including supporting regulations to provide daily guidance on ethical behaviour; to increase awareness of all personnel about the core values at Belgian defence to apply them on a daily basis; to provide a list of “vulnerable” functions, positions and activities with an increased risk towards integrity breaches and conflicts of interests and determine all the necessary measures to increase resistance to these breaches; to provide better education, training and coaching of personnel to deal with integrity issues and ethical dilemmas.

The last speaker, Dr. Lauren Kierans, focused her presentation on why we need people that blow the whistle in the armed forces and why we need to protect them.

“Whistleblowing” can be defined as the disclosure by organisation members, either former or current, of illegal, immoral or illegitimate practices under the control of their employer to persons or organisations able to take action. Dr. Kierans stated that workers are the best to blow the whistle since they have access to much information and they are normally the first ones to recognise the breaches. Their role has an important public interest dimension. Research underpins their important role, particularly in cases of corruption, fraud and similar ones: 54% of the conduct reported by whistleblowers has stopped. Especially early disclosure is fundamental, safeguarding the rule of law. However, workers are concerned about being identified within their workplaces. Moreover, some organisations also discourage workers to blow the whistle. Thus, whistleblowers can be confronted with personal and professional repercussions, for instance, both physical and psychological harassment, suspensions, no promotions and so forth. The rate of suffering of whistleblowers fluctuates, but it is definitely accentuated in small groups.

Both at the international and national level, actions have been taken to protect them. At the national level, different jurisdictions adopt different approaches. For example, while in the UK public interest in blowing the whistle needs to be demonstrated, this is not the case in Ireland. Within the EU, only 10% of the Member States have comprehensive whistleblower legislation. For instance, the UK whistleblowing legislation has acted as a model, but it does not apply to armed forces. In most of the other jurisdictions, the approach is fragmented. At the European level, a directive was adopted in 2019. However, it does not deal with security disclosure, which remains up to the States.

The armed forces are a particular case because of the hierarchical structure that characterises them. Generally speaking, there is a duty to obey lawful orders and, in case of refusal, insubordination can be tried before martial courts. In some jurisdictions, there is however also a duty to disobey unlawful orders, for instance in Italy and Finland, but, for example, not in the UK. Because of the hierarchical structure, it is more likely that a senior or a former official raises concerns. While art. 10 of the ECHR protects freedom of expression, it also envisages a restriction at para. 2 for national security. This provision applies to armed forces but a “citizens in uniform” approach needs to be adopted: some limitations are legitimate because the individual has accepted to surrender some of his/her rights by joining the armed forces. Hence, art. 14 dealing with prohibitions of discrimination is also secured albeit with limitations.

While States have, generally speaking, a wide margin of appreciation about whistleblowing legislation, some requirements need to be met, for instance, good faith, reasonable grounds to believe that the information is true, interest in disclosure, a detriment has been suffered. Australia and Ireland, for example, introduced in 2013 whistleblowing legislation covering the armed forces. However, Ireland limits the recipients to whom the disclosure can be made, namely, employers and ministries.

The public domain can be a recipient only if some requirements are met, for instance, in case the whistleblower does not seek a personal gain. Ireland's legislation can definitely be considered as a model in this respect.

After the last speaker, Mr. Emmanuel Jacob encouraged the implementation of human rights in the military forces: military personnel are to be considered as citizens in uniform so their rights must be respected. In this manner, armed forces might also become more attractive for potential persons interested in joining the armed forces.

### Panel 3: "The Use of Propaganda and Other Methods of Influencing Other Nations"

The third panel of the conference was dedicated to the use of propaganda and other methods of influencing other nations. It was chaired by Dr. William H. Boothby, former Deputy Director of Legal Services for the Royal Air Force and Associate Fellow of the Geneva Centre for Security Policy. The chair opened the panel by introducing a few thoughts about the body of law governing influence operations. IHRL and domestic law apply to military operations that are not necessarily harmful. Thus, this body of law also governs influence operations. Since propaganda and influence operations are becoming more and more important, it is interesting to consider which other bodies of law would apply in that context. Much of the law of targeting, for example, concerns attacks, which imply an act of violence. However, certain rules do not presuppose the existence of an attack. For instance, arts. 48, 51§1 and 57§1 of the Additional Protocol I to the Geneva Conventions (AP I) mention military operations, but how far does this definition go? The three provisions require harm, but does this mean that military operations without harm fall outside the scope of the law of targeting? On the other hand, why should military operations without harm be carried out in conformity with the targeting rules? The chair hoped his panel would be able to provide some answers to these questions.

After the introduction, the chair introduced the first speaker, Mr. Jean-François Mayence, in charge of the Legal Unit 'International Relations' at the Federal Office for Science Policy, who discussed the topic of legal aspects of the use of outer space for propaganda purposes.

For the purposes of his presentation, Mr. Mayence broadly defined 'outer space law' as including the regulations for space activities (for instance, launching of rockets and satellites) and the law applicable to the data that is generated, transmitted to and from outer space.

Mr. Mayence identified a core principle, around which five treaties under UN 67-79 were built, but which poses an issue for propaganda in outer space: every country is free to exploit outer space, even though no country can exercise national jurisdiction over outer space. The issue for propaganda is that to acquire or broadcast information, a State does not need to ask the permission of other States, not even for taking pictures of other States' territories.

After a short historical summary of satellite broadcasting technology, starting in the early 1920's with the first international commercial radio broadcasting and ending in 2003 with the launch of eBird, the first "internet-satellite", Mr. Mayence came to the core of the presentation, namely the legal framework that applies to the use of outer space for propaganda purposes.

Mr. Mayence immediately acknowledged that propaganda is not explicitly addressed by space law. However, there are references in outer space law that might be useful for propaganda. He continued by dividing the relevance of space technology in two main groups: the first group contains the acquisition of (unauthorised) information, such as Earth's observation, and what the data can be used for; the second group regards the broadcasting of (unauthorised) information, such as the

identification of a target and the diffusion of information for specific purposes (for instance, direct radio, TV, Internet).

Concerning the information broadcasting, two provisions stand out in the 1967 Treaty on the Principles governing the Activities of States in the Exploration and the Use of Outer Space, including the Moon and Other Celestial Bodies. The first provision concerns the international responsibility of States for national governmental and non-governmental activities. States are responsible for the non-compliance with international law, even when violations are committed by non-governmental entities under the State's jurisdiction. This is a heavy responsibility for States. The second provision encompasses an obligation to prevent potentially harmful interferences with other States' activities, which are broader than technical interferences ("jamming"). An important historical note to the 1967 Outer Space Treaty is that the Union of Soviet Socialist Republics attempted to include a prohibition on the use of outer space for propagating war, national or racial hatred, or enmity between nations. However, the proposal was rejected by the USA.

Not only the 1967 Outer Space Treaty has relevant provisions, but also the 1936 International Convention concerning the Use of Broadcasting in the Cause of Peace prohibits any transmission which would be regarded as an incentive to act against the internal order and security of a party, to war, or which would feature statements of incorrectness—the so-called fake news, which is a concept that, although not exactly the same as propaganda, is close to it.

The 1972 United Nations Educational, Scientific and Cultural Organization (UNESCO) Declaration of Guiding Principles on the Use of Satellite Broadcasting for the Free Flow of Information, the Spread of Education and Greater Cultural Exchanges dictates that '*[s]atellite broadcasting should be apolitical and conducted with due regard for the rights of individual persons and non-governmental entities, as recognized by States and international law.*'

Lastly, Mr. Mayence discussed the 1974 Convention relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite and the 1978 Convention on the Transfer and Use of Data of Remote Sensing of the Earth from Outer Space. The latter, which concerns former Soviet region countries and is still in force, encompasses a commitment to refrain from disclosing 50 meters resolution images of a party's territory, or to use them in any detrimental way. However, it is unsure whether this Convention is still applied.

Regarding information acquisition, a couple of United Nations General Assembly (UNGA) resolutions provide some relevant references for propaganda. For example, the purpose of the 1982 UNGA Resolution 37/92 on Principles governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting is achieving, through international cooperation, a right balance between freedom of speech and right to information on the one hand, and national (political and cultural) sovereignty on the other hand. Secondly, the 1986 UNGA Resolution 41/65 on Principles relating to Remote Sensing of the Earth from Outer Space states that remote sensing activities should be conducted in compliance with international law, the United Nations (UN) Charter and outer space treaties.

A famous and recent example of issues regarding information acquisition are the military sites that were shown on Google Maps. In Belgium, a new ministerial decree protects military sites on Google Maps, since the Google Maps images of such sites could also serve propaganda purposes. However, it is necessary to strike a balance between protecting information and not attracting the attention of people on the sites. In addition to providing intelligence to terrorists, uncontrolled medium or high resolution data may serve as support to propaganda, but censorship might even worsen the situation by allowing irrational and conspiracy theories (as it happened, for example, for the Black Knight

satellite in 1998) or by drawing unwanted attention to specific areas. Interpretation of images may be misleading in certain cases and may serve as a hoax. Google Maps and similar companies therefore pose new challenges for State security and strategic interests.

Mr. Mayence concluded that several international legal instruments of space law provide for a general prevention or prohibition on the use of space systems for harmful propaganda or subversive purposes, but have remained theoretical so far. Propaganda in itself, however, is not regulated in treaties. The 'New Space' provides the opportunity for a growing number of stakeholders throughout the world to launch, operate and exploit their own space systems with multiple applications. However, the new space and the new actors make it very difficult to regulate. Mr. Mayence therefore concluded that self-regulation by global operators (above all, broadcasting companies, social networks and geodata providers such as Google) might be the most effective way so far to regulate information in an environment where States seem reluctant (or unable) to intervene through international cooperation.

The second speaker, Senior Captain Marc Vanhalle, provided the audience with an operational insight on the use of propaganda and other methods of influencing other nations through his experience in Information Operations (having been deployed at NATO, EU and UN exercises and operations). His focus, however, was on NATO and based on his last experience in the Enhanced Forward Presence (eFP) operation.

The speaker explained that the definition of propaganda for his presentation would be: "the dissemination of deliberately false information, especially when supplied by a government or its agent to a foreign power or to the media, with the intention of influencing the policies or opinions of those who receive it."

Senior Captain Vanhalle proved the relevance of this topic by asking two questions. Is Belgium at risk? Yes, as capital of the EU and home to NATO headquarters, Belgium is an important target. There are also known cases of Russian influence after the terrorist attacks of 22 March 2016 and during the discussions on the UN migration pact. Are military operations at risk? Yes: not so long ago there was, for example, fake news blaming Belgium for collateral damage and chemical attacks in Syria. The reason why military operations are at risk is because of the "fog of war": nobody in the field, not even the commanders, has all information available, so you lose time to counter the fake news. International frameworks such as NATO have identified this threat. Mostly the Baltic countries are particularly active in this area (see, for example, the NATO Strategic Communications Centre of Excellence in Latvia and the NATO Cooperative Cyber Defence Centre of Excellence in Estonia).

Senior Captain Vanhalle then focused on the capabilities, tools and techniques of *PSYOPS* (Psychological Operations). *PSYOPS* are planned activities that use methods of communication and other means directed to approved audiences in order to influence perceptions, attitudes and behaviours, affecting the achievement of political and military objectives. As the speaker jokingly said—if the enemy does it, it is called propaganda; if we do it, we call it *PSYOPS*. The speaker continued to list some of the most important *PSYOPS* that are used in practice.

The first one is the Key Leader Engagement (KLE), namely the engagement of an important person—often a (senior) leader of the friendly force—that is used to influence key decision-makers and leaders in the assigned area of operations. This is a good way to reach target audiences that you otherwise would not reach and prevent problems before they arise.

The second possibility is the Presence (physical presence of a military force), Posture (how the military members act) and Profile (use of military commanders to transmit key messages). Deploying

even limited capability to the right place at the right time can add substantial credibility to messages being delivered through other channels and provide a major contribution to deterrence.

The last ones, which also send the strongest message, are the kinetic effects and physical destruction, which have a significant psychological impact. Attacks on Command and Control systems and physical destruction will affect the understanding of an adversary and its ability to apply force. For this reason, *PSYOPS* will always be part of the targeting board.

Lastly, Senior Captain Vanhalle shared his experience in the NATO operation Enhanced Forward Presence in Estonia (eFP-EST). The objectives of the operation were to reassure and deter; to show a credible and capable force; and to create a positive perception of the Estonian population.

Even before the Belgian units were deployed, Russian propaganda had already started. Therefore, Belgium had to carry out a counter-propaganda campaign on social media before being deployed. On arrival, Belgium implemented traditional media as well: the arrival of the Belgian forces during a snowstorm (“code yellow”) created prime time news on the local tv and in local newspapers, for example, which increased the credibility of the Belgian Armed Forces.

To create deterrence, Belgium focused on multinational military training activities and on specific military capacities (weapon systems), but the most popular perception came from the IED (Improvised Explosive Device) dogs, which were often featured in the media. Also Very Important Person visits were planned (visits of the Prime Minister and the King of Belgium), which were positively received and reached most of the objectives. Finally, there were also some outreach and community events.

For an operation to succeed, it is equally essential to avoid negative propaganda and attention. Misbehaving troops and accidents occur in every operation. It is important to keep it contained and to communicate openly when it happens. In Latvia, for example, the Estonians took the blame for Belgium for a collision between a fuel truck and an ammunition truck.

To conclude, the speaker shared some issues he encountered in practice. First of all, Belgium is always part of a multinational operation, but every nation has its national interest, which does not always align with the NATO objectives. Secondly, Senior Captain Vanhalle also talked about his experience with rigid chains of command. A higher rank is often an older person, and in his experience, they are generally less adaptive to new capabilities and want to keep the approval authority with themselves, even though time is often crucial. The third issue he encountered was that we have defensive capability to counter information, but there is no political will to use Info Ops (Information Operations) as an offensive capability. Finally, it is difficult to prove that the effect was created by the Info Ops and the direct link between the operations and the effect.

Last but not least, Colonel Mr. Drs. Bart van den Bosch, from the Faculty of Military Sciences of the Netherlands Defence Academy, presented on the applicability of LOAC to military operations below the threshold of attack, such as influencing operations. Col. van den Bosch acknowledged that LOAC has always focused on attacks, which are acts of violence against the adversary, whether in offence or in defence (art. 49 (1) AP I). However, the speaker argued that LOAC covers more than attacks.

It is generally accepted that there are military operations related to hostilities that are not attacks, such as jamming, reconnaissance, espionage, electronic warfare, information operations and propaganda, while attacks are active combat actions, physically engaging and harming the opponent. His statement is that LOAC applies both to attacks and military operations related to hostilities.



First, the speaker looked at the purpose of LOAC, the legal regime for the conduct of hostilities, which regulates and limits methods and means of hostilities and protects certain categories of persons and objects. Thus, in this logic, military operations related to hostilities should be under LOAC. He also based his reasoning on art. 35 AP I, which states that the right to choose methods or means of warfare is not unlimited. If you use military operations as a method of warfare, you are somehow bound by LOAC, or else you would have military means and methods which are not regulated by LOAC.

Military operations must nonetheless be related to hostilities in order to be ruled by LOAC. Warfare is a bigger picture than only military means: diplomacy, information, economics, finance, law enforcement. These are not governed by LOAC. A future conflict will most likely not be exclusively a military clash, but will be a combination of traditional and modern means, lethal and non-lethal, so it is important to define when and how LOAC applies also beyond attacks.

The speaker therefore continued clarifying some concepts. Military operations related to hostilities are any action performed within the context of hostilities by military personnel and/or military materiel to reach a (relative) military advantage over the opponent. A military advantage can be a negative effect on the opponent or a positive effect on your own side. If this criterion is fulfilled, the action is related to the hostilities. With this definition, the speaker is able to define the threshold of attack, namely military operations performed within the context of hostilities aimed at, or with foreseeable consequences of, physical injury, death to persons, physical damage or destruction of objects or a combination thereof.

Col. van den Bosch then continued to look at which LOAC rules are applicable below the threshold. It is clear to him that the attack rules do not apply, such as the prohibition on attacking civilians, civilian objects, medical personnel, buildings and transportation. Most LOAC rules are framed in wording around attacks and do not regulate operations below attack. However, some rules in AP I refer to military operations, for example, art. 35 AP I, that states that means and methods of warfare are not limited.

In cases not covered by international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established customs, from the principles of humanity and the dictates of public conscience (Martens clause).

Col. van den Bosch further argued that the principles of LOAC should be applied and gave a quick overview to which extent they should be applied. First of all, the principle of military necessity is applicable. If there is no military advantage to be gained, there is no reason to carry out the operation. Also the principle of humanity should be applied, as it is the basis of and incorporated throughout LOAC. Concerning the principle of distinction, Col. van den Bosch made a distinction between persons and objects. Persons have a general protection against the dangers arising from military operations (art. 51(1), AP I) and against attacks (art. 51(2), AP I). For objects, there is only a protection against attacks (art. 52(1), AP I). Next, the speaker discussed proportionality. As a principle, proportionality should be applied, so the negative effects on humanity have to be balanced against the military advantage. However, the proportionality rule from arts. 51(5) and 57(2) AP I do not apply since they refer to damage. The last principle the speaker discussed was chivalry/honour, which he stated should be applied as a guide, but not as a legal obligation.

The speaker concluded that military operations, as long as they are related to hostilities—even if they do not have physical consequences and are not attacks, but are used as means and methods of warfare, have to be in compliance with the principles of LOAC (following from art. 35, AP I), but not the attack rules.

Finally, Col. van den Bosch elaborated on how this works in practice and formulated two important applications of his findings. The first application is the proportionality “equation” for operations below the threshold of attack. The negative non-physical effects of a military operation for the civilian population, individual civilians, civilian objects or a combination thereof may not be out of proportion with the appreciable military advantage anticipated of that military operation. However, the bar for the military advantage is lower than for attacks. It does not have to be concrete and direct but it has to be appreciable. The proportionality equation can be seen as an analogy with the proportionality rule, but with the difference that the balance is on a lower level. The impact is lower, so there is only a lower military advantage necessary.

The second application is the “precautionary measures below attacks”, which is also an analogy to precaution in attacks. Art. 57 AP I covers attacks but the term “everything feasible” is used in the same sense. During planning, preparation and execution of a military operation below the threshold of attack, “everything feasible” should be done to exclude that the operation has, will or could have physical consequences. Chivalry and honour will assist the “reasonable commander” to determine what is “out of proportion” and “everything feasible.” If these two rules are applied, a middle ground can be found between a permissive approach (not an attack, thus, no targeting rules shall apply) and the restrictive approach (attack rules apply to all military operations).

#### Presentation on the new U.S. Army Handbook on the Law of Land Warfare

The new U.S. Army Handbook on the Law of Land Warfare was presented by Mr. Michael Meier, Special Assistant for Law of War Matters in the National Security Law Division of the Office of the Judge Advocate General (Department of the Army, United States).

The new version of the U.S. Army Handbook on the Law of Land Warfare was published in August 2019 and replaced the former version dating from 1956. The manual is intended to be a commander’s handbook, focusing on the explanation of *ius in bello* rules and providing guidance as to their concrete application. The burden of compliance with LOAC being placed on the commanders (advised by legal advisors), it is important that they receive very clear information on the matter. The manual is therefore meant to be an accessible and reliable tool for the practitioners in the field. It thereby differs from the ‘Department of Defense: Law of War Manual’ which is an academic document.

The new version of the manual includes doctrine on the Additional Protocols to the Geneva Conventions of 1949 (for those rules that are considered as customary international law by the United States) and other instruments, as well as lessons learned from the campaigns in Vietnam and Afghanistan.

### **3. Friday 20 September 2019**

#### Panel 4: Follow-up on “The Leuven Manual on the International Law Applicable to Peace Operations”

The first panel of the last day of the 2019 edition of the ‘*Silent Leges Inter Arma?*’ conference aimed at providing the audience with a follow-up on the ‘Leuven Manual on the International Law Applicable to Peace Operations’, released in December 2017. The panel was chaired by Dr. William H. Boothby, Associate Fellow, Geneva Centre for Security Policy, and consisted of two presentations respectively given by Mr. Alfons Vanheusden, Assistant Secretary-General of the International Society for Military Law and the Law of War and Head of the Legal Advisory Division, DG Legal Support, Armed Forces, Belgium, and Professor Dr. Kjetil Mujezinovic Larsen, of the Department of Public and International Law of the University of Oslo.

Dr. William H. Boothby launched the discussion of the panel with a short introduction. The Chairman presented the Manual as a comprehensive statement of law and practice in the field of peace operations, also highlighting the fields where there is room for development. Dr. Boothby also specified that every single rule of the Leuven Manual was commonly agreed upon by the group of experts responsible for drafting the Manual.

The first speaker, Mr. Alfons Vanheusden, acted as the head of the project management team during the drafting phase of the Leuven Manual and participated in the drafting of the rules and the commentary. The ‘Leuven Manual on the International Law Applicable to Peace Operations’, he explained, has been prepared by an international group of experts at the invitation of the ISMLLW. The Manual covers consensual peace operations, based on three bedrock principles: the consent of the parties, impartiality and a limited use of force. These three principles have however evolved over time to better fit the multi-dimensional mandates and the increasingly volatile operating environments.

The Leuven Manual attempts to address all relevant issues of peace operations, and where useful or necessary it offers policy recommendations, notably where the law is silent or unclear. It consists of 146 ‘black letter rules’ and their accompanying commentary divided into 21 chapters. The authority of the Leuven Manual rests in bringing the relevant law and associated good practices together in a structured and accessible form of rules to which all experts have subscribed.

Once the Leuven Manual was released, the Society set up and complied with a dissemination plan, intended to make the Leuven Manual known to the world. The first step of this plan consisted in making the Leuven Manual available to, among others, the leadership of the UN, the EU, NATO, the African Union and the International Committee of the Red Cross. These international organisations had previously been given the opportunity to provide comments during the drafting phase of the Leuven Manual. The Leuven Manual has since been presented at various events around the world, and notably in New York, Geneva, Yaoundé, Seoul and Beijing.

In order to reach the widest possible readership, the Leuven Manual is currently being translated in French and Spanish. Translation in other languages, such as Chinese, is also envisaged.

The Leuven Manual is intended to be a living reference for peace operations, implying that regular updates will perhaps be necessary. It has already been brought to light that some topics could benefit from further elaboration or could be tackled in a new edition of the Leuven Manual. This is the case for the topic of the protection of personal data in peace operations. Mr. Vanheusden trusts that a consensus on legal rules and best practices should be attained given the recent adoption of comprehensive data protection legislation both nationally and internationally. Another topic that could be tackled in an updated version of the Leuven Manual is the protection of the environment in peace operations, which is high on the international agenda (the Draft Principles on Protection of the Environment in Relation to Armed Conflicts having recently been adopted on first reading by the International Law Commission). Other topics that could be further reflected upon are the derogation from relevant human rights provisions, international policing and UN administrations in peace operations.

The second speaker, Dr. Kjetil Mujezinovic Larsen, was one of the main authors of Chapter 5 of the Leuven Manual, entitled ‘The Applicability of International Human Rights Law in Peace Operations.’

Dr. Mujezinovic Larsen started his presentation by saying that the law is sometimes vague, complex and uncertain but that it needs to be translated into practical and applicable guidance for the personnel

involved in peace operations. According to him, one also has to make a clear distinction between the obligation to act in conformity with the applicable law and the responsibility arising from a violation of the law. Chapter 5 of the Leuven Manual only deals with the applicable law, leaving aside the questions of responsibility (dealt with in Part IV of the Leuven Manual).

Chapter 5 consists of nine black letter rules dealing with the applicability of IHRL, as a legal regime, in peace operations. Dr. Mujezinovic then examined these rules one by one.

The first rule explains that military personnel engaged in a peace operation may derive their obligations with regard to IHRL both from their contributing State and/or from the international organisation undertaking the operation.

The second rule attempts to frame the situations in which IHRL will enter into play by reference to the concept of jurisdiction. Peace forces usually deploy outside of the territory of their contributing State, it is therefore the extraterritorial application of IHRL that is at stake. The commentary to the rule summarises the current jurisprudence on the topic.

The third rule regards the obligation of the troop-contributing States to ensure respect for their HR obligations. This obligation is threefold: obligation to respect, to protect and to fulfil human rights in any given situation.

The fourth rule of Chapter 5 deals with the obligations of international organisations in that regard, taking as a premise that international organisations have their own obligations under international law, including IHRL.

The fifth rule states that troops taking part in a peace operation are under an obligation to comply with the HR rules of the host State when acting on its territory.

The sixth rule concerns interoperability, which is often an issue when personnel of different States, therefore having different legal obligations, operate together.

The seventh rule deals with derogations from IHRL where a State's obligations under that body of law seem to be incompatible with the mandate of the peace operation. The interpretation of the mandate, and especially of a United Nations Security Council Resolution authorising States to take 'all necessary measures' as also authorising derogations from IHRL, is currently a matter of controversy for the international community.

The eighth rule concerns itself with the simultaneous application of IHRL and IHL. According to the speaker, this is a matter of lesser importance in the particular context of the Leuven Manual since it only deals with consensual peace operations.

#### Presentation of the Military Law and the Law of War Review

The Military Law and the Law of War Review (MLLWR) was presented by its managing editor and director of publications of the ISMLLW: Dr. Martyna Falkowska-Clarys.

The MLLWR, published by the Belgian Group of the ISMLLW under the auspices of the ISMLLW, is one of the main respected and prestigious reviews of its field. In fact, it can boast almost 60 years of existence and expertise, founded in 1962 under a slightly different name—*Revue de Droit Pénal Militaire et de Droit de la Guerre*.

Its goal is ambitious: to achieve the establishment of a unified set of principles upon which may be grounded the military and wartime legislation of the various States. In doing so, the MLLWR has been an invaluable resource, having provided high quality publications focused not only on military law and the law of war, but also on crucial fields of international law, such as international criminal law and the legal aspects of the use of force, encompassing diverse bodies of the law and going beyond its traditional scope. The MLLWR has both hosted comprehensive studies on various topics and analyses of specific aspects of practice. Particular issues have been dedicated to particular fields of law and followed milestones of the field, for instance the commentary on the AP I. Furthermore, the MLLWR also reports on the activities of the ISMLLW, for instance, meetings and conferences. All in all, it is a great resource of in-depth information in many respects.

Furthermore, the MLLWR acts as a meeting point for reflections both for academics and practitioners with different cultures and experiences, boasting a wide authorship. This is enhanced by the possibility to publish in it in six different languages: English, French, Spanish, Dutch, Italian, German. Although no translations of the original publications are provided for, all the publications are accompanied by abstracts in all the six mentioned languages. Hence, it is a great resource for those working on these topics who want to acquire a diversified perspective, being crucial for a wide audience as well.

Focusing on quality, the MLLWR meets the modern most prestigious standards of publications, in particular in terms of blind peer review and the editorial process. The MLLWR is present online as well as in the main catalogues, for instance HeinOnline. Since last year, its articles are also open access.

The MLLWR is the fruit of a collective effort: Dr. Vaios Koutroulis and Prof. Dr. Tom Ruys, the General Editors; Dr. Martyna Falkowska-Clarys, the Managing Editor; the work of a substantial editorial board; but also editorial assistants, translators and so forth.

Dr. Falkowska-Clarys invites everyone to explore the MLLWR and read its current and past issues.

#### Closing Remarks

Mr. Ludwig Van Der Veken, President of the Belgian Group & Secretary-General of the International Society for Military Law and the Law of War finally closed the conference, thanking the speakers and the audience for the fruitful discussions.