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Introduction

This is our fourth edition of the NATO Legal Electronic Gazette. In addition to being sent to the 32 NATO legal offices located in 19 countries, with each edition we have increased our points of contact with the legal departments of the Ministries of Defence of the NATO countries. Fruit of this increased contact with the Alliance MODs is found with the first article of this issue written by Mr. Frederik Naert.

The next issue of the Gazette will be published after the NATO Legal Conference that will be held in Stavanger, Norway, from 24-26 April. In it we expect to share highlights of the Conference and descriptions of the many efforts being made to transform NATO legal practice.

As always, short articles of general interest to our legal community are requested and appreciated!

June and July Legal Courses

A reminder to all legal advisors, both those within the NATO system and those working for their national offices.

The NATO School has two upcoming legal courses. The "NATO Legal Advisors' Course," Course P5-34 which aims at providing active duty and civilian NATO and PfP Legal Advisors with an in-depth introduction to legal aspects of multinational military operations including the plans, policies, operations, and procedures of the Alliance. The course will be offered during the week of 4 - 8 June 2007 and again from 15 - 19 October 2007. Fifteen plus seats remain for the June session.

The second course is a new one: "Advanced NATO Operational Law (OPLAW) Course", Course N5-68. The aim of this course is to ensure that Legal Advisors deploying as part of an operational or tactical level operational staff, possess a broad understanding of the complex legal issues that arise in the context of modern NATO military operations. The pilot course is scheduled for the week of 9-13 July, 2007.

School website:
www.natoschool.nato.int
under the pull-down menu "Academics." See :
"course booking – seats available"

Accountability for Human Rights Violations by International Organisations

This contribution is a summary of what I presented at a conference on 'Accountability for Human Rights Violations by International Organizations' on 16-17 March, 07 in Brussels and solely reflects my personal opinion (for a copy of the full paper just send me a request). Examples have been added to illustrate the relevance of the topic to NATO.

In discussions on the accountability and responsibility of international organisations (a topic currently under consideration by the International Law Commission, see http://untreaty.un.org/ilc/guide/9_11.htm) and of their member States, one of the key concerns often expressed is that States should not be able to avoid their international obligations by acting through or in the framework of international organisations. This contribution looks at some legal mechanisms through which such an escape may be prevented (for more information, see the International Law Association 2004 *Final Report on the Accountability of International Organisations* at <http://www.ila-hq.org>).

A first major approach is binding international organisations to the same rules as their

member States, since, where this is the case, the obligation resting on the member State should not be violated by the international organisation as it is also bound by the same obligation. However, this mechanism is rarely accepted in respect of treaties, except concerning the European Community for some customs or external trade agreements, in particular the GATT (where the member States were substituted by the EC upon having transferred their competences in this field to the EC). Thus, absent a specific commitment to the contrary, NATO is not bound as such by treaty obligations of its member States (e.g. Additional Protocol I to the 1949 Geneva Conventions).

However, this approach does function for customary international law, which is generally accepted as being binding on international organisations (e.g. International Court of Justice, advisory opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, 20 December 1980, § 37), albeit subject to exceptions and modifications to accommodate their specific nature and competences. Therefore, NATO is, in principle, bound by customary international humanitarian law. A third element under this heading is general principles of law.

In this respect, it is submitted that the European Court of Justice's jurisprudence incorporating human rights into European law as general principles of law common to the legal systems of the member States, and including some rights derived from treaties in which they participate, may offer a model for incorporating human rights into the law of international organisations. Based on this, it might be argued that NATO is bound by most of the human rights reflected in the 1966 International Covenant on Civil and Political Rights.

This may be complemented by a number of ways in which member States may continue to be responsible for respecting their own international obligations, even when acting within the framework of an international organisation. Three categories of cases may be identified in this respect.

The first one is responsibility arising from the establishment of an international organisation; it is submitted that a failure to reasonably ensure that the organisation respects a member State's international obligations when it acts where that State would otherwise have acted, will engage that member State's responsibility.

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This corresponds to the European Court of Human Rights' *equivalent protection test* (*inter alia* applied in *Bosphorus*, 30 June 2005, § 155, see <http://cmiskp.echr.coe.int>) and the ILC's approach so far (see provisional draft article 28). It means, e.g., that a member State hosting a NATO agency or headquarters might incur responsibility if it grants immunity that is not properly counterbalanced by alternative dispute settlement procedures.

Secondly, it is submitted that votes by Government representatives are acts attributable to their State and give rise to that State's responsibility when the vote itself can be regarded as a breach of an international obligation. This seems to be confirmed by the European Court of Human Rights' decisions in *Matthews* (18 February 1999, §§ 32-33) and in *SEGI & GESTORAS PRO-AMNISTIA* (23 May 2002) (<http://cmiskp.echr.coe.int>). Under this rule, a vote in favour of rules of engagement that would violate obligations of a State under the 1949 Geneva Conventions would violate its obligation to "respect and to ensure respect for" these Conventions.

Third, it would appear that a member State that violates an international obligation towards a third State cannot invoke the fact that it is merely implementing a decision of an international organisation of which that third State is not a member as a circumstance precluding wrongfulness. This is implicit in the Human Rights Committee's General Comment 31 (21 April 2004, § 10) and explicit in the European Court of Human Rights' ruling in *Cantoni* (15 November 1996, § 30). The relevance of the latter two mechanisms is clearly illustrated by the claims concerning operation *Allied Force* brought against a number of NATO member States before the International Court of Justice (*Legality of Use of Force* cases, see <http://www.icj-cij.org/icjwww/iddecisions.htm>) and the European Court of Human Rights (*Bankovic* case, date, 12 December 2001, see <http://cmiskp.echr.coe.int>). The courts did not get to address this point due to a lack of jurisdiction. The issue might be addressed in the *Saramati* case discussed in issue 2 of this *Gazette*.

While the law is certainly not settled in respect of many of these issues, it is submitted that it offers sufficient elements to support the views expressed above, which would go a considerable way towards ensuring the legal aspect of accountability of international organisations and their member States.

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"It might be argued that NATO is bound by most of the human rights reflected in the 1966 International Covenant on Civil and Political Rights."

Legal Aspects of Combating Terrorism Course



At the invitation of the Director of the Centre of Excellence - Defence Against Terrorism (COE-DAT), Colonel Ahmet Tuncer, Turkish Army, I had the professional pleasure of delivering two lectures and serving as a seminar leader in the **LEGAL ASPECTS OF COMBATING TERRORISM COURSE** conducted at the COE-DAT in Ankara, Turkey, from 29 January to 2 February 2007.

Inaugurated in 2005 and accredited by NATO in 2006, the COE-DAT was founded "to overcome terrorism, a serious threat to world peace, by establishing an internationally respected centre, consisting of other countries with common goals." It conducts results-oriented studies as well as provides education and training for those involved in combating terrorism. <http://www.tmmm.tsk.mil.tr/> The Legal Aspects of Combating Terrorism course is offered twice a year as part of a robust annual program of courses, workshops, conferences, publications, and mobile education efforts that fulfill the COE-DAT's mission to become NATO's Transformation Expert for Defence against Terrorism. <http://www.tmmm.tsk.mil.tr/annualplan.htm> A complete overview of the COE-DAT may be downloaded at

http://www.tmmm.tsk.mil.tr/briefing/TMMM_BRIFING_G.pps?bcsi_scan_81D5FEFB6D3BD525=1

Course participants included military officers, senior attorneys, law enforcement officers, and government officials engaged in counter-terrorism activities from NATO Commands and NATO countries, Pakistan, the United Arab Emirates, and Israel. Briefings by experts from Pakistan, the United Kingdom, Turkey, and the United States highlighted challenges NATO faces to defend against terrorism. Seminar group discussions followed these briefings with the assignment to analyze problems described by the speakers. The students presented their findings to the whole class in lively and interactive plenary sessions.

As the Legal Advisor of NATO's ACCI, located at SHAPE Headquarters in Casteau, Belgium, my two presentations, "Future Legal Aspects of Combating Terrorism" and "Interagency Cooperation and Terrorism" dealt with the topics encompassed by ACCI's mission of combating threats to NATO Commands, personnel, forces, and installations posed by terrorism, espionage, sabotage, and subversion.

In the plenary session that followed my presentation, subjects that garnered significant comments included the doctrine of pre-emption, the doctrine of anticipatory self-defence, and information sharing among NATO.

On a personal level, my experience at COE-DAT was extremely enjoyable. The seminar discussions provided the opportunity for a candid exchange of views by the course participants in a good atmosphere that significantly contributed to better understand this complex subject. The COE-DAT and Colonel Ahmet Tuncer are marvelous hosts. The course manager, Major Umit Guleryuz, Turkish Army, graciously ensured both the speakers and the students were well provided for during this five day course. I look forward to a repeat engagement during the week of 10-14 September 2007 and would encourage all NATO legal advisors who provide advice on operational issues to attend the second session of the COE-DAT's **LEGAL ASPECTS OF COMBATING TERRORISM COURSE**.

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Can Might Make Rights ?

Building the Rule of Law after Military Intervention

'Can Might Make Rights'

(By Jane Stromseth, David Wippman & Rosa Brooks. Cambridge, NY: Cambridge University Press, 2006. Pp. 414 pages, \$29.99, paper) , a project of the American Society of International Law, is the latest of several recent texts seeking to draw lessons out of the international community's involvement in reconstruction efforts and is notable for its focus on such efforts as they have taken place, and are currently taking place, in the specific context of post-intervention environments. The book is based upon several case studies, most notably the efforts in East Timor, Bosnia, Kosovo, Liberia and Sierra Leone, as well as the ongoing post-conflict reconstruction underway in Afghanistan and Iraq. The authors draw upon varied and extensive personal experience in reconstruction and development positions as well as a broad review of published and unpublished reports, studies, and other treaties concerning these and other post-conflict environments. From these sources and experience they draw specific, useful observations and guidance for practitioners. **Can Might Make Rights** should become part of the personal professional library of any individual

involved in the planning and execution of or support to reconstruction efforts.

Efforts to define "rule of law" have been made by almost every organization involved in reconstruction and reform efforts, with the effect that the term has attracted the criticism of being all things to all people. While other writings have made progress at distilling the essence of a definition⁽¹⁾ provided by the authors here, it has the benefit of a focus on the post-intervention environment, and also is broad enough to support the synergistic approach developed throughout the rest of the book.

The authors define the rule of law in the following way:

The "rule of law" describes a state of affairs in which the state successfully monopolizes the means of violence, and in which most people, most of the time, choose to resolve disputes in a manner consistent

 (1) See, for example, Rachel Kleinfeld, *Competing Definitions of the Rule of Law, in Promoting the Rule of Law Abroad; In Search of Knowledge*, (Thomas Carothers, ed. Carnegie Endowment for International Peace, 2006), pp 31-74.

with procedurally fair, neutral, and universally applicable rules, and in a manner that respects fundamental human rights norms (such as prohibitions on racial, ethnic, religious and gender discrimination, torture, slavery, prolonged arbitrary detentions, and extrajudicial killings). In the context of today's globally interconnected world, this requires modern and effective legal institutions and codes, and it also requires a widely shared cultural and political commitment to the values underlying these institutions and codes ⁽²⁾.

This is, to be sure, an extremely broad and comprehensive definition, susceptible to the charge that it is too broad to be of practical value. But such an allegation would miss the point the authors made throughout their text – that successfully establishing the rule of law, however one defines it, must take account of all of the components in the definition or the effort is unlikely to succeed.

 (2) *Can Might Make Rights*, p. 78

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While this definition is broad, it is necessarily so and only the synergistic approach that such a definition supports will be worth undertaking. Only by recognizing this at the beginning, and maintaining patience, persistence, and humility in the overall process, can the international community hope for success, one which is ends-based and strategic, adaptive and dynamic, and systemic.

This synergistic approach is one that will resonate with the international military community, as NATO continues its exploration of an "Effects-Based Approach to Operations" (EBAO), an approach to planning being developed in cooperation with the U.S. Joint Forces Command which recognizes the need for "building and sharing a common understanding of the strategic purpose and the problem to be solved; developing relevant goals and objectives, knowledge of the operational environment, and harmonization of the actions required to resolve the problem.(3)"

(3) *Commander's Handbook for an Effects-Based Approach to Joint Operations, U.S. Joint Forces Command Joint Warfighting Center, 24 February 2004*

This approach recognizes the need for common understanding across the interagency and multinational team, looking at necessary effects within political, military, economic, social, infrastructure, informational, and other aspects of the operational environment (4). Many of the themes discussed in **Can Might Make Rights** will resonate with military planners working in an EBAO process as it will with others, non-military.

The authors point out that rule of law efforts which focus on developing institutions and programs, but which fail to address the underlying cultural forces at work, are likely to fail. While this is intuitive to anyone who has or is working in the field, it is also the area of discourse which many professionals – military as well as civilian – are most hesitant to enter. The cloud of cultural imperialism looms, but the authors do an admirable job of facing the issue of establishing a Rule of Law culture as an inevitable one that, whatever else the interveners do, cannot be ignored. The need to address underlying cultural challenges – the existing fear of formerly repressive police, deep-seated corruption, long-standing

(4) Col. Jody Prescott "Effects Based Approach to Operations and its Implications for ACT" *The Three Swords Magazine*, 6 June 2006, available at http://jec.nato.int/files/SEP_06.pdf, last accessed 15 February 2007

reliance on extra-governmental dispute resolution processes, all of which, if left unchecked, undermine the value in the programmatic and institutional reforms, is imperative. Focus on the Hippocratic maxim "first do no harm," combined with the caution that cultural development must be given time to take root and develop, provides a realistic tone and the authors go to pains to list a number of best practices culled from the vast literature that has accumulated over the course of the interventions studied.

Interestingly, the authors begin their concluding chapter by saying "This is not an optimistic book." Yet this statement is not accurate – quite the opposite. Optimism, truly held, does not require one to ignore the challenges, difficulties, and even failures inherent in any situation. On the contrary, true optimism requires only an underlying and deeply held belief that good can come from any situation – that there is no such thing as a hopeless situation.

Can Might Make Rights is indeed an optimistic book, albeit also a realistic one.

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Running throughout the book is the sense that, even in the extremely difficult situation of a post-conflict environment, there is reason to maintain hope that the rule of law, with its associated benefits, can be achieved. Failures in specific efforts or programs are reasons to stop trying, but rather are valuable sources of data so that future efforts are better. In their own words, the moral of this book "is that it is possible for outside interventions to help foster the rule of law, but only if interveners fully understand the nature and magnitude of the task – and only if interveners understand that the role outsiders can play is crucial but limited.⁽⁵⁾"

This is not the definitive book on the subject – and indeed, that was never the authors' stated purpose. Instead **Can Might Make Rights** succeeds in being a very valuable addition to the ongoing conversation.

⁽⁵⁾ *Can Might Make Rights?*, p.388

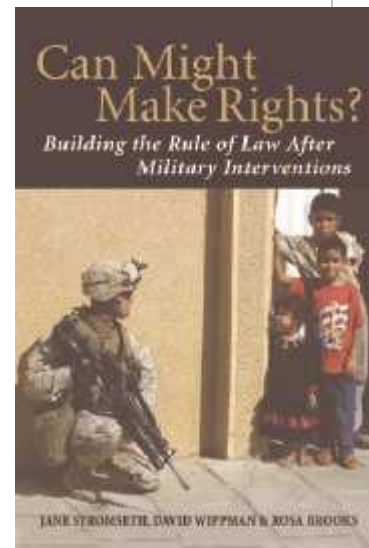
It is a conversation that will continue by necessity, and will, one hopes, include practitioner's handbooks that continue an interdisciplinary, interagency, and multinational approach even as they write for their specific audiences. Other such efforts are underway.

In **Can Might Make Rights**, these scholars do an excellent job advancing the dialogue.

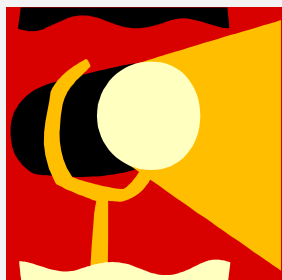
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(This article is summarized from a review written by the ASIL

<http://www.judicialmonitor.org/current/inreview.html>)



Spotlight



**Mrs. Mette
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Poland**



Name: Mette Prassé- Hartov

Rank/Service/Nationality: Civilian (DNK)

Job title: Legal Advisor, NATO Joint Force Training Centre, Bydgoszcz, Poland

Primary legal focus of effort:

As one of NATO's newest international military bodies, JFTC has since its activation (March 2004) developed the relationship with Poland as a Host Nation. JFTC Legal Office has mainly been supporting the process of standing up a new NATO centre, addressing status and Host Nation issues as well as assisting the development of internal concepts, directives, staff procedures, and training output.

Likes: serving in a new NATO entity

Dislikes: cold coffee

When in Bydgoszcz, everyone should: Visit JFTC Legal Office! And, pay a visit to the Gothic Cathedral (Farna) and take a walk along the Brda River in the Old Town of Bydgoszcz.

Best NATO experience: NATO/PfP Legal Symposium 1999 (Tallinn, Estonia)

My one recommendation for the NATO Legal Community: To continue and strengthen the informal interaction and information exchange as well as the collective memory within the NATO legal community.

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GENERAL INTEREST

Electronic Resources:

International Law In Brief is a free weekly newsletter prepared by the Editorial Staff of *International Legal Materials*, a publication of the American Society of International Law. Subscription information may be found at:

<http://www.asil.org/resources/e-newsletters.html#lawinbrief>

The International Society for Military Law and the Law of War publishes a 'Newsletter' every three months (in English and French) for its members. In addition, the Society has a Documentation Centre with a large collection of publications on the areas of law within its competences. The Society's activities and Documentation Centre are open to members as well as to non-members. The Society has almost 700 members, including university professors, military or civil magistrates, government officials, lawyers and officers from over 50 countries, and is a liaison organization for many national groups with similar objectives as those pursued by the Society and organizing their own activities. For more information on the Society, please visit the Society's website at <http://www.soc-mil-law.org/>

For legal matters involving the United Nations, the electronic research guide of the Dag Hammarskjöld Library provides an easy access to treaties, courts and tribunals, and the principle legal bodies of the United Nations. See <http://www.un.org/Depts/dhl/resguide/specil.htm#intro>.



"Laws are the
sovereigns of
sovereigns"

Louis XIV

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