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Introduction

Despite the summer of temperature extremes upon Europe and North America, much legal activity of interest to Alliance and Partner Nations continues. Mr. Frederik Naert has kindly contributed a thoughtful article about the May decision of the European Court of Human Rights (ECtHR) in the cases of *Behrami and Behrami v. France* (No. 71412/01) and *Saramati v. France, Germany and Norway* and also invited our attention to the June decision of the House of Lords in the *Al-Skeini* case that is discussed in the General Interest section of this issue.

Our first Operational Law Course will be conducted at the NATO School on 9-13 July. While that course is occurring, attention will also be paid to planning for our next Legal Advisors Course that begins in Oberammergau on 22 October. (See http://www.natoschool.nato.int/internet_courses/PDF/courses_2007calendar.pdf to plan upcoming 2007 and 2008 Courses)

As the short summary of the 2007 NATO Legal Conference that follows this introduction displays, a number of actions should be undertaken to enhance the delivery of legal support within the Alliance and in NATO-led operations. Start thinking about the progress we can make in a year because the NATO Rapid Deployable Corps-Turkey (NRDC-T) has graciously agreed to host the 2008 NATO Legal Conference in Istanbul from 21 through 25 April 2008. The conference will be conducted in the venerable Turkish Military Museum overlooking the Bosphorus. Further details will be provided after the summer holidays, but please mark your calendars knowing that NRDC-T has already arranged commercial hotel accommodations within walking distance of the conference site for all attendees.

Summary of 2007 NATO Legal Conference

During three consecutive days of briefings and plenary discussion, 52 NATO legal advisors and legal personnel from all levels of command and the NATO agencies shared information, knowledge, and opinions about the difficulties and successes in providing legal support to the Alliance.

Air Marshall Peter Walker, UK Royal Air Force, the Director of the Joint Warfare Centre (JWC) welcomed us and connected the legal community to the transformation process of NATO. Mr. Frode Berntsen, the former JWC Legal Advisor, challenged the legal community to improve the linkage between NATO Headquarters and the operational units facing quickly emerging tactical issues, to find methodologies to separate NATO policy from NATO legal doctrine, to consolidate legal guidance in a common database available to all NATO commands, to better understand the application of national caveats on NATO forces

and to constructively participate in Rule of Law/Justice Reform activities. The keynote speaker, Dr. Baldwin De Vidts, Legal Advisor to the Secretary General, voiced the need for functional evolution of our NATO legal capabilities to better address the security threat posed to the Alliance by global elements that arise outside of Europe.

Following these three presentations, guided by the NATO Legal Mind-Map prepared by the SHAPE Legal Office emphasizing legal support to NATO's operations, legal representatives from Allied Command Operations, NATO International Military Staff, the NATO Agencies, and Allied Command Transformation updated the conference participants on the issues animating the 32 NATO legal offices located in 19 countries. Building on the recommendations from the 2006 Bi-Strategic Command Legal Conference, the Conference concluded

by identifying seven requirements with identified deliverables to immediately pursue. They are:

1. Better legally describe NATO Command Authority and Responsibility;
2. Streamline Negotiation and Conclusion of Agreements;
3. Improve legal document and file review, retention, and archiving.
4. Capture, analyze and share Best Practices and Lessons Learned.
5. Improve common understanding of operational terms and legal challenges.
6. Continue active legal involvement in NATO's developing operational concepts such as an Effects Based Approach to Operations, Rule of Law Operations, and NATO Network Enabled Capability.
7. Refine and align the role of legal support to NATO organizations.

Summary of 2007 NATO Legal Conference

Responsibility for fulfilling each of these identified requirements will be shared between the ACO and ACT Legal Offices with assistance from the NATO Agencies. An in-progress review will be conducted in the Autumn of 2007, with delivery of the final products expected no later than the 2008 NATO Legal Conference.



European Court of Human Rights Declares Kosovo Cases Inadmissible

Mr. Frederik Naert – Belgian MOD



On 31 May 2007, the Grand Chamber of the European Court of Human Rights (ECtHR) declared inadmissible the applications brought in the cases *Behrami and Behrami v. France* (No. 71412/01) and *Saramati v. France, Germany and Norway* (No. 78166/01). Both cases concerned the conduct of personnel of the international presence in Kosovo.

The case of *Behrami and Behrami*, arose from tragic events on 11 March 2000 when eight boys in the Mitrovica area of Kosovo, found a number of live cluster bombs and played with them. One bomb detonated resulting in the death of one child and serious injury to another. Because the claims process involving the United Nations Mission in Kosovo (UNMIK), the Kosovo Claims Office, and France as a Troop-Contributing Nation of NATO's Kosovo Force (KFOR) provided no satisfaction, the victims applied to the European Court of Human Rights.

They alleged that France, as lead nation of the multinational Brigade responsible for the Mitrovica area, breached its obligation under article 2 of the European Convention of Human Rights (ECHR) to take positive measures to protect life. Specifically, that France should have

marked and/or defused the un-detonated cluster bombs that KFOR allegedly had known to be present on the Mitrovica site.

In the second case, *Ruzhdi Saramati*, from Kosovo and of Albanian origin, was detained on an order by the Commander, KFOR (COMKFOR), (first a Norwegian and then a French General) between 13 July 2001 and 26 January 2002 (see issue 2 of this *Gazette* for a presentation of the case). The applicant initially submitted that it was a German KFOR officer who orally issued the arrest order and informed him that he was being arrested by COMKFOR order but in the end withdrew the claim against Germany. The Chamber dealing with each of these two cases relinquished jurisdiction in favour of the Grand Chamber, which joined the two cases.

The Court determined the question raised by the cases turned less on whether France, Germany, and Norway exercised extra-territorial jurisdiction in Kosovo but, rather, whether the ECtHR was competent to examine those States' contribution to the relevant civil and security presence exercising control of Kosovo under the ECHR (§§ 69-72). The Court considered that issuing detention orders fell within the security mandate of KFOR and that the supervision of de-mining fell within the

mandate of UNMIK. It went on to hold that the impugned action of KFOR (detention) and inaction of UNMIK (the alleged failure to de-mine) could, in principle, be attributed to the UN because both acted under a delegated UNSC Chapter VII mandate (§§ 212-143).

The Court then held that it was not competent to review the acts carried out by the States in question on behalf of the UN, interpreting the Convention in light of other international law applicable in relation between its Contracting Parties, especially the UN Charter. Since operations established by UNSC Resolutions under Chapter VII of the UN Charter were fundamental to the mission of the UN to secure international peace and security (the primary responsibility of the UNSC as a counterpart to the prohibition, now customary international law according to the Court, on the unilateral use of force) and since they relied for their effectiveness on support from member states, the Convention could not be interpreted in a manner which would subject to the scrutiny of the Court the acts and omissions of Contracting Parties covered by UNSC Resolutions and occurring prior to or in the course of such missions.

European Court of Human Rights Declares Kosovo Cases Inadmissible

One may wonder whether NATO would be willing to accept such control in view of its claimed independence from the UN.

To do so would be tantamount to imposing conditions on the implementation of an UNSC Resolution which were not provided for in the text of the Resolution itself. That reasoning equally applied to voluntary acts of the States concerned such as the vote of a permanent member of the UNSC in favour of the relevant Chapter VII Resolution and the contribution of troops to the security mission: such acts might not have amounted to obligations flowing from membership to the UN but they remained crucial to the effective fulfilment of its Chapter VII mandate by the UNSC and, consequently, of its imperative peace and security aim by the UN (§§ 144-152).

The Court distinguished the present cases from its 2005 judgment, *Bosphorus Hava Yollari Turizm ve Ticaret AS (Bosphorus Airways) v. Ireland* where it dismissed a claim against Irish actions implementing European Community implemented UN sanctions (most UN sanctions are first implemented by EC legislation which is then in turn implemented by the member States). The Court noted that in *Bosphorus* Irish authorities carried out the impugned act

seizure of the applicant's leased aircraft) in Ireland following a decision by the Irish Minister of Transportation. Because the Irish State action the impugned act (seizure of the applicant's leased aircraft) in Ireland arose from obligations flowing from European Community law, the Court took note that the European Community Treaty provided human rights safeguards equivalent to those of the ECHR and found the impoundment of the aircraft did not give rise to a violation of the ECHR. (See also the item on accountability of international organisations in issue 4 of this *Gazette*).

In *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* the Court determined the impugned conduct of KFOR and UNMIK could not be attributed to the respondent States. First, the actions did not take place on the territory of those States or by virtue of a decision of their authorities. Moreover, there was a fundamental distinction between the international organisation/ international cooperation at issue in the *Bosphorus* case and those in the present cases (§§ 145 and 150-151). The Court found UNMIK was a subsidiary organ of the UN created under Chapter VII.

As such, KFOR actions were directly attributable to the UN rather than the Troop Contributing Nations of NATO.

In light of that conclusion, the Court considered that it was not necessary to examine the remaining submissions of the parties, including the one about extra-territorial conduct. The decision is available in English and in French at <http://cmiskp.echr.coe.int> (see especially §§ 69-72 and 121-153).

The case is of great significance to the law applicable to peace operations but its exact implications will require further analysis. However, my initial personal reflection is that the attribution of KFOR conduct to the UN seems questionable given that such attribution generally requires *effective control* and that such control is highly questionable in this case; one may wonder whether NATO would be willing to accept such control in view of its claimed independence from the UN. Furthermore, a logical conclusion of the Court's view would be that the United Nations are in principle internationally liable for any KFOR action, at least within its UNSC mandate. However, it is doubtful whether the UN would subscribe to this and the private law claims procedures applied in Kosovo indicate a distinct attribution to KFOR (or even the individual troop contributing nations).

European Court of Human Rights Declares Kosovo Cases Inadmissible

Finally, the Court's apparent broad relinquishing of jurisdiction over any State act *related to* the UN's (Chapter VII) peace and security functions also seems to be at variance with the more limited leeway accepted by the EU's Court of Justice in some of its cases concerning the implementation of UN sanctions (i.e. for *obligations* only and not for discretionary conduct, see especially Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v. Council of the EU* , 12 December 2006, available online at <http://curia.europa.eu/en/content/juris/index.htm>).

While some of the Court's broad arguments may be questioned, its conclusion in respect of the specific conduct at issue seems justified in that it occurred pursuant to a Chapter VII UNSC mandate and may indeed be considered as an exercise of international jurisdiction (arguably by NATO rather than the UN for KFOR and by the UN for UNMIK) over persons/territory that was not transferred by States Parties which previously exercised such jurisdiction.

In any event, while the judgment gives States considerable latitude in Chapter VII operations, it should not be an excuse for ignoring human rights concerns altogether to the detriment of the rule of law which such missions usually aim to promote.

Mr. Frederik Naert
Belgian MOD
Comm +32-2-7013439
frederik.naert@mil.be

Spotlight



Colonel Geir

Fagerheim

Chief Legal Office

Joint Warfare

Centre

Stavanger,

Norway



Name: Geir A Fagerheim

Rank/Service/Nationality: Colonel /Air Force/ Norwegian

Job title: Chief Legal Office, Joint Warfare Centre

Primary legal focus of effort: JWC develops and conducts training on the new concepts and doctrine for joint and combined staffs. As Chief Legal Office, my task is to integrate legal training and legal doctrines into these concepts.

Likes: Well, I won't get too philosophical : fishing. Catching a salmon of 20 kg would be an accomplishment.

Dislikes: Delayed flights (I commute weekly between Oslo and Stavanger by plane)

When in Stavanger, everyone should: I am new to Stavanger and I don't have a good knowledge of the area yet. What I think Norway really can offer visitors is beautiful scenery with a combination of fjords and mountains. And we have a fascinating weather. So, when in Stavanger, get out of your hotel room and enjoy!

Best NATO experience: I hope and believe that this tour at JWC will be the one.

My one recommendation for the NATO Legal Community:

Communicate – challenge - transform

Geir.Fagerheim@jwc.nato.int



HAIL

&

FAREWELL

Hail

NATO HQ Sarajevo : LTCOL Mark Tellitocci (USA A) joined in June 2007

ACT/SEE : Mrs Alexandra Von Stein-Lausnitz (GER) and Mr. Arnt Guenter Glienke (GER) started a three-month internship on July 2nd, 2007

Joint HQ Lisbon : LTCOL Gavin Davies (GBR A) joined in July 2007

Farewell

NATO HQ Sarajevo : LTCOL Barry Stephens (USA A) left in June 2007

Joint HQ Lisbon : LTCOL John Hardy (GBR A) joined in July 2007

GENERAL INTEREST

House of Lords Upholds Limited Applicability ECHR in Iraq

On 13 June 2006, the UK House of Lords dismissed the appeals brought against the Court of Appeal's judgment in the case of *Al-Skeini and others* (also referred to in part as the *Mousa* case) concerning the death of six Iraqis in Basra during the period of British occupation.

In first instance, the Court concluded that "*the case of Mr Baha Mousa's death in the custody of British forces in Iraq comes within the scope of the [ECHR] as falling within the jurisdiction of the [UK] ... but that the other claims ... arising out of shootings of Iraqis by British forces in the field fail on the ground that those shootings occurred outside the jurisdiction of the [UK] and thus outside the scope of the [ECHR]*" (*R (Al-Skeini and others) v Secretary of State for Defence* ([2004] EWHC 2911 (Admin), 14 December 2004, available online at <http://www.bailii.org/ew/cases/EWHC/Admin/2004/2911.html>, § 344).

The Court of Appeal upheld this decision but took a different position on some of the arguments leading to this conclusion, accepting a somewhat broader reach of the European Convention of Human Rights and UK Human Rights Act (HRA) ([2005] EWCA Civ 1609, 21 December 2005, available online at <http://www.bailii.org/ew/cases/EWCA/Civ/2005/1609.html>, especially § 147: "*the HRA has extra-territorial effect in those cases where a public authority is found to have exercised extra-territorial jurisdiction on the application of [State Agent Authority] principles*".

The relatives of the 5 applicants killed in the shootings appealed to the House of Lords, as did the Secretary of Defence in respect of the reasoning of the Appeals Court relating to the detention death case, while accepting the more narrow reasoning of the Divisional Court in respect of the latter. The House of Lords dismissed all the appeals, unanimously regarding the shootings and with 4 to 1 as regards to the detention death, thus confirming a limited applicability of the ECHR to UK forces in Iraq. The decision ([2007] UKHL 26) is available online at <http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd070613/skeini-1.pdf>

NATO Military Concepts Approved

MC 471/1 NATO Targeting Policy was approved by the North Atlantic Council on June 15, 2007.

MC 216/4 (AAP-16 (D)) – Manpower Policy and Procedures was approved by the Military Committee in June 2007.

GENERAL INTEREST

Russia Ratifies PfP SOFA

On June 14, President Vladimir Putin has signed a federal law ratifying an agreement among signatories to NATO and other states participating in the NATO Partnership for Peace program regarding the status of their forces (SOFA), the Kremlin press service said Thursday.

The agreement, which was ratified by the lower house of parliament, or Duma, May 23, and the upper house, or Federation Council, May 25, was first signed in 1995 and regulates the presence of foreign troops on Russian territory and guarantees the rights of Russian military personnel participating in joint military exercises within the framework of the Partnership for Peace program, among other provisions.

The parliamentary defense committee earlier backed ratification of the document, which has been signed by 41 countries, stating that the document meets Russia's interests by ensuring efficient cooperation between parties to the agreement in the event of joint military exercises, rescue operations, and relief efforts.

Russia plans to conduct about 200 joint exercises with other signatories to the agreement in 2008, and none of them were related to military cooperation. Georgia, Ukraine, Kazakhstan, Uzbekistan, Kyrgyzstan, Moldova and Azerbaijan are the other members of the Commonwealth of Independent States that have signed the NATO SOFA agreement.

<http://en.rian.ru/russia/20070614/67239075.html>

New NATO Agency

NATO Allies agreed on June 20 to set up a new NATO agency to acquire and manage C-17 strategic transport aircraft on behalf of a group of 15 NATO nations and two Partnership for Peace countries.

The Strategic Airlift Capability initiative will help address NATO's -- and Europe's -- critical shortfall in strategic airlift. This capability will support our current operations, including in Afghanistan, and will be a pillar of the Alliance's long-term transformation.

SAC (Strategic Airlift Capability) aircraft will be flown by multinational aircrews; a multinational military structure will be created to command and control the aircraft. The 17 SAC nations will fly the planes based on their national requirements, which may include national, NATO, or EU operations, as well as other international purposes such as humanitarian airlift or disaster relief for the UN.

The Alliance formally approved the establishment of a NATO Airlift Management Organization (NAMO) and NATO Airlift Management Agency (NAMA) to acquire and support the aircraft. The SAC plans to acquire 3-4 C-17s; the first is expected to be delivered in mid-2008.

The SAC planes will be configured in a similar way as the C-17s flown by the US Air Force, Canadian Air Force and the UK Royal Air Force. The air crews will be trained to the same basic standards, including air-to-air refueling and night vision operations.

The following NATO nations are members of the Strategic Airlift Capability initiative: Bulgaria, Czech Republic, Denmark, Estonia, Hungary, Italy, Latvia, Lithuania, Netherlands, Norway, Poland, Romania, Slovakia, Slovenia, United States, Sweden and Finland, both Partnership for Peace Countries, are also SAC Members.

Membership in the airlift fleet remains open to other nations.

<http://www.nato.int/docu/pr/2007/p07-075e.html>



"Nothing appears more surprising.....than the easiness with which the many are governed by the few,....as force is always on the side of the governed, the governors have nothing to support them but opinion. It is, therefore, on opinion only that government is founded, and this maxim extends to the most despotic and most military governments as well as to the most free and most popular."

David HUME, *Essays, Moral, Political and Literary. Of the First Principles of Government*
1758

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

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