

Special Interest Articles

- Safe and Security Environment at KFOR
by *LtCol Wentzek*
(formerly of KFOR)

- Accession of Bosnia and Herzegovina into the Partnership for Peace Programme by
Mr. William Thomas
(NATO HQ Sarajevo)

- 8th Hague Joint Conference on Contemporary Issues of International Law by
Mrs Cecile Vandewoude (SHAPE)

- Germany's Federal Constitutional Courts refines German Perception of NATO by
Mr. Ulf-Peter Häußler
(German Armed Forces)

- My first six months with NATO by *Mr. Oliver Aretz* (NAEW E-3A Component)

Hail and Farewell

Spotlight : *Ms. Desislava Zhelyazkova*
(ACT/SEE)

General Interest/Upcoming events

Introduction

This is our seventh edition of the NATO Legal Electronic Gazette and, despite the summer holidays, it displays the considerable activity of our NATO legal community.

This is our most substantive issue – 17 pages ! It provides insight on

- current events in the Balkans from the perspective of the Legal Offices at KFOR and NATO HQ Sarajevo;
- a recent conference in the Netherlands on International Humanitarian Law;
- an extensive discussion of a July 2007 German federal Court decision that turned aside constitutional objections to German's continued participation in ISAF;
- the first impressions of one of our new NATO Legal staff upon beginning working in our Alliance.

Our Hail and Farewell page counts 10 new arrivals and six departures (there may be others ! Please let us know).

The General Interest/Upcoming events sections provide an overview of our future NATO events and electronic links to information, such as ratification lists for NATO treaties.

Safe And Secure Environment at KFOR

LtCol Boris Wentzek – Former Chief Legal Advisor HQ KFOR



"We have to maintain SASE!" – "SASE? - What the heck is SASE?" (AAP 6 will not help you, by the way.) If you don't know SASE, you don't know NATO operational speak. Then you are no brother, you are probably a lawyer.

The fluency with which officers and general officers use this catch phrase is astonishing. I would not go so far as to allege that nobody knows what he is talking about, but the origin of this phrase remains dark to most people; the purpose of using it, however, is very clear : "KFOR has jurisdiction !" From repelling an attack of Serbian Armed Forces, to combating organized crime, to combating smuggling, to house searches, to seize weapons without proper authorizations, to regulating and controlling political demonstrations, to organizing preventive measures against forest fires, KFOR is there to provide a Safe And Secure Environment.

The only impediment for overwhelming success is UNMIK (United Nations Interim Administration in Kosovo), the civilian sister organization also established under UN Security Council Resolution 1244. "Frankly, I believe that UNMIK never knew its plans and procedures", this quote of a general officer is epitomizing the deeply rooted dislike of military organizations towards the civilian administration, which prevents swift and effective military solutions to all problems.

But I do not want to create another "Dolchstoß"-Legend.¹ The task of the lawyer is to interpret and explain the law, which in this case is international public law. How did it happen that armed forces are so deeply involved in activities which the ordinary citizen in the street would *prima facie* label "police work"?

The legal interpretation of the term "secure environment"² starts with the historic situation of the year 1999 and the language context of the resolution.

Consider the security situation in Kosovo in June 1999:

- By acts of terrorist groups as well as by acts of state agents a grave humanitarian situation existed;
- In October 1998 already, UN Security Council Resolution 1199 had expressed deep concern about the excessive use of force by Serbian security forces and the Yugoslav army;

¹ The term "Dolchstoß"-Legend was used by right wing politicians and soldiers after World War I to explain the failure of the Imperial German Army: they claimed it was the pacifistic civilian politicians who "stabbed the unbeaten army in the back" and brought Germany's fall.

² The term "safe and secure environment" is not used by Resolution 1244, it is a NATO invention.

- A situation of ethnic cleansing had evolved due to acts of military and paramilitary police forces of Serbia and of the Federal Republic of Yugoslavia;
- The number of Kosovo-Albanians fleeing these atrocities was estimated to be close to a million, mainly fleeing to Albania and the former Yugoslav Republic of Macedonia (FYROM)³;
- After the forced and very hasty withdrawal of all military forces and police forces of Serbia and of the Federal Republic of Yugoslavia, there were no government officials left to provide for public order and law enforcement.

The first forces capable of providing public safety and order were the military forces of the International Security Presence (ISP)⁴. Naturally, military leaders like being in charge and are very reluctant to relinquish control; it was hardly ever accepted that the authority for public order was only fleeting.

³ Turkey recognises Macedonia by its constitutional name.

⁴ More commonly known as KFOR

Safe And Secure Environment at KFOR

Article 9 lit. c of Resolution 1244 states: "Ensuring public safety and order until the international civil presence can take responsibility for this task" (*emphasis added*).

In the year 2007 it is difficult to refute on a factual basis the ability of the civil presence to take care of public order and safety, the Kosovo Police Service having app. 8700 and the international police forces having app. 2000 personnel. Additionally, there are legal documents accepted by the Commander of the International Security Presence spelling out the responsibility of the police and the military forces.⁵ Even more difficult is denying the fact that "ensuring public safety and order" is a civilian task, and – given the language – a clearly transitory one for military forces, there was the search for new tasks to justify military activities, and it was found that the "secure environment" task is not clearly limited time wise. That gave room for manoeuvre and this room was and is widely used. But is this reading correct? Is there still the authority for military forces to interfere

⁵ Note of Understanding between the SRSG and the COMKFOR, dated 21 Dec 04

Is there still the authority for military forces to interfere with public order issues? What the military interpretation of "maintaining a Safe and Secure environment" boils down to is the claim to have jurisdiction for all public order issues if the conduct of the people or the police are not to the liking of the ISP. (This is inferred from all the issues KFOR is officially occupied with, see enumeration at the beginning.)

Can this be true? Why this redundancy ("Safe and Secure") in the usage of the term? The philological evidence is murky, "Safe" and "Secure" are very often used as synonyms, but common usage distinguishes markedly between the nouns "Safety" and "Security". The usage and meaning in the Resolution 1244 is identical.

The term "secure environment" is used in Article 9 lit. c in conjunction with a specific task for the international security presence (ISP): *"Establishing a secure environment in which refugees and displaced persons can return home in safety, the international civil presence can operate, a transitional administration can be established, and humanitarian aid can*

be delivered".

The expression "safe environment" appears in Annex 2 No. 4 of Resolution 1244 with the wording *"The international security presence must be ... authorized to establish a safe environment for all people in Kosovo and to facilitate the safe return to their homes of all displaced persons and refugees."*

By the historic situation and by the language context it is clear that the task "establish a secure environment" is not primarily linked with law enforcement but with a more basic need, the protection from murder or assault or persecution for the civilian population. KFOR operated in this function in the first months after entry into Kosovo and began establishing a Secure (or Safe?) environment in Kosovo. Return of refugees and many displaced persons is accomplished (admittedly not as many IDPs as one had expected, but still decent numbers). Currently, the International Civil Presence operates, the transitional administration (=UNMIK) is established, humanitarian aid was and is delivered.

"Is there still the authority for military forces to interfere with public order issues ?"

Safe And Secure Environment at KFOR

If constructed closely to the textual meaning, many "responsibilities" of the international security presence are already over or done. "To establish" is a finite process, it starts at some point in time, and it will end when the secure environment is reached (otherwise the process fails). Is the secure environment established in Kosovo? I think the answer is "yes". That means that this task is over, it is done. The Security Council was very well aware of the difference between "to establish" and "to maintain". The ceasefire (see No. 9 lit. a) must be "maintained", not only established. In the same manner the NATO OPLANS do not speak of establishing SASE, but "to support the maintenance of a Safe And Secure Environment."⁶ The daily business, however, forgets the "support to".

Contrary to extensive, but mostly hidden disdain for UNMIK, it is doing a good job in maintaining public order and enforcing the law. (The yardstick should be the neighboring countries, not highly developed western states.) Given that the military tasks are mostly done, military commanders in Kosovo face the same dilemma as in Bosnia and Herzegovina. What to do in everyday's business if there is nothing militarily to do?

⁶ SACEUR OPLAN 10501 Main Part page 7, page 9 ; same wording with COMKFOR OPLAN 32501

By looking at Article 9 of Resolution 1244 from the eight tasks, five are finished and three are remaining; one (lit. f) is not really glamorous, one (force protection and freedom of movement) is very unspecific and frequently interpreted as road construction. That leaves border surveillance as a good playground, – UNMIK Police is indeed weak in this field, – but the way it is executed, it is clearly law enforcement. But, still, there is empowerment by international legal instruments at least, the international security force promised to provide appropriate control of the borders of FRY in Kosovo with Albania and FYROM until the arrival of the civilian mission of the UN⁷. But again, the "until" is overlooked.

As a conclusion, the current practice of military operations of KFOR is to a large extent *ultra vires*, because it is not justified under the Resolution 1244 any more. The support to the maintenance of a secure environment, which is tasked by the military OPLANS, is often not given as support to, but as solitary actions "doing it yourself and handing over the results to the police". This does not only meet estranged looks from UNMIK Police

⁷ Art II Sect 2 lit h) MTA

Officials but is also not covered by the international mandate. KFOR ought to restrict itself to military actions. If KFOR as a military force is required to act, the level of threat and violence has to be equivalent to the capabilities of a military force, meaning that the threat comes from e.g. irregular or paramilitary groups armed with automatic weapons, bazookas or grenade launchers (or, of course, from regular military forces), or from widespread violence in the whole province reaching a level of overwhelming police forces. This is corroborated by the actual text of the resolution (Art. 9 lit. d) which spells out the mission of "ensuring public safety and order until the international civil presence can take responsibility for this task" not only as a separate task from "secure environment" but clearly as a genuine responsibility of the civil presence (only subject to the standing-up of the civil administration). This shows that the distinction between tasks of military forces and tasks of civil law and order forces was known and recognized by the Security Council in a fashion congruent with the usual distinction in western style parliamentary democracies. If NATO wants to teach democracy to Kosovars it should act as a good example.

LtCol Boris Wentzek
boris1wentzek@bundeswehr.org

Accession of Bosnia and Herzegovina into the Partnership for Peace Program

*Mr. William Thomas, Legad
Transition Management Group – NATO Hq Sarajevo*



With the recent accession of Bosnia and Herzegovina (BiH) into the Partnership for Peace Program (PfP), NATO Headquarters Sarajevo (NHQSa) initiated coordination of targeted assistance to BiH for the latter's planned implementation of the NATO/PfP SOFA.

As part of its primary mission to assist BiH authorities with ongoing defence reform, NHQSa (through its Transition Management Group) sought the assistance of Headquarters, Supreme Allied Command Transformation (HQ SACT), Estonia and the US Army--a trio that enjoys a tried and trusted partnership in training other countries on best practice in NATO/PfP SOFA implementation.

The first result was a seminar recently held on BiH's Adriatic coast from 14-17 May 2007. Co-organized and hosted by NHQSa, co-chaired by HQSACT Legal Advisor and the Estonian Ministry of Defence Legal Advisor, Desk Officer representatives from 14 BiH Ministries and Institutions comprised an attentive body of students.

The theory part of the seminar (also, of course, reflective of actual practice) was provided by briefers from HQ SACT Legal Office, NATO Joint Force Training Centre (JFTC) Legal Office, and the US The teaching faculty endeavored to challenge and enlighten in equal measure by balancing theory and practice in this Army. Similarly, the Estonian delegation headed by the Permanent Under Secretary for Defence, Mr Lauri Almann, shared an immensely valuable approach based on lessons learned from the perspective of a new NATO member. The practice part of the seminar was based on a set of exercises drawn and tailored from the Estonian Handbook of NATO SOFA Exercises published in 2003.

The new BiH version comprises a special edition of the original handbook and was made available in both English and Serbian/ Bosnian/Croatian. The exercises themselves played out in lively working groups involving both BiH representatives and the international instructors conducted with simultaneous translation by NHQSa staff

Accession of Bosnia and Herzegovina into the Partnership for Peace Program

Initial feedback from the BiH participants judged the seminar as enormously valuable both in terms of substantive knowledge and, in the specific context of SOFA implementation, as highlighting the need for an increased level of inter-ministerial co-ordination in a State currently facing challenges in this key area.

It is anticipated that BiH will ratify the PfP/NATO SOFA and its additional protocols later in 2007. With this in mind, the Estonian Ministry of Defence has kindly invited BiH to continue a "lessons learned" bilateral dialogue facilitated by NHQSa and HQ SACT where necessary.

For further information on NATO activities in Bosnia-Herzegovina, see <http://www.jfcnaples.nato.int/NHQSA/>

Mr. William Thomas
Comm +387 33 495 000 Ext 7302
William.Thomas@bihdr.nato.int

8th Hague Joint Conference on Contemporary Issues of International Law

Mrs. Cecile Vandewoude –SHAPE Intern

From 28 until 30 June 2007, the American Society of International Law, The Dutch Society of International Law, the foundation "The Hague Joint Conferences on International Law" and the "Stichting T.M.C. Asser Instituut" organized for the eighth time the bi-annual Conference on Contemporary Issues of international law. This conference honoured the centennial anniversary of the Hague Conferences of 1907 with a line up of panels focussing on salient issues in international humanitarian law and criminal jurisdiction.

In 1907, forty-six of the world's leading nations assembled at The Hague to adopt a dozen seminal conventions, declarations and regulations defining the rules of conduct in modern warfare. These rules have since ripened into customary international law, binding on all states. They formed the basis for the later adoption of the 1949 Geneva Conventions and 1977 Additional Protocols, as well as the Biological Weapons and Chemical Weapons Conventions.

The "Martens Clause" of the 1907 Hague Convention IV served as a foundation for the concept of crimes against humanity recognized in the Nuremberg and Tokyo judgments, the Genocide Convention and the statutes of the contemporary international criminal tribunals. The Hague Conference of 1907 also served as a model for the

League of Nations and United Nations, and it considered for the first time a proposal to establish a World Court, leading ultimately to the creation of the International Court of Justice.

One of the panels dealt with "the present-day conduct of hostilities" and featured renowned professors Yoram Dinstein (Professor Emeritus at Tel Aviv University) and Michael Schmitt (Professor at The United States Naval War College). This panel examined some modern methods and means of warfare with a view to analyzing potential problems in terms of their compatibility with international humanitarian law.

Technological developments have resulted in the emergence of new methods and means of warfare. Non-kinetic warfare, such as computer network attack, and the introduction into arsenals of certain high-tech weaponry, such as combined effect bombs, cluster and depleted uranium munitions, etc. have raised questions concerning the extent to which the law fully foresees and regulates their use.

Professor Yoram Dinstein focused on air and missile warfare (AMW) which is relatively new to

land and sea warfare. AMW is not codified in an up-to-date text, not even in a binding text. The only existing text is the Hague Rules on Air Warfare of 1923. Currently, an attempt is being made by a group of experts, under the aegis of HPCR to produce an up-to-date non-binding manual on AMW. A fundamental underlying problem is the "great schism" between Contracting and Non-Contracting Parties to Additional Protocol I (to the Geneva Conventions) of 1977.

Professor Dinstein stressed the principle of distinction, meaning the obligation to distinguish between military targets (i.e. military aircrafts, warships, etc.) and civilian objects (e.g. civil and medical aircraft, civilian vessels and hospital ships). Professor Dinstein pointed out several issues regarding the compatibility of AMW and international humanitarian law. Only a few are mentioned here. In air-to-air combat :

(1) how does a military aircraft surrender ?;
(2) can no-fly zones be legally established ?;
and the inadequacy of measures of real-time identification of medical aircraft.

In air-to-land combat the professor raised the following questions:

8th Hague Joint Conference on Contemporary Issues of International Law

(1) Who bears the responsibility of aborting an air strike when it becomes apparent that circumstances on the ground are not as anticipated ?; and
 (2) what is the status of civilians launching attacks from a distance by cruise missiles or unmanned aerial vehicles (UAVs) ?

Finally, in air-to-sea combat he indicated as illustrative problems:

(1) can an effective blockade be maintained solely by aircraft ?;
 (2) when do prize procedures apply ?; and
 (3) what is the modern law of contraband ?

While contemplating these issues, Professor Dinstein said that we should bear in mind that "people change and the law changes with them". By this statement, he meant that the above mentioned problems might be solved by looking at previous evolutions international humanitarian law went through. In some cases IHL has not changed at all, but policy has changed (e.g. "shattering civil morale"), in other events the law has changed minimally (e.g. "target area bombing") and

sometimes it has changed maximally. Professor Michael Schmitt of the United States Naval War College focused on "Computer Network Attacks", which he defined as "operations to disrupt, deny, degrade, or destroy information resident in computers and computer networks themselves". One would rely on data streams to execute the attack. Such attacks have the ability to create fast a strategic/operational/tactical effect. This is a new way of targeting objects and renders a whole new set of targets vulnerable.

But are such attacks lawful? According to international humanitarian law indiscriminate attacks are prohibited. These are attacks of which the effects cannot be limited. Can the effect of malicious codes (viruses and worms) be limited ? Will civilians not be affected ? Is such an attack proportional, bearing in mind that computer systems are connected to each other? Do such attacks require new intelligence or impose new planning requirements ? Is there a possibility to surrender?

There are no clear cut answers to the legal issues raised by these scholars, but their comments point to the necessity of a future international regime that successfully addresses non-kinetic means of attack

with legal concepts that both embrace the protection of non-combatants and the obligation of states to protect their citizens and interests.

Cecile Vandewoude
 NCN 254-5855
 Comm +32-65-44 58 55
 Cecile.vandewoude@shape.nato.int

Germany's Federal Constitutional Court refines German Perception of NATO & ISAF

Mr. Ulf-Peter Häußler(*) – Legal Advisor, German Armed Forces

When earlier this year, Germany's Federal Government decided to contribute six RECCE Tornados to the ISAF mission, the political controversy concerning this contribution ended up before Germany's Federal Constitutional Court. The parliamentary caucus of "Die LINKE"¹ contended that both its consent to the Riga Summit Declaration and Comprehensive Political Guidance and the decision mentioned violate the rights of Parliament to participate in foreign policy decision-making. On 3 July 2007, the Federal Constitutional Court dismissed the application. The reasons attached to its judgment contain a detailed analysis of NATO as an international organisation, and of the ISAF framework and practice, from the perspective of German constitutional law. This analysis might frame the German perception of NATO and the politico-legal framework of Germany's participation in ISAF for the foreseeable future.

Since the end of the Cold War, three major cases concerning German participation in NATO operations were brought before the Federal Constitutional Court. On 10 July 1994, the court held that Germany's contributions to, *inter alia*, operations Sharp Guard and Deny Flight alongside with the Federal Government's consent to the Strategic Concept 1991 were not in violation of constitutional law; it also introduced the requirement of parliamentary approval of all deployments of armed contingents to operations led by international organisations such as NATO, the WEU, and the UN. Later, the German consent to NATO's revised Strategic Concept 1999 came under scrutiny. According to the parliamentary caucus of "Partei des Demokratischen Sozialismus"² the 1999 strategy had altered the North Atlantic Treaty without expressly amending it. On 22 November 2001 this application was dismissed, and the argument that the Federal Government was obligated to press for a formal amendment and submit the latter for parliamentary approval, was rejected. The case under review, the third case in this line, confirms the previous judgments.

The Legal Framework

Following World War II, and with the prohibition of aggressive use of force by the UN Charter in mind, the framers of contemporary German constitutional law adopted a variety of provisions aimed at ensuring that Germany follows the path of peace in its international relations³.

³ In particular, according to the Preamble of the Basic Law the German people has adopted its constitution "[i]nspired by the determination to promote world peace ...". The waging of a war of aggression is a constitutionally defined crime (Article 26 of the Basic Law). Peace is a matter of multilateralism: Article 24(2) of the Basic Law envisages that:

With a view to maintaining peace, the Federation may enter into a system of mutual collective security; in doing so it shall consent to such limitations upon its sovereign powers as will bring about and secure a lasting peace in Europe and among the nations of the world.

(*) Legal Advisor, German Armed Forces (Joint Command Special Operations). The views expressed herein are the author's and do not necessarily correspond with the official position of the Federal Government, the Federal Ministry of Defence, or the German Armed Forces.

¹ "The LEFT" is the current successor of the Eastern German Communist Party after the recent merger of the "Party of Democratic socialism" and a left-wing grouping of mainly Western German background.

² "Party of Democratic Socialism", denomination chosen by the successor of the Eastern German Communist Party.

Germany's Federal Constitutional Court refines German Perception of NATO & ISAF



They have also confirmed Parliament's strong position vis-à-vis the Executive in matters of foreign policy ⁴. On this basis, the parliamentary caucus of 'Die LINKE' was entitled to bring the case under review before the Federal Constitutional Court because of the following submissions :

(1) that the Federal Government, by virtue of its support of ISAF and consent to the Comprehensive Political Guidance at the Riga Summit (to which it should have preferred pressing for an amendment of the North Atlantic Treaty), has not prevented the Alliance from abandoning its regional character, and

⁴ *The Basic Law requires Parliament consent for international treaties Germany enters into, and makes the right to give or withhold such consent enforceable in constitutional litigation. According to Article 59(2) of the Basic Law: Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law. ...*

Moreover, under Article 93(1) of the Basic Law, The Federal Constitutional Court shall rule:

1. on the interpretation of this Basic Law in the event of disputes concerning the extent of the rights and duties of a supreme federal body or of other parties vested with rights of their own by this Basic Law or by the rules of procedure of a supreme federal body ...

(2) that it should not have contributed RECCE Tornados to ISAF because this operation was indicative of NATO's deviation from the aim to maintain peace ⁵.

Summary of Judgment (1) ISAF & NATO's Regional Character

Parliamentary consent to the ratification of such treaties covers respective "integration programs"; it contributes to the Federal Government and Parliament's shared responsibility for Germany's participation in, and future adherence to these "integration programs" vis-à-vis the sovereign, i.e. the German nation. As far as NATO is concerned, the "integration program" embodied in the North Atlantic Treaty encapsulates mutual support in the case of an armed attack, related consultations, and far reaching implementation powers of the North Atlantic Council in all pertinent matters. This "integration program" is based on NATO's fundamental aim and purpose, viz. the maintenance of peace at regional level.

⁵ *According to consolidated jurisprudence of the Federal Constitutional Court an application made to this court will be considered if the applicant can substantiate that its/his/her rights have possibly been violated by the action challenged.*

Building on its 2001 judgment, the Federal Constitutional Court has stressed that crisis response operations do not challenge NATO's character as a regional defence alliance. NATO's aim and purpose to maintain peace in Europe and North America in a comprehensive manner has never implied a *ratione loci* limitation of NATO operations on NATO Member States' territories; the notion of collective defence encompasses the conduct of operations on the territory of an aggressor, including operations to ensure its sustainable pacification. In that sense, a crisis response operation (as implied by the Federal constitutional Court: Article 5) on an aggressor's territory which complements, *ratione materiae et temporis*, a defence operation on the same territory, is congruent with the North Atlantic Treaty's inherent geographical limitation. From the court's perspective, the 1999 strategy's related innovation, viz. the introduction of non-Article 5 crisis response operations (para 31), also comes within the ambit of the North Atlantic Treaty.

On that basis, the court has characterised ISAF as an 'out of area' non-Article 5 crisis response operation as envisaged by the 1999 strategy (cf. paras 53(e), 56, and 59).

Germany's Federal Constitutional Court refines German Perception of NATO & ISAF

By way of contrast, the invocation of Article 5 on 12 September 2001 is immaterial to the court's assessment; from a legal perspective, the court held ISAF must be distinguished from OEF meticulously. Although 'out of area', ISAF has not disconnected NATO from its regional framework. From the Federal Constitutional Court's perspective, ISAF does not only serve Afghan security. Rather it also aims to protect the Euro-Atlantic region from further attacks. This aim is reflected in the strategic mission statement contained in relevant UNSCRs and the characterisation therein, of the situation in Afghanistan as a threat to international peace and security. Moreover, this aim is rooted in the fact that ISAF is directly connected to the only armed attack ever on a NATO Member State to which the Alliance responded by way of invoking Article 5 – the September 11 terrorist attacks ⁶.

⁶ Note that although the Federal Constitutional Court has used the German word "Angriff" ("armed attack") it has also spoken of the September 11 attacks as "Terroranschläge", a term which refers to criminal activity rather than acts of (degenerated, as it is here) warfare. This usage reflects a 'criminality' perception of the September 11 attacks which the majority of both the legal and policy communities in Germany seem to share.

In particular, the court refers to the Riga summit Declaration and the Alliance's Comprehensive Political Guidance (paras 2 and 6, respectively), for the international community's assessment that a stable security environment deserve its support (scil.: by, *inter alia*, ISAF) beyond OEF's counter-terrorism efforts. The court held that "those responsible within NATO's framework could, and still can, assume that providing security support to the civilian reconstruction of Afghanistan contributes directly to the Euro-Atlantic region's security; as demonstrated by September 11, in light of contemporary threat patterns caused by globally acting terrorist networks, threats to the security of the Alliance's common geographical space can no longer be considered to emerge in a certain territorial context only" (author's translation).

Finally, the Riga Summit Declaration and the Alliance's Comprehensive Political Guidance do not indicate that the transformation of NATO goes beyond the "integration program" consented to by the German Parliament; notably, the Declaration has continuously referred to Euro-Atlantic security (paras 11, 30, 34, 40, and 46).

Summary of Judgment(2) German ISAF RECCE Tornados

Contrary to the contention made by "Die LINKE", the Federal Constitutional Court held that neither ISAF practice nor related passages of the Riga Summit Declaration indicate that NATO deviates from its aim to maintain peace. Accordingly, as the court concluded, the Federal Government has not violated rights of Parliament by, *inter alia*, its decision to contribute RECCE Tornados to ISAF and to consent to the Riga Summit Declaration. Article 24(2) of the Basic Law qualifies membership in a system of mutual collective security as a key mechanism to establish and maintain sustainable peace in Europe and world-wide. The framers of the Basic Law wanted exactly this, viz. that Germany abides by the customary prohibition of use of force in international relations in the framework of collective security systems ⁷. According to the court, NATO operations conducted in violation of international law in general and the prohibition of the use of force in particular could indeed indicate that the Alliance deviates from its aim to maintain peace.

⁷ Note that the Federal Constitutional court referred to the ICJ's Nicaragua case (ICJ Rep. 1986 at 13, paras 187sq) for the customary prohibition of use of force.

Germany's Federal Constitutional Court refines German Perception of NATO & ISAF

A deviation can, however, only be established on the basis of a structural pattern of violations of international law – as opposed to individual such violations. For that reason, the Federal Constitutional Court refused to entertain the allegations of individual violations of international law. According to the court, a violation of the rights of Parliament presupposes that NATO's practice has effectively disconnected the Alliance from its legal basis in the North Atlantic Treaty (i.e. rendered the original parliamentary consent to the ratification thereof practically irrelevant). It follows that the contentions made by "Die LINKE" do not require that the Federal Constitutional Court extend its scrutiny to the question of whether NATO operations violate international law in a generalistic manner. Instead, the Federal Constitutional Court considered whether ISAF practice and the Riga Summit Declaration contain any indications that NATO structurally deviates from its aim to maintain peace.

As regards ISAF practice, the court discussed the effect of its co-ordination with OEF. "Die LINKE" had contended that OEF's alleged illegality spills

over on ISAF. In light of the current mode of co-ordination and the legal basis thereof, the court refused to entertain this contention. For that purpose, it relied on the – uncontested – expert testimony given by the German Chief of Defence, General Schneiderhan. According to this testimony, the existing institutional link between ISAF and OEF – the U.S. counter-terrorism "dual hat" being now placed within RC(E) rather than as DCOM Security (as it earlier was) – precludes ISAF and OEF from being blurred in an uncontrolled manner. Likewise, the RECCE Tornados contributed are not – unlike contended – part of integrated fighting missions, if only because, in accordance with the national mandate, they are not equipped with any other than self-defence weaponry. Finally, concerning the intelligence gathered, the court has made reference to the summary of key aspects of the ISAF OPLAN in the German national ISAF mandate: only ISAF may request RECCE flights, pictures taken will be transferred into a database, classified secret, and their accessibility will depend on a personal access code.

On that basis, it is for ISAF to determine, within its responsibility and in accordance with the OPLAN, whether certain pieces of intelligence

should be provided to OEF in order to enhance mutual security.

This practice corresponds with both elements of the relevant legal framework: the distinction between ISAF and OEF⁸, and the fact that the UN Security Council has frequently called for, and welcomed co-ordination⁹ between ISAF and OEF (UNSCRs 1510, 1659, and 1707). On that basis, the court concluded the facts established in the hearing do not support the contention that OEF's alleged illegality spills over on ISAF because

⁸ *In the Federal Constitutional Court's assessment, ISAF is a Chapter VII-based operation to maintain security in order to provide a basis for civilian reconstruction of Afghanistan while OEF is a counter-terrorism operation for which collective self-defence (Article 51 of the UN Charter) is relied upon. Note that the court does not say that OEF is based upon Article 51 of the UN Charter and does not quote UNSCRs 1368 and 1373 in this respect either. That might indicate that it did not want to address the controversial question whether OEF is still a self-defence operation or has lost its legal link to September 11 (as is alleged by some).*

⁹ *The court even speaks of "Koordinationen", i.e. – literally translated – the plural of co-operation.*

Germany's Federal Constitutional Court refines German Perception of NATO & ISAF

both the legal framework and theater practice prevent the separate responsibilities of the operations from being blurred – meaning in effect that there is no "channel" through which such illegality could indeed spill over. The court finally notes that even individual violations occurring within OEF field level operations would not affect NATO's aim to maintain peace, and that the Riga Summit Declaration (para 5) contains the manifestation of NATO's will to commit its operation in Afghanistan to the aim to maintain and stabilise peace.

Comments and Conclusion

The judgment is but one example of a growing trend in German constitutional jurisprudence, i.e. to uphold the precedence of German constitutional law – and, at the same time, the court's own judicial authority – in matters of international co-operation. The court has originally developed this jurisprudential pattern with respect to EEC/EC/EU integration. The fact that it is following its course with respect to NATO might respond to the Alliance's exercise of an increasing measure of supranational authority in the framework of international peace missions (vis-à-vis the

governments and inhabitants of the theatres of its operations).

The judgment conveys a clear message: German membership in NATO, and its participation in NATO operations, is contingent on compliance with the constitutional requirement that NATO, as an organisation, pursues the aim to contribute to international peace. Moreover, unless the North Atlantic Treaty is amended, NATO's focus is regional from a German perspective. The judgment indicates that NATO operations based on a UN mandate and acting within the framework established thereby will, as a rule, match these criteria. Given the relevant UNSCRs, NATO's OPLAN for ISAF, and ISAF theater practice, the court has not bought in to the doubts raised concerning ISAF's compliance with international law. As a result, the judgment endorses the current policy adopted by Germany's Federal Government and approved by Parliament, yet without indicating that this is the only policy which would be congruent with German constitutional law. The judgment also indicates, however, that closer co-operation between ISAF and OEF – at least if initiated without a UN mandate – might reopen the question of spills-over of the latter's alleged illegality.

It is most likely that Germany will rely on the judgment concerning INTEL sharing in the ISAF framework in order to avoid an escalation of the related political controversy¹⁰. From a legal perspective, there is no need to be inflexible though; Germany is not obligated by its constitution to stick to the present policy if the situation in theater changes and such change is reflected in relevant UNSCRs and the NATO OPLAN for ISAF.

¹⁰ *It should be noted that a considerable number of Members of Parliament and influential members of all major democratic political parties have certain reservations concerning Germany's continued willingness to participate in OEF's Afghan theater.*

Ulf-Peter Häußler
Comm +49-3327-503405
ulfpeterhaeusler@bundeswehr.org

My First Six Months with NATO

Mr. Oliver Aretz – NAEW 3A Component

After passing the second German bar exam and working as a lawyer in Germany for merely 8 months, I started my employment at the E-3 A Component Geilenkirchen in January 2007.

Although the NAEW E-3A Component was not completely new to me as I served as a German conscript at the Civilian Personnel Office about ten years ago, when beginning to work at E3-A component, I felt like being in a different world. I came from private practice, where I mainly dealt with criminal, labor and contract law and went from that environment straight into a big multinational organization. Despite the fact that occupations are of the same nature – the similarities are limited. Because the nature of a legal advisor's profession is to come in contact with people who do not always follow the rules, like at my previous job, I am sure I may be meeting persons who bend the law over here as well, but I haven't clearly identified them yet !

Even though one might have heard of an agreement called SOFA, the German legal training does not really prepare for that. Although the theoretical and practical training

takes about 6 to 7 years (which feel at least like ten) and include two most enjoyable exams, nobody ever mentioned HNS MOU, NCPR, DCPS etc. to me.

The learning continues and now after six months I claim that I understand how NATO works - at least the basics, which, of course, would not have been possible without the warm welcome and the excellent support I received here at the Geilenkirchen Legal Office. Many thanks for that!

Additionally I recently had the pleasure of attending the Legal Advisor's Course at the NATO School in Oberammergau this year, which from my point of view can only be highly recommended to anyone starting in a legal position with NATO. The LEGAD course features excellent lessons in a magnificent setting – just don't forget your gym clothes – you will need them to train off those liters of beer(s) and deep fried schnitzels.

I can truly say that I have not regretted stepping into the world of NATO (and even more into the unique world of the E-3A Component). I enjoy the diversity of the work and of the people from the participating nations

whom we are dealing with on a daily basis.

Finally, I will be looking forward to meeting you in (hopefully sunny) Istanbul next year.

*Oliver Aretz
NCN 229-2472
Comm +49-2451-63-2472
oaretz@e3a.nato.int*

Spotlight



Ms. Desislava

Zhelyazkova,

ACT/SEE intern

from Aug 07 to

Jan 08



Name: Desislava Zhelyazkova

Rank/Service/Nationality: Civilian (Bulgarian)

Job title: Intern at SACT SEE Legal Office, Belgium

Primary legal focus of effort: Build an easily accessible and searchable knowledge base which would consist of all NATO legal documents. This shall happen through implementation of modern technologies. However, knowledge management does not equal IT solutions only but focuses on the specific needs and qualifications of the working professionals and the NATO legal community as a whole.

Likes: Traveling

Dislikes: Grey skies and rain.

When at SHAPE , everyone should: Experience biking.

Best NATO experience: Being part of the NATO multinational team is a great experience in itself. I am enthusiastic about my role in finding solutions corresponding to the NATO legal issues.

My one recommendation for the NATO Legal Community: The Alliance has available well trained and dedicated professionals. The focus should be on building a flexible and productive network among them while making use of all resources offered by today's society.

Desislava.zhelyazkova@shape.nato.int



HAIL

&

FAREWELL

Hail

JFC Naples : COL Richard Galvin (USA A) joined on July 6

JFC Naples : WgCdr Mark Phelps (GBR RAF) joined in August

JFC Naples : Maj Thomas Charpentier (FRA AF) joined in August

JFC Brunssum : Mr. Pascal Limpens (NLD) became a NATO Civilian in July

CC-Land HQ Heidelberg : LtC David Caldwell (USA A) joined in July 2007

CC-Air HQ Ramstein : Wg Cdr Andrew McKendrick (GBR RAF) joined in August 2007

KFOR : LtC Thomas Toussaint (FRA A) joined in August 2007

NC3A : Mr Vincent Roobaert (BEL) joined in July 2007

HQ SACT : Mrs. Emma Hart (GBR) will join the Legal Affairs Office as the Legal Assistant on September 4.

ACT/SEE : Ms. Desislava Zhelyazkova (BGR) started a six-month internship on August 6th , 2007

Farewell

JFC Naples : COL Tia Johnson (USA A) left in July 2007

JFC Naples : WgCdr Adamson (GBR RAF) left in August 2007

JFC Naples : Maj Rudolf Stamminger (FRA AF) left in August 2007

CC-Air HQ Ramstein : Wg Cdr Philip Spinney (GBR RAF) left in August 2007

KFOR : LTCOL Boris Wentzek (GER A) left in July 2007

GENERAL INTEREST/UPCOMING EVENTS

- Please go to the link hereunder to read about the first Operational Law Course which was launched by ACT on July 9-13 to provide training to the Alliance and Partner nations Legats deploying in support of NATO operations :
<http://www.act.nato.int/multimedia/articles/2007/070726oplaw.html>
- NATO concurred to the release of General Lance L. Smith as Supreme Commander Transformation : <http://www.nato.int/docu/pr/2007/p07-088e.html>
- On the Treaty Affairs - U.S. Department of State web page <http://www.state.gov/s/l/treaty/depositary/>, many ratification lists for NATO Treaties are available.
- On August 28, 2007, Russia deposited the PfP SOFA and the Additional Protocol to the PfP SOFA – entry into force will be September 27, 2007.
- *The 30th Roundtable on Current Issues of International Humanitarian Law* will be held at the International Institute of Humanitarian Law in San Remo, Italy from September 6 to 8, 2007. It will be followed by a workshop on *Multinational Rules of Engagement* on September 10 and 11, 2007. For further information please consult www.iihl.org
- *PIMS Training and NATO Administrative Law Workshop* will be organized at ACT/SEE from September 18 to 20, 2007. For additional information, please refer to the invitation sent out to all NATO Legal Offices on August 20.
- The next *NATO Legal Advisor's course* will take place at the NATO School from October 22 to 26, 2007 (please note change in dates). Additional information can be found on www.natoschool.nato.int. For long range planning, the NATO Legal Advisor's course is planned from May 19 to 23, 2008 with the second Operational Law Course scheduled in July.
- The NATO Legal Conference will be taking place from 21 to 25 April, 2008 in Istanbul, Turkey.



*Strategy without
tactics is the slowest
route to victory.
Tactics without
strategy is the noise
before defeat.*

[Sun Tzu](#)

Articles/Inserts for next newsletter can 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)

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