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Introduction

Fellow Legal Professionals and Persons Interested in NATO,

Our fifteenth electronic NATO Legal Gazette contains new articles written by Legal Advisors from Belgium, France, Germany, and the Netherlands. Each of these articles provides insight on current issues NATO Legal Advisors are addressing or activities being undertaken. Because of an editorial oversight—mine—in our 14th issue we published an earlier version of Captain Federico Sperotto's article, "Contextual Application of Human Rights and International Humanitarian Law Instruments During Armed Conflicts." The correct version of his paper is now included in this edition.

The summer moving season is upon us all. In our Hail and Farewell column we record the arrival and departure of eleven Legal Advisors in our NATO community. Two of the departing LEGADS, Mrs. Mette Hartov-Prassé, and Commander Jaimie Orr have been staunch supporters of this Gazette. The idea for its creation came from a conference Mette hosted while Jaimie provided editorial support. Both have contributed several articles. As they leave NATO service, their significant contributions are deeply appreciated. It is hoped that in their next jobs they find time to remain in touch and, perhaps, continue to author articles of interest to our legal community of NATO offices, Ministries of Defence, and other international organizations.

Finally, we seek to grow the Upcoming Events and General Interest section of the Gazette. With the purpose of sharing knowledge between legal professionals and transforming how we keep each other informed of events of importance, all readers of the Gazette are requested to provide the ACT Staff Element Europe Legal Office via an email to either myself Sherrod.bumgardner@shape.nato.int or Mrs. Dominique Palmer De Greve Dominique.degreve@shape.nato.int notice of any news about NATO or training, seminars, or conferences that you are hosting that are open to our community for the remainder of 2008 and 2009. Our goal is to build a calendar of upcoming events that permits Legal Advisors in the soon-to-be 28 member nations of the Alliance and the more than 35 Partner Nations to be aware of these opportunities for legal training and education. And, as always, short articles (3-8 pages) on legal issues important to our community are requested. With your assistance, we hope to publish another issue in late August or early September.

Sincerely,

Sherrod Lewis Bumgardner

Legal Advisor

Allied Command Transformation, Staff Element Europe

17 March 2008 in Mitrovica North, Kosovo

Lt Col Gilles Castel – Legal Advisor KFOR



This article will focus on the events that took place on 17 March 2008, highlighting the use of force in accordance with KFOR Rules of Engagement, showing the procedure for Hand-over/Take-over of mission between UNMIK-P and KFOR forces and showing the type of events that KFOR has to face in Kosovo.

On 17 February 2008, the Government of Kosovo unilaterally declared its independence. The following days, some violent incidents occurred at the Kosovo gates, opposing United Mission in Kosovo-Police (UNMIK-P) and KFOR forces to Serbian demonstrators. Despite a lot of degradation, those incidents ended only with minor casualties. On 14 March 2008, Kosovo's Serbs (KOS) radicals occupied the Mitrovica courthouse, symbol of the Kosovo institutions in the North.

On 16 March 2008, UNMIK-P decided to hold an operation on Monday 17 March 2008 with the support of Kosovo Police Service (KPS) for the reclamation of Mitrovica Court House. They regained control of the courthouse and detained approximately 53 KOS who occupied the building. Demonstrators arrived in front of the courthouse within a short time after the arrival of UNMIK-P troops, as well as of the first KFOR troops. A few moments later, the first stones were thrown to UNMIK-P and KFOR troops while they were assuring the security of the transfer of the detainees. The escalation continued and Molotov cocktails were thrown against UNMIK and KFOR vehicles. Rapidly the convoys transporting the detainees were blocked by the demonstrators and UNMIK-P and KFOR troops suffered their first wounded early in the morning. At this point, the tension quickly increased and the first defensive hand grenades were thrown against the troops, causing several casualties among the forces. During all morning, the troops deployed on the spot were under attack by demonstrators using stones, Molotov cocktails, hand grenades and fire arms like AK 47. At noon, KFOR troops assumed the police primacy in Mitrovica North due to the withdrawal of UNMIK-P forces that had suffered such a number of wounded troops that they were not able to continue their mission any longer.

The situation calmed down after KFOR troops answered the demonstrators' fire by using force with individual fire arms or snipers shots. At the end of the day, both UNMIK-P and KFOR troops had 90 wounded, among them one UNMIK-P officer who died during his medical treatment.

What can we learn from a legal point of view about this demonstration that turned into a violent riot ?

At first, all the procedures set at KFOR level or between UNMIK and KFOR worked well, even if we had to adapt some of them after these events. Pursuant to United Nations Security Council Resolution (UNSCR) 1244 dated 10 June 1999 and according to the Note of Understanding (NOU) signed by the Special Representative of the Secretary General (SRSG) and the COMKFOR, the police primacy (all operations related to law enforcement measure) is an UNMIK responsibility while the tactical primacy (use of KFOR forces during limited scope operations as defined by unit, location, mission, or time) is shared between UNMIK and KFOR. It is also planned that if UNMIK is no more able to perform its police primacy, SRSG may request COMKFOR to take the lead of the police operation. That was the case when UNMIK-P was so overwhelmed by the violence that they had to withdraw from the spot. SRSG then requested COMKFOR to assume the police primacy.

17 March 2008 in Mitrovica North, Kosovo

The events from 17 March 2008 also highlighted some weaknesses in the NOU relating to the handover procedures between UNMIK and KFOR troops in case of emergency. In order to solve this problem KFOR issued a specific directive describing the procedure to be followed in emergency situations. Still, according to the NOU, COMKFOR gave back this police primacy to SRSG a few days after, when the situation in Mitrovica North had calmed down. KFOR also noticed that the procedure set in the NOU does not give a proper answer to emergency situation. Therefore, KFOR issued a directive in which the hand-over Procedure to be followed in case of emergency is described.

Second, the question is asked whether KFOR Rules of Engagement were efficient enough. Thus, during this CRC operation KFOR had to use force in accordance with its Rules of Engagement. According to the Law of Armed Conflict, use of minimum force may include the use of lethal force. But, in accordance with the principles of the Rules of Engagement and in order to take into consideration the current political situation in Kosovo, COMKFOR decided, through a fragmental order, to restrict the right to use lethal force only where there is an imminent threat to a human life. Notwithstanding this restriction, nothing during the events from 17 March hampered the action of the KFOR forces.

In respect of the principle of proportionality, KFOR forces used a large scope of RCMs, from tear gas to sniper's shoot, including the use of rubber bullets and of live ammunition.

Three interesting points can be highlighted :

- COMKFOR received from COMJFC Naples the permanent delegation to use RCMs in CRC operation. COMKFOR sub delegated this authorization to its Task Forces Commander, without limitation of duration and without limitation about the means, except for the use of rubber bullets that still remain under the direct authorization of COMKFOR. The use of rubber bullets was submitted to a specific KFOR procedure and was also subject to limitation (rubber bullets should only be shot in rebound shot). In the early morning of 17 March, Task Force North Commander requested from COMKFOR the authorization to use rubber bullets to face the situation. This authorization was first given orally. A short time after, Task Force North Commander also requested to be able to shoot rubber bullets in straight shot. This authorization was also given immediately orally and confirmed later with a written order. After the action, the procedure has been reviewed and all limitations to the use of rubber bullets removed to allow KFOR forces to use all the scope of the RCM means in the conduct of their operations.

- The use by the rioters of fire arms and hand grenades was clearly an imminent threat to human life. The use of Molotov cocktails is a very sensitive issue because the applicable rules on this matter are subject to vastly different national interpretation and regulation. The only certainty was when the Molotov cocktails were deliberately thrown on wounded soldiers... Thus, the use of lethal force against the launcher of Molotov cocktails will remain submitted to the appreciation of the on-scene Commander.

- Despite this uncertainty about when we may use lethal force against the Molotov cocktail launcher it is sure that the use of snipers in such operations perfectly answers the principle of proportionality. Indeed, the use of snipers on 17 March permitted to immediately cease the violence against KFOR troops. Because the crowd was not only constituted of violent people but also of "normal" demonstrators, the use of other riot control means like hand grenades was very sensitive. This way, the systematically deployment of snipers in CRC operation and their use in a discriminate and proportional way is one of the main lessons learned of this day.

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Even if the events that occurred at the Kosovo gates have shown a certain level of violence, the demonstration in Mitrovica North is significant of the type of action that KFOR may have to face : a peaceful demonstration that very quickly escalates to a real riot. KFOR Rules of Engagement are robust enough and the lessons learned, both after the events at the gates and in Mitrovica North, provided KFOR with the necessary experience and procedure to be able to face such future events.

*Lieutenant Colonel Gilles Castel
Legal Advisor
KFOR
Comm +38-503-603-2087
Castelg@hq.kfor.nato.int*

“To Reside or Not to Reside, That is the Question”

Mr. Jarin Nijhof – Chief, Host Nation Division, 21st Theater Sustainment Command, Netherlands Law Center¹

A New and Improved Dutch Interpretation of Ordinary Resident Regarding Municipal Tax Assessment

Dutch local governments do not always know how to categorize NATO personnel and their dependents who reside within the municipality. These individuals derive a privileged status in connection with their temporary and official stationing in the Receiving State under international law. This temporary and privileged status results in an exemption from several municipal taxes. These temporary NATO personnel, however, sometimes reside in the Receiving state for an extended period of time. They and their dependent family members often take an active part in the local social life of the community. Their children play in the local soccer club and their spouses attend events at the village community center and church. Sometimes these NATO personnel even purchase a home. Dutch municipalities—as every other properly functioning municipality across the world—periodically review their real estate databases to ensure that real estate holdings are properly assessed and to ensure that local residents are paying their assessed share. However, from time to time municipal tax agents attempt to augment tax revenues by 'imposing' certain local taxes upon long-residing NATO personnel.

The question then becomes which laws and regulations govern municipal taxation of foreign service members who live in the Netherlands because of their assignment to official duties there. In order to answer this, I'll first briefly outline the general legal framework regarding fiscal privileges awarded to NATO personnel in relation to (municipal) taxes. Secondly, I will examine municipal real estate tax in greater detail. I will conclude by discussing some recent court rulings which have significant [and favorable] legal ramifications for NATO personnel who live and work in the Netherlands beyond the ordinary three-year assignment cycle period.

Legal Framework

Many members of foreign armed forces and their civilian components are stationed in the Netherlands with a NATO component² or pursuant to a bilateral agreement.³ The legal status of these personnel is established by the respective stationing agreement. The stationing agreement for the Headquarters Allied Joint Force Command Brunssum⁴, for instance, provides that the *Protocol on the Status of International Military Headquarters* ('Paris Protocol'), an international agreement established in accord with the North Atlantic Treaty, applies to its personnel.

¹ Mr. Jarin Nijhof serves as Chief, Host Nation Division, 21st Theater Sustainment Command, Netherlands Law Center. He holds a degree in Dutch Law from Maastricht University and an LL.M. in European Legal Studies from Maastricht University. The views expressed herein can be attributed only to the author, and do not reflect the official position of the U.S. Department of Defense, the U.S. Department of the Army or the Dutch Ministry of Defense.

² Such as Headquarters Allied Joint Force Command Brunssum (HQ JFC Brunssum), NATO Airborne Early Warning & Control Programme Management Agency (NAPMA) in Brunssum, Civil-Military Co-operation Centre of Excellence in Budel or NATO Consultation of Command and Control Agency (NC3A) in The Hague.

³ E.g. the Exchange of Notes (with Annex) constituting an Agreement relating to the Stationing of United States Armed Forces in the Netherlands, The Hague, 13 August 1954, U.N.T.S., Vol. 251 (1956), no. 3535.

⁴ Agreement on the special conditions applicable to the establishment and operation of International Military Headquarters within the European territory of the Kingdom of the Netherlands (with related letters), Paris, 25 May 1964, U.N.T.S., Vol. 248 (1965), no. 7920.

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Other stationing agreements declare the *Agreement between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces* (NATO SOFA) applicable.⁵ This article will focus primarily on the language of the latter agreement.⁶

One of the inherent territorial sovereign rights of a state is to collect taxes within its territory. However, different tax regimes exist within the various NATO member states. Obviously in case of a military movement, the reality of the 26-NATO partner states may give rise to fiscal conflict, which is entirely undesirable in view of Article 5 of the North Atlantic Treaty.⁷ The drafters of the NATO SOFA were very cognizant of the potential conflict over money and therefore focused on fiscal and economic prerogatives in Article IX to Article XIV, inclusive.⁸ These NATO SOFA provisions have a direct effect on and apply to the Dutch legal system by virtue of Article 93 and Article 94 of the *Constitution of the Kingdom of the Netherlands*.⁹

In accord with the NATO SOFA, NATO personnel are, for example, exempted from certain duties, such as the import duty on personal effects and furniture,¹⁰ and the import duty on their personal car or motorcycle vehicle.¹¹ It is important to note that the NATO SOFA provides 'blanket' exemptions for certain taxes and duties. However, the NATO SOFA does not provide 'blanket' exemptions for services rendered.¹² That is the reason why many NATO personnel who rent a house or apartment in the Netherlands must pay a garbage and sewer tax like every other resident of the Netherlands.

⁵ E.g. Paragraph 4 of the *United States-Netherlands Agreement of August 13, 1954* (see footnote 4) provides that the legal status of personnel stationed pursuant to that Agreement is governed by the NATO SOFA.

⁶ The legal status of personnel stationed at diplomatic missions is generally governed by the *Vienna Convention on Diplomatic Relations*. To the staff of NC3A and NAPMA, the 'Agreement on the Status of the North Atlantic Treaty organization, National Representatives and International Staff' ('Ottawa Convention') applies. In this article, I will not take these conventions into consideration.

⁷ Article 5 provides: "The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area. (...)"

⁸ Cf. Serge Lazareff, *Status of Military Forces under Current International Law*, Leyden 1971, p. 57. The Paris Protocol repeatedly refers to these respective NATO SOFA provisions (for example in Article IV and Article VII of the Paris Protocol) because of which they also apply to personnel of Military Headquarters.

⁹ Article 93 of the Constitution states: "Provisions of treaties and resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published"; Article 94 of the Constitution provides: "Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions".

¹⁰ Article XI, paragraph 5, NATO SOFA.

¹¹ Article XI, paragraph 6, NATO SOFA.

¹² Lazareff, p. 396 and p. 399.

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Case Study: Real Estate Tax

Article X, paragraph 1, of the NATO SOFA, makes clear that no taxation based on domicile or residence may be demanded from members of a force or the civilian component temporarily stationed in a Receiving state.¹³ Given this wording, one would assume the clause also encompassed a real estate tax. In this respect, however, Dutch courts have repeatedly held that a municipal real estate tax levy is *not* considered a tax on account of domicile or residence. The legal reason supporting this position is that the real estate levy is imposed pursuant to a right of use that the occupant enjoys, regardless of whether the occupant actually resides in the Netherlands, or is domiciled in the Netherlands, or is a resident of the Netherlands. The Dutch interpretation clearly appears in contravention of the text of the NATO SOFA¹⁴ given that a service member or member of the civilian component generally takes up residence in the Netherlands only by virtue of his or her official duty stationing in the Netherlands. Be that as it may, this straightforward and common interpretation has not been successfully contested to date in a local Dutch court because of the right of use distinction drawn by Dutch courts.

Although Article X, paragraph 1, of the NATO SOFA is not applicable to municipal real estate tax according to the Dutch interpretation, the Dutch government nevertheless believed that exemptions from certain municipal taxes may be justified under international custom in the context of an international treaty such as the NATO SOFA. Consequently, several exemptions are embodied in a supplemental Dutch national regulation, *the Regulation Exempting Diplomatic and International Organizations from Payment of Municipal Taxes*, of 1997 (the Regulation).¹⁵ Article 5 of the Regulation provides that members of the armed forces and members of the civilian component and their dependents who are stationed in the Netherlands are exempt from certain municipal taxes, such as a real estate tax.

Paragraph 2 of Article 5 of the Regulation, however, specifies that, “Persons possessing Dutch nationality and persons who are permanent residents of the Netherlands shall be excluded from the exemption referred to in paragraph 1.” Prior to the February 12, 2008 judgment, Dutch courts have consistently ruled that NATO personnel and their dependents were considered ‘permanently resident’ in the Netherlands if they resided in the Netherlands for longer than 10 years and, in conjunction with the fact that the NATO individual did not show an intent to depart the Netherlands within the foreseeable future. The 10-year period is based on the policy maintained by the Ministry of Foreign Affairs with respect to certain personnel sent to work as administrative, technical and domestic staff at a diplomatic mission as described in Article 37, paragraph 2 of the Vienna Conventions on Diplomatic and Consular relations (1961). Such personnel are considered by the Dutch Ministry of Foreign Affairs to be “permanently resident” in the Netherlands after having worked in the Netherlands for 10 years.

¹³ Article X, paragraph 1, provides: “Where the legal incidence of any form of taxation in the Receiving State depends upon residence or domicile, periods during which a member of a force or civilian component is in the territory of that State by reason solely of his being a member of such force or civilian component shall not be considered as periods of residence therein, or as creating a change of residence or domicile, for the purposes of such taxation. (..)”

¹⁴ Cf. Lazareff’s observation regarding the French interpretation stated during the Preparatory Works “that the text did not apply to taxation levied on occupied premises”; Lazareff, p. 365.

¹⁵ *Staatscourant (Netherlands Government Gazette) 1996, no. 249. Online available (in Dutch only) at the Vereniging van Nederlandse Gemeenten (Association of Netherlands municipalities) website: http://www.vng.nl/Documenten/Extranet/Marz/BEL/vrijstellingen_bzk_diplomatiek_2001.pdf (Accessed: 26 June 2008).*

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Recent Developments

Court of Appeals of 's-Hertogenbosch judgment of 12 February 2008

The judgment of the three-judge tax section of the Court of Appeals of 's-Hertogenbosch of 12 February 2008¹⁶ announced a turnaround with respect to this view. Here are briefly the facts: in 2005 the tax officer of the municipality of Onderbanken, the Netherlands, imposed a tax assessment for a municipal real estate tax on an American dependent of an American school teacher employed by AFNORTH International School (AIS) in Brunssum. The American dependent is a retired military officer. His wife has been employed with AIS since 1989. He was the primary owner listed on the municipal records. Based on the precedent case law, the municipal tax official determined and subsequently argued that the American dependent homeowner in question was “permanently resident” in the Netherlands because he had been living in the Netherlands for over ten years and did not illustrate an intent to depart the Netherlands. Therefore, the municipality imposed a real estate tax assessment beginning in calendar year 2005.¹⁷ The question at issue for the three-judge panel was whether the American dependent and his wife were proper beneficiaries of the Regulation's Article 5 exemption from municipal real estate tax.

In an earlier lower court hearing, the American homeowner's assertion that imposition of the real estate tax assessment by the Onderbanken municipality was an unauthorized and impermissible infringement of his and his spouse's Article 5 exemption under the Regulation because of their NATO SOFA status, fell on deaf ears. The District Court of Maastricht strictly followed the earlier line of judicial precedent and ruled that the homeowners, in essence, had assumed resident status in the Netherlands.¹⁸

The Maastricht court's interpretation brought to light a conflict between internal Dutch law and the NATO SOFA. It seemed that NATO personnel [and their dependents] were left to the good graces of the local tax assessor regarding the duration of their exclusion from payment of a municipal real estate tax. The Maastricht court's decision did not seek to balance or weigh the homeowner's specific privileged status against the municipality's 10-year rebuttable presumption for defining permanent resident.

Upon review, the three-judge Court of Appeals panel in Den Bosch examined the matter a bit more closely. Two conflicting issues impacting state sovereignty were lurking under the surface of the panel's decision. First, the NATO SOFA is silent on the assignment limit or the time duration of a service member's privileged status under the treaty.¹⁹

¹⁶ Court of Appeals 's-Hertogenbosch, 12 February 2008, LJN BC9201. Court decisions with an LJN (National Jurisprudence Number) are available (in Dutch only) at the Netherlands judiciary system website: <http://zoeken.rechtspraak.nl/default.aspx> (Accessed: 26 June 2008).

¹⁷ The municipal tax official did not specify why the imposition of tax assessment started in 2005 and not in 2000 when the individual in question lived in the Netherlands for over ten years.

¹⁸ District Court Maastricht, 22 August 2006, LJN AY9983. The Court ruled: “whereas claimant's spouse and claimant have lived in this country since 1989 and it has not been argued nor has it been shown that they had the intention on 1 January 2005 to depart the Netherlands within the foreseeable future, it is the opinion of the Court that they are permanently resident in the Netherlands, so that the Regulation is not applicable to them.”

¹⁹ So long as the member of the force or civilian component is in the Receiving state for official duties.



AFNORTH High School

(Source : <http://www.afno-is.eu.dodea.edu/highsch/>)

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Secondly, and equally important and equally troubling, the lower court's interpretation clearly conflicted with the national prerogative of a Sending State. In practice, unless the lower court's decision was overruled, the Sending State, in this case the United States, could and perhaps, would be, bound by a local municipality's discretion to limit the duration of an international military assignment of a member of its armed forces or member of the civilian component [and their family members] in the Netherlands to 10 years. The lower court's decision did not recognize that it is the Sending state, and not a subordinate element of the Receiving state, who has the primary interest and the paramount responsibility for assigning personnel and for the length and location of their NATO tour of duty²⁰. The Maastricht court's decision failed to take into account the operational considerations and staffing requirements of the Sending state.

In itself, it is not at all surprising that a provision addressing “permanently resident” was included in Article 5 of the Regulation. Article 1, paragraph 1b of the NATO SOFA provides in concise language that persons in the State in which a force is located are not considered to belong to the “civilian component if they (...) are *ordinarily resident there* (...)”. Based on this definition, individuals who are permanently resident in a Receiving state can not be included in the definition of the civilian component. As such, these local individuals have no privileged status under the NATO SOFA.²¹ Consequently, it logically follows that these individuals should not receive a beneficial exemption through Article 5 of the Regulation. The Regulation is therefore consistent with the NATO SOFA because it mirrors the other's limitations.

The Den Bosch Court of Appeals was sensitive to the argument that their analysis and decision involved more than a mere municipal tax assessment on local real estate. The court held that internal Dutch legislation must be read consistently, and in conjunction with, international agreements that the Dutch federal government has concluded with other foreign governments²². The appellate court further went on to articulate that the words 'ordinary resident'²³ and 'permanently resident'²⁴ have the same meaning. The court concluded that as long as an individual is a member of the civilian component of the United States armed forces in the Netherlands, he or she is deemed to be not permanently resident in the Netherlands, nor would permanent residency be established if his or her stay exceeded the period of 10 years.

²⁰ Cf. Lazareff, pages 83, 84 and 94.

²¹ Cf. D. Fleck, *The Handbook of the Law of Visiting Forces*, p. 57: “Arguably anyone who is already living outside [his] native country does not need these privileges, because he has voluntarily subjected himself to the culture and legal order of the Receiving state. Furthermore, an interpretation of this kind also corresponds to the wording that the [...] personnel concerned must be ‘accompanying’ the force of a contracting state.”

²² The Court of Appeals ruled: “The State [...] – in all its divisions – [is] bound by the conventions it has concluded. When the author of the Regulation notes that the terms used in the Regulation are to be interpreted in accordance with the meaning they have in the relevant conventions, then such note is superfluous, insofar that even without this note the Regulation must be interpreted in accordance with the convention. This means that [...] for the military exemptions it should also be assumed that the terms used are in accordance with the applicable treaty. In other words: for application of the military exemptions, the term “permanently resident” should be interpreted in accordance with the NATO Status of Forces Agreement.”

²³ Term used in Article 1, paragraph 1b, NATO SOFA.

²⁴ Term used in Article 5, paragraph 2, Regulation Exempting Diplomatic and International Organizations from Payment of Municipal Taxes.

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The court's ruling was a clear break with pre-existing Dutch legal precedent. The court's decision clearly and accurately refuted the notion that a municipality could impose a financial assessment based on a 'window of time.' The court decision clearly established that NATO personnel living in the Netherlands pursuant to military orders are in the Netherlands in a temporary, non-resident status, for as long as their military duty requires their presence in the Netherlands.

From four rulings delivered by the Dutch Supreme Court on 6 June 2008 it appears that the judgment of the Court of Appeals of 12 February was not a stroke of chance. In the four cases in question, a dependent of a teacher at the AFNORTH International School in Brunssum,²⁵ a British civilian employee of Headquarters Allied Joint Force Command Brunssum,²⁶ a German civilian employee of NAPMA²⁷ and a British civilian employee of NAPMA²⁸ were imposed real property tax with respect to the right of use. In its rulings, the Supreme Court confirmed the interpretation as applied by the Court of Appeals in its judgment of 12 February 2008.

The Dutch Supreme Court found that: “According to the contents of the Regulation, and the Explanatory Notes, it is the intention to implement international custom pursuant to treaties and (seat) agreements the Netherlands has concluded with international organizations that have established themselves in the Netherlands. This implies that the terms mentioned in the Regulation are to be interpreted in accordance with the meaning they have in such treaties and agreements as is stated in the Explanatory Notes to the Regulation. The officials described in Article 243 of the Municipalities Act have given this substance in that they leave these decisions up to the Minister of Foreign Affairs, who is involved on behalf of the Netherlands Government in the realization of and compliance with the treaties and (seat) agreements with the international organizations mentioned in the Regulation, and who is designated as having primary responsibility for contacts with such organizations and to mediate in cases where there are problems between the organizations and government authorities in the Netherlands.”²⁹

The Dutch Supreme Court states that: “The foregoing implies that interested party should be able to rely on the fact that the tax authority grants him exemption from the tax on the use of real property when the Minister of Foreign affairs has determined, in accordance with the above, that his spouse is not permanently resident in the Netherlands.”³⁰

Consequently, an official of an international organization is not considered to be ordinarily resident in the Netherlands unless the Minister of Foreign Affairs determines otherwise.

²⁵ Supreme Court of the Netherlands, 6 June 2008, LJN BD3159.

²⁶ Supreme Court of the Netherlands, 6 June 2008, no. 43787.

²⁷ Supreme Court of the Netherlands, 6 June 2008, LJN BD3187.

²⁸ Supreme Court of the Netherlands, 6 June 2008, no. 43789.

²⁹ Supreme Court of the Netherlands, 6 June 2008, LJN BD3159, ground no. 3.5.6.

³⁰ Supreme Court of the Netherlands, 6 June 2008, LJN BD3159, ground no. 3.5.7.

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Conclusion

The recent rulings of the Supreme Court of the Netherlands underline the fact that municipal governments do not have “carte blanche” when carrying out the discretionary authority delegated to them. They are not only bound by international agreements as well as Netherlands legislation and the definitions included therein, but they must also interpret and apply such definitions in accordance with international law. In this regard, it is not up to the municipal tax official, but the Minister of Foreign Affairs to determine whether or not a person is ordinarily resident in the Netherlands within the sense of the Regulation. Since the Minister of Foreign Affairs applies the limitative period of ten years solely to specific administrative, technical and household personnel of diplomatic missions as described the Vienna Convention on Diplomatic Relations, this actually means that officials of international organizations are not determined to be ordinarily resident. The recent rulings illustrate that NATO personnel need to assert, and vigilantly protect, their rights under domestic and international law and, when necessary, call local government officials to account.

Mr. Jarin Nijhof
Comm + 31-(0)46-443-7688
DSN 360-7688
Jarin.Nijhof@EUR.ARMY.MIL

JFC Naples Legal Mobile Training Team – Welcome !

Lt Col Ronald Gilissen – JFCNP Chief of Plans

In the past months Joint Forces Command Naples LEGAD Office has sent out three Legal Mobile Training Teams (MTT). With the PfP-program and the new NATO-members in mind, an MTT went to Bulgaria; as a part of NATO's Mediterranean Dialogue, in which JFC Naples plays an important role, MTT went to Mauritania and Jordan. Below you will find three texts giving you an idea of what these MTT represent.

Mauritania

From April 7 to April 9 2008, Colonel Richard Galvin (USARMY) and Major Attila Varga (HUN ARMY) went to Nouakchott, the capital of the West-African state of Mauritania. It is a developing country, ranked 137 out of 177 in the UN Human development index 2007/2008 and has a population of approx. 3,364,940. Its Armed Forces are composed of 12,000 regular forces plus 3,000 Gendarmerie-type forces and 3000 national guards. It is their intent to have a modern military sector, able to perform peace-keeping tasks in an international environment. For the first time in its history and with support from France and the United States, Mauritania is planning to contribute one company to the joint African Union/United Nations Hybrid operation in Darfur (UNAMID) in July 08.

The aim of this JFC HQ Naples-sponsored activity was to provide a training opportunity for the military officers who are engaged, or are planned to be engaged, in Peace Support Operations, by introducing the relevant NATO procedures and allowing them to discover critical areas where NATO's expertise can be applied in order to promote their Armed Forces' interoperability with NATO.

Thirty military officers (from OF-1 to OF-5) from different branches of the Mauritanian Armed Forces participated in the training.

In general, briefings focused on the Operational Law applied during NATO-led Peace Support Operations (PSO), the rules of International Humanitarian Law and the role of the Legal Staff PSO. Lectures covering following subjects were provided:

- NATO structure
- NATO Military Cooperation
- Key NATO legal documents
- Status of NATO Forces
- Claims issues (Art VIII of NATO SOFA)
- NATO Host Nation Support
- Legal basis of NATO Peace Support Operations
- Law of Armed Conflict
- NATO Rules of Engagement

As part of the training there were syndicate discussions on the briefings' topics. During these discussions, participants were very active and used this opportunity to ask questions about NATO and NATO-led PSOs. At the end of the training, each of the participants received a certificate and a CD containing all the briefings delivered and the applicable background documents.

JFC Naples Legal Mobile Training Team – Welcome !

We assess that the Legal Mobile Training Team sent by JFC Naples was very successful. Thanks to the Mauritanian officers' great interest and active participation during the training, our aim was achieved. We are confident that the briefings by our team during this 3-day MTT and the information provided, will be beneficial for military personnel during their participation in PSOs in the future. We also hope that the MTT informed and helped people in the Muslim world understand NATO's role better. The presence of Chief LEGAD Col Galvin was much appreciated and rightfully taken as a sign of the importance NATO gives to the Mediterranean Dialogue and the contributing Nations. Additionally the Acting JFCNP Political Advisor Dr. Alexis Vahlas, accompanied the MTT to observe a Mediterranean Dialogue training event.

April 7 to 9, 2008 : MTT in Nouakchott, Mauritania



JFC Naples Legal Mobile Training Team – Welcome !

Bulgaria

Following a request for NATO Rules Of Engagement training by the Bulgarian General Staff, the Chief of Staff JFCNP approved a joint NATO ROE Workshop at the Bulgarian Ministry of Defense in Sofia on 13 - 14 May 2008.

A special Legal¹ Mobile Training Team went to Bulgaria; the Workshop's main objective was to provide Bulgarian officers from the operations, plans and legal staffs, tailored training on NATO ROE doctrine, including practical guidance from operational and tactical-level commands on the development, implementation and application of ROE in support of NATO operations. The Bulgarian General Staff (J7) also requested lectures on the NATO SOFA, legal aspects of NATO Peace Support Operations, and Host Nation Support. The training was coordinated among JFCNP J5/LEGAD, Air Component Command Izmir A5/LEGAD, Land Component Command Madrid LEGAD and Bulgarian General Staff (J7).

The joint team that went to Sofia was led by Col Richard Galvin (JFCNP LEGAD) and supported by LTC Udo Indlekofer, GAF (ACC Izmir A5), LTC Sally Stenton, USAF (ACC Izmir LEGAD), Mrs Ida Pavesi (LCC Madrid Acting LEGAD), LCDR Steve Milewski, USN (JFCNP Ops LEGAD) and Ms. Desislava Zhelyazkova (ACT/SEE Legal Office Intern). This presence of strong representation from the air and land components, along with the Bulgarian language ability of Ms. Zhelyazkova greatly added to the value of the MTT. The 25 - 30 Bulgarian officers who participated in the workshop expressed strong interest in all briefings and routinely engaged the team with questions. Because ROE are fundamentally an operational matter, the presence of officers from both operations/planning staffs and legal staffs added great value to the training and the lively discussions. Considering the (still growing) importance of ROE and all aspects involved, trainings like these could – and in my opinion should – become normal phenomena in other NATO Nations as well.



MTT in Sofia, Bulgaria

(from left to right: LT CDR Milewski (JFC N), Mrs. Pavesi (CC-Land Madrid), Maj. A. Varga (JFCN), LTCOL Tsirev (BGR A), Ms. D. Zhelyazkova (ACT/SEE), COL R. Galvin (JFC N), LT COL S Stenton (CC-Air Izmir))

¹ Given the composition of the team and the substance trained I have labelled this as a "special Legal MTT." Because ROE are fundamentally an operational matter one could of course argue that this is not a Legal MTT. I suggest that one of the readers writes an article for this Gazette on why ROE are fundamentally an operational matter, a point of view still often contended by many.

² Wikipedia: "number of active service personnel Jordan."

JFC Naples Legal Mobile Training Team – Welcome !

Jordan

From 3 to 5 June 2008 COL Rich Galvin and LTC Ron Gilissen supplied a Legal MTT to Jordan. The population of Jordan is slightly above 6,000,000 with active troops of about 100,000².

As with the MTT in Mauritania the aim of this JFC HQ Naples-sponsored activity was to provide a training opportunity for the military officers who are engaged or planned to be engaged in Peace Support Operations by introducing the relevant NATO procedures and allowing them to discover critical areas where NATO's expertise can be applied in order to promote their Armed Forces' interoperability with NATO.

This MTT being part of the Mediterranean Dialogue, an additional aim was also to have a real dialogue and to learn from the experiences of the Jordanian officers, many of whom have been in one or more of the 18 PSOs worldwide that Jordan has contributed troops to over the past decades. The MTT was given in the very impressive Peace Operations Training Center, where the Jordanians provide pre deployment training for Jordanian soldiers and international troops, including cultural training for U.S. Army soldiers before they are deployed to Iraq. This facility, just outside the capital Amman, has a mock-up street 600 meters long where all kinds of scenarios are performed, using proper actors. These real life vignettes often entail situations during which (legally relevant) decisions have to be made, which will then be played and judged on the spot: high level ROE training!

Around 30 officers (OF-3 and OF-4 in equal numbers, coming from all services, including two LEGADs) participated in the Legal MTT. The program was similar to the one in Mauritania, with the presentation on Host Nation support changed for a presentation (and discussion) on NATO SOFA Article VII: Jurisdiction.

In part, because of the relatively short working days during this MTT (at least according to many Westerners' standards - the Jordanian culture has wisely adapted to the high temperatures), and also because of the active engagement in discussions by almost all of the participants, the entire program could not be run as planned. The learning results (on both sides) though justified the Jordanian approach. The CDROM the students were given after the MTT contained all the presentations materials.

The discussions and responses during and after the actual meetings make me believe that Legal MTTs are highly successful and that this concept needs to be further explored and expanded, taking into account future developments and the (future) role of NATO. The MTTs done so far have shown that as long as the briefers are prepared to tailor their course and adapt to the particular nation and culture, the benefits are significant. Finally I want to express how much we, the members of the MTTs and especially the JFCNP LEGADs Office, appreciate the superb hospitality these nations offered us.

*LT Col Ronald Gilissen
Comm + 39 081 721 5084
NCN 433-5084
rgilissen@afsouth.nato.int*

Contextual Application of Human Rights and International Humanitarian Law Instruments during Armed Conflicts

Capt Federico Sperotto – TA (Truppe Alpine) HQ

This is an amended version of the article published in Issue # 14 of the NATO Legal Gazette

Human rights law (HR) and international humanitarian law (IHL) –or the law of armed conflict– are traditionally two distinct branches of law, one dealing with the protection of persons from State's abuses, the other concerning the behavior of the parties to an armed conflict. In a landmark advisory opinion, the International Court of Justice (ICJ) referred to the international humanitarian law (IHL) as constituting the *lex specialis* interpreting the meaning of arbitrary deprivation of life in Art. 6 of the International Covenant on Civil and Political Rights (ICCPR).¹ In the Court's opinion, IHL provides the means for determining whether human rights standards are violated.

Aside from the case of an armed conflict, military forces can be deployed in a foreign territory pursuant a resolution from an international organization, or through an inter-state arrangement. In those cases, IHL will have no application. But during an operation in a non-permissive environment, such as during NATO-led security operations in Afghanistan, it may be unclear how to treat a military unit you come into contact with, especially when the accomplishment of the mission demands the use of coercive means.

In fact, the normative system which applies to the ISAF mission is complex. ISAF is authorized to do all necessary and legal in order to attain security throughout Afghanistan. This includes the authority to conduct offensive operations. As a guideline, a NATO-led force acts in accordance with the spirit and principles of the law of armed conflict. In addition, troop contributing nations (TCN) must respect human rights obligations deriving from international and domestic law.

Indeed, in cases such as air strikes or when NATO seizes the initiative against those who oppose the mission through combat means, the situation demands the full applicability of the law of armed conflict. In most cases concerning the use of coercive means, it can be said that human rights are generally protected by the law of armed conflict, but not in their full scope. In these cases the law enforcement model derived from the jurisprudence of human rights seems more suitable, particularly in reference to the exercise of stop and search powers, treatment of detainees and civilian deaths.

Traditionally, IHL and HR have been seen as mutually exclusive, especially in the view of the States. In the *Bankovic* case, concerning a NATO air strike against a broadcasting station in Belgrade in 1999, the respondent States argued that "The resulting [European] Convention [on Human Rights] exposure would, according to the Governments, risk undermining significantly the States' participation in such missions and would, in any event, result in far more protective derogations under Article 15 of the Convention. In addition, they suggest that *international humanitarian law, the ICTY and, most recently, the International Criminal Court ("ICC") exist to regulate such State conduct*" (emphasis added).²

¹ *Legitimacy of the Threat or Use of Nuclear Weapons*, ICJ Advisory Opinion, 8 June 1996, para. 25.

² See European Court of Human Rights (Eur.Ct.H.R.), *Banković and Others v. Belgium and 16 Other Contracting States* - 52207/99 [2001] ECHR 970 (19 December 2001), para 43.

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Today experts accept the applicability of both humanitarian law and human rights. Assuming that there is a consensus among scholars in favor of the opinion that human rights applies alongside humanitarian law, this article brings into focus some international and national decisions on the matter. Seen from the standpoint of the individual soldier, the issue may have little practical significance. Actually, the State alone will be responsible for violations of human rights. High-level officers and their advisers, on the contrary, cannot ignore its relevance due to the fact that an interplay between the two regimes provides a stronger rule of law coverage to the mission while a violation of human rights standards can de-legitimize every effort.

Overview of the Relevant Jurisprudence

The International Court of Justice (I.C.J.) dealt with the issue of the applicability of human rights treaties in armed conflicts in its advice on the use of nuclear weapons of July 8th, 1996. Referring to the International Covenant of Civil and Political Rights, the Court stated that "whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself".³ International humanitarian law is *lex specialis* to human rights law. It means that, in the opinion of the Court, "The interpretation of the human rights law may be conducted through the prism of IHL".⁴

On the *lex specialis* approach, the Supreme Court of Israel stated in a recent judgment that between Israel and the various terrorist organizations active in Judea, Samaria, and the Gaza Strip, a continuous situation of armed conflict has existed since the first Intifada, adding that "The combat activities of the IDF are not conducted in a legal void". The Court also noted that even those who are of the opinion that the armed conflict between Israel and the terrorist organizations is not of international character, think that international humanitarian or international human rights law applies to it, adding that "Humanitarian law is the *lex specialis* which applies in the case of an armed conflict. When there is a gap (*lacuna*) in that law, it can be supplemented by human rights law."⁵

The International Criminal Tribunal for the Former Yugoslavia (I.C.T.Y.) held in the case of *Kunarac* that in terms of goals because of their resemblance, values and terminology, human rights is a welcomed tool in determining the content of customary international law in the field of humanitarian law.⁶ In addition, the I.C.T.Y. noted in *Tadic* the impetuous development and propagation in the international community of human rights doctrines, causing a shift from "State sovereignty-oriented approach towards a human-being-oriented approach".

³ See also *Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion, 9 July 2004, para. 43.

⁴ MCGOLDRICK, Dominic, *From '9-11' to the Iraq War 2003*, Hart Publishing, Portland, 2004, p. 45.

⁵ *The Israel Supreme Court, High Court, Judgment 769/02 (The Public Committee against Torture in Israel v. The Government of Israel)* December 14, 2006, para. 18.

⁶ I.C.T.Y., *The Prosecutor v. Kunarac et al.* IT-96-23 and IT-96-23/1 "Foca", Trial Chamber, Feb. 22, 2001, para. 390.

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Finally, the interplay of IHL and human rights law was definitively assessed by the Appeal Chamber. The Chamber noted in fact that the traditional terms of art used in the past, "war" and "law of warfare", were largely replaced by two broader notions:

- (i) that of "armed conflict", essentially introduced by the 1949 Geneva Conventions; and
- (ii) the correlative notion of "international law of armed conflict", or the more recent and comprehensive notion of "international humanitarian law", which has emerged as *a result of the influence of human rights doctrines on the law of armed conflict* (emphasis added).⁷

In *Furundzija*, the I.C.T.Y. held that "The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law".⁸

The Inter-American Commission on Human Rights dealt with the issue in *Coard et. al. v. the US*, a case arisen from the US intervention in Grenada in 1983. In its report the Commission argued that while international humanitarian law pertains primarily in times of war and the international law of human rights applies most fully in times of peace, the potential application of one does not necessarily exclude or displace the other. There is an integral linkage between the law of human rights and humanitarian law because they share a "common nucleus of non-derogable rights and a common purpose of protecting human life and dignity". The Commission held that certain core guarantees apply in all circumstances, including situations of conflict, and this is reflected, *inter alia*, in the designation of certain protections pertaining to the person as peremptory norms (*jus cogens*) and obligations *erga omnes*. As a guideline, the Commission assumed that where IHL and HR provide levels of protection which are distinct, it is bound by its Charter-based mandate to give effect to the normative standard which best safeguards the rights of the individual.⁹

In other cases, concerning situations of internal armed conflict, the Commission explained that its ability to resolve violations of non-derogable right arising out of an armed conflict may not be possible in many cases by reference to Article 4 of the American Convention of 1969 alone, because the American Convention contains no rules that either define or distinguish civilians from combatants and other military targets, much less, specify when a civilian can be lawfully attacked or when civilian casualties are a lawful consequence of military operations. Therefore it is necessary to look at and apply definitional standards and relevant rules of humanitarian law as sources of authoritative guidance in its resolution and other kinds of claims alleging violations of the American Convention in combat situations."¹⁰

⁷ I.C.T.Y., *The Prosecutor v. Dusko Tadić*, Case No. IT-94-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, para. 87.

⁸ I.C.T.Y., *The Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1 "Lašva Valley" , Trial Chamber, Dec. 10, 1998, para. 183.

⁹ Inter-American Commission on Human Rights (Inter-Am.Com.H.R.), Case 10.951, Report N° 109/99, September 29, 1999, para. 42.

¹⁰ *Ibidem*, para. 161.

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In the case of *Las Palmeras*, the Inter-American Court stated that it is also competent to determine whether any norm of domestic or international law applied by a State, in times of peace or armed conflict, is compatible or not with the American Convention. In this activity, the Court has no normative limitation: "Any legal norm may be submitted to this examination of compatibility (emphasis added)".¹¹

The applicability of the European Convention on Human Rights (1950) during armed conflicts, mainly in the internal ones, is undisputed. In a survey of cases examined in 2005, the Court of Strasbourg even observed that the action of the military and security forces in responding to domestic conflict does not fall outside the scope of the European Convention but come under the scrutiny of the Court.¹² Two other arguments support this conclusion. The first is obviously the literal formulation of Article 15 of the European Convention. The second descends from the terminological and conceptual vicinity between the language used by the Court and the formulations laid down in the law of war instruments.

Concerning the right to life, in its 2nd paragraph Article 15 reads as follows: "No derogation from Article 2, except in respect of deaths resulting from *lawful acts of war* ... shall be made under this provision (emphasis added)". Everything depends on the concept of *lawful acts of war*. The paucity of precedents on this issue makes inferential reasoning necessary. An act of war is lawful if it is consistent with the standards set forth in the instruments of international humanitarian law, or the law of armed conflict, namely, the Geneva Conventions of 1949 and their Additional Protocols. Note that in its 1st paragraph Article 15 provides expressly that measures derogating to the European Convention cannot be inconsistent with other obligations under international law.

The *Bankovic* and the *Al-Skeini* cases show that human rights claims referred to the European Convention can arise in the course of an international armed conflict. This second concerned the death of an Iraqi citizen while in custody of British troops in Bashra.¹³ The European Court's approach to large-scale armed struggle is quite similar to the view adopted by the Human Rights Committee.¹⁴ But while the Committee sustained that in addition to the provisions of the Covenant, international humanitarian law helps during armed conflict to prevent the abuse of a State's emergency powers,¹⁵ the Court, namely in its judgments on Chechen cases,¹⁶ which indeed related to a full-scale armed conflict, did not reserve any room for the rules of international humanitarian law.

¹¹ Inter-American Court of Human Rights (Int – Am.Ct. H. R., *La Palmeras Case*, judgement on preliminary objections (III), 4 feb. 2000, par. 32.

¹² Eur.Ct.H.R., *Short Survey of Cases Examined by the Court in 2005*, p. 5.

¹³ The High Court of Justice Queen's Bench Division (Divisional Court) *Al Skeini Ors, R (on the application of) v Secretary of State for Defence* [2004] EWHC 2911 (Admin) (14 December 2004).

¹⁴ United Nations, Human Rights Committee (UN H.R.C.), CPR/C/21/Rev.1/Add.11, General Comment no. 29, para. 4.

¹⁵ *ibid.*, para. 3 and 10.

¹⁶ In February 2005 the European Court of Human Rights decided the first cases concerning violations of human rights committed during the conflict in Chechnya, between 1999 and 2000. See Eur.Ct.H.R., *Isayeva, Yuzupova and Bazayeva v. Russia* - 57947/00; 57948/00; 57949/00 [2005] ECHR 129 (24 February 2005) and *Isayeva v. Russia* - 57950/00 [2005] ECHR 128 (24 February 2005).

Contextual Application of Human Rights and International Humanitarian Law Instruments during Armed Conflicts

It could be argued that the Court considers the system of the Convention as a *self-contained regime*, i.e. an autonomous system decoupled from international law, a regionally-limited auto-referential system with its own primary and secondary specific rules.¹⁷ Or, more simply, that the Court wants to avoid any criticism for operating an arbitrary interpolation of rules from different regimes. The Court has made relevant efforts, however, to adapt principles arisen from decisions on incidents which occurred during law enforcement operations to wide-scale armed conflicts. These principles can be summarized as follows: where potentially lethal force was used in pursuit of a permitted goal, the force had to be strictly proportionate to the achievement of that goal. Operations involving potential use of lethal force had to be planned and controlled by the authorities so as to minimise the risk to life. Authorities had to take all feasible precautions in the choice of means and methods with care being taken to avoid and in any event minimise incidental loss of civilian life.¹⁸ As affirmed by Professor William Abresch, "With rules that treat armed conflicts as law enforcement operations against terrorists, the ECtHR [the European Court of Human Rights] has begun to develop an approach that may prove both more protective of victims and more politically viable than that of humanitarian law."¹⁹

Conclusion

The decisions cited above prove that there is a substantial degree of convergence in favor of the view that human rights law applies in full alongside humanitarian law. Human rights bodies and international tribunals called upon to judge on the violation of the laws and customs of war, recognize the interoperability between the two regimes in a sort of mutually useful exchange. Human rights law provides complementary regulations of issues not addressed in detail by IHL or not properly considered by the domestic law of TCN. IHL is a source of authoritative guidance to resolve claims alleging violations of HR instruments in combat situations. The Inter-American Commission on Human Rights has played a major role in this regard. The European Court seems more cautious, but the decisions on *Al-Skeini* and, partially, on *Al-Jedda*,²⁰ two decision rendered by the British judiciary in application of the ECHR, introduce a stringent standard in respect of the treatment of civilians with whom soldiers come into contact which cannot be ignored. IHL NATO involvement in human rights violations is a highly improbable scenario. However, misconducts damaging fundamental rights cannot be excluded. Consequently, the legal framework of the mission, including the rules of engagement (ROE)²¹, should be able to spell out in basic terms when and how human rights obligations apply.

Capt Federico Speretto
Legal Assistant
Mountain Troops HQ, Bolzano, Italy
Comm +39-0471449170
Federico.Speretto@gmail.com

¹⁷ SIMMA Bruno, PULKOWSKI Dirk, *Of Planets and the Universe: Self-contained Regimes in International Law*, EUR. J. INT'L LAW, 2006, Vol. 17, no. 3, p. 492.

¹⁸ Eur.Ct.H.R., *Chamber judgments in six applications against Russia*, Press Release, 088, 24 February 2005.

¹⁹ ABRESCH, William, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, The European Journal of International Law Vol. 16, no.4, p. 767.

²⁰ R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent), on appeal from:[2006] EWCA Civ 327, 12 Dec. 2007.

²¹ According to Peter Rowe "What human rights law can do is to simplify what may appear to be a confusing situation". ROWE, Peter, *Do Soldiers Really Have to Apply Human Rights Law in Military Operations?*, The 4th Ruth Steinkraus-Cohen International Law Lecture, 16 May 2006, p. 11.

Book Review : The EU-NATO Relationship by Martin Reichard¹

Mr. Vincent Roobaert – NC3A²

For a long time, the relationship between the European Union and NATO was a non-issue. Both organisations were acting in their separate fields, *i.e.* economic and military, and there was no need for any form of cooperation. This state of affairs changed after the end of the Cold War and with the conflicts in the Balkans. At the EU level, it became clear that the European Union would need to get more involved in the security field, especially at its borders. For NATO, the end of the Cold War led to a rethinking of the rationale and purposes of the Alliance and the understanding that the Alliance needed to embrace new missions, such as peacekeeping and peacemaking operations. At the same time, this meant that the previous division of labours in place between the EU and NATO had lived and that the two organizations had to start developing means of collaboration.

The author of the book, Martin Reichard, worked for the Austrian Mission to NATO from 2005 to 2006. In his book, he brings together a legal and political perspective on the cooperation between the two organisations, starting from the internal developments that triggered the need for this cooperation to concrete areas of collaboration.

The first chapter of the book is devoted to an examination of the transatlantic relationship. The author examines the evolution of this relationship from the Cold war onto the Iraq war and looks at how this relationship could evolve based on, among others, diverging values on security. This first chapter sets the stage for the rest of the book and the examination of the growing role endorsed by the European Union.

The evolution of the EU-NATO relationship finds its roots in developments at both the EU and NATO level and which are looked at in two separate chapters. According to Dr. Reichard, external and internal reasons justified the creation of the European Security and Defence Policy ("ESDP") and a greater involvement of the European Union in the defence arena. First, the tragic events in the former Yugoslavia underlined Europe's need for a military capacity. Second, after the completion of the monetary union, the creation of a common security and defence policy was seen as the next step towards greater European integration. NATO and its missions also evolved with a new Strategic Concept and the Prague Summit of 2002 and now also encompasses out of area and counter-terrorism operations. These developments are extensively examined. Of particular interest to us is the chapter on the ESDP which looks at the EU institutional framework and the legal basis in the (now defunct) European Constitution.

Before addressing the substance of the EU-NATO cooperation, the author takes a look at the evolution of the institutional framework of this cooperation, from the early informal contacts between then NATO Secretary General Javier Solana and former European Commission President Jacques Santer towards a more permanent institutionalisation. In that regard, the author examines the binding character of decisions taken at the level of the EU to European Union members of the North Atlantic Council.

¹ Martin Reichard, *The EU-NATO Relationship. A Legal and Political Perspective*, Ashgate, 2006, 412 pages (ISBN-13 978-0-7546-4759-1).

² This review does not reflect the views of NATO, NC3A or the NATO Member States.

Book Review : The EU-NATO Relationship by Martin Reichard

Closely related to this issue is the question of the potential primacy of NATO in the NATO-EU relationship. This topic is addressed in a separate chapter. Of main interests are the developments on the three concerns raised by the US in relation to the development of the ESDP, namely preventing

- (i) discrimination between NATO members;
- (ii) duplication of efforts; and
- (iii) decoupling EU and US security and the evolution of the EU doctrine on NATO's primacy in the relationship between the two organisations.

How this relationship works in practice is examined in the next two chapters on collective self defence and crisis management, which review the creation of the NATO Response Force ("NRF") and the EU Rapid Reaction Force ("ERRF"). Dr. Reichard also provides a first assessment of the EU-NATO relationship "in action" in operations such as Macedonia, Bosnia, Kosovo and the Democratic Republic of Congo.

In the last two chapters of the book, the author ends by shedding some light on the Berlin Plus Agreement, the protection of information in both EU and NATO and the exchange of information between the two organisations.

Although not always easy to read, Dr. Reichard's book manages in around 400 pages to raise awareness about many fundamental issues surrounding the NATO-EU relationship. Although the developments on the EU Constitution appear somehow outdated already, they nevertheless prove interesting as they indicate the agreement of the drafters on where the EU should go in terms of collective security and crisis management. The book covers most aspects of the EU-NATO relationship: from the origin, with the EU's realization that it would need to move into the security field, to the practical aspects of actual information exchange between the organizations. To conclude, the book will be very useful to anyone interested on learning more about NATO, the EU and how they work together.



(source :

<http://www.amazon.com/Eu-Nato-Relationship-Legal-Political-Perspective/dp/0754647595>)

Mr. Vincent Roobaert
 NCN 255-8298
 Comm +32-2-707-8298
 Vincent.Roobaert@nc3a.nato.int

NATO School, Oberammergau signs Memorandum of Understanding with the ISISC ¹

Dr. Katharina Ziolkowski – NATO School

On 29 May 2008, Colonel James J. Tabak, NATO School Commandant, signed a Memorandum of Understanding with ISISC in order to establish a wide range of co-operation with the Institute headed by Prof. M. Cherif Bassiouni. The following notes illustrate the expertise and the activities of the Institute, the purposes of the agreement as well as the expected advantages for the NATO legal community.

1. The ISISC

The ISISC was established in 1972 thanks to the generosity of Giovanni Leone, the Italian Head of State *pro tempore* and President of the *Association Internationale de Droit Pénal (AIDP)*. Syracuse, the seat of the institute, was chosen because of its symbolic location centering between East, West, North and South in the center of the Mediterranean Sea. Despite its name, which indicates a focus on criminal law, ISISC's areas of interest cover human rights law and international humanitarian law amongst other topics.

In recent years in conjunction with the International Human Rights Law Institute (IHRLI) in Chicago, USA, the Institute has been deeply involved in *Technical Assistance Projects* in Afghanistan and Iraq. These projects focus on the training of judiciary members and law enforcement officers in both Iraq and Afghanistan. Further, ISISC operates specific initiatives in the area of counter-narcotics. In 2004, the President of ISISC, Professor M. Cherif Bassiouni, was appointed by the UN Secretary General as the *United Nations Independent Expert on Human Rights in Afghanistan*.

Furthermore, the Institute has diverse relations with the legal community of Arab countries. For instance, the Arab League Member States' Ministers of Justice met in 2006 at the ISISC's Headquarters in Syracuse to review the draft *Model Law on International Penal Cooperation*. A meeting of these representatives outside an Arab country is quite unique.

Throughout the past 37 years ISISC has hosted almost 400 conferences or seminars, including among others:

- the preparatory sessions for the *UN Treaty on the Prevention of Torture* (1984),
- the preparatory sessions for the *UN Model Treaties on Judicial Cooperation*² (1990),
- several inter-session meetings of the *Preparatory Committee* for the establishment of the International Criminal Court (ultimately created in 1998 by the Rome Treaty) as well as related subsequent sessions on the *Elements of Crimes* and on the *Rules of Procedure and Evidence*,
- International Monetary Fund (IMF) Conferences on Anti-Money Laundering (2005),
- International Monetary Fund (IMF) Conference on the Prevention of Terrorism Financing (2006, 2008) and,
- meeting of the United Nations Office on Drugs and Crime for the *Implementation Manual* of UN Conventions relating to International Terrorism.

¹ *The International Institute of Higher Studies in Criminal Sciences.*

² *i.e. Model Treaty on Extradition, Model Treaty on Mutual Assistance in Criminal Matters, Model Treaty on Transfer of Proceedings in Criminal Matters and Model Treaty on Transfer of Supervision of Offenders Conditionally Sentenced or Conditionally Released.*



The NATO School

NATO School, Oberammergau signs Memorandum of Understanding with the ISISC

Since 2000 ISISC has offered an annual course in the field of international criminal law (ICL course). The aim of this course is to provide young lawyers with the tools necessary to face current challenges in both international and international criminal law. Topics for the course range from *Judicial Cooperation*, to *Terrorism's New Wars and ICL's Responses*, and *Post Conflict Justice*. The most recent 2008 ICL Course dealt with *Sharia Law and International Criminal Law* and included lectures specifically focusing on the aspects of international humanitarian law and areas of human rights law.

To date, the institute has published over 130 substantive works in the fields of criminal law, international criminal law and international public law.

2. The Purpose of the Memorandum of Understanding

The Memorandum of Understanding between the NATO School and ISISC grants the staff of the institutions mutual access to the offered training opportunities offered. Further, it aims at facilitating the mutual assignment of high-level guest speakers. Lastly, the Memorandum of Understanding represents a framework for future joint initiatives (to be established by further implementing Memoranda of Understandings), e.g. conferences, round tables, research projects and publications.

The common area of interest in the field of international humanitarian law and human rights law underscores the importance of academic exchange. The ISISC provides the NATO School with the benefits of its relationship with UN bodies and the trusted and respected authority and influence the Institute enjoys within the Arab League Member States. These are the individuals within the academic world who helped the ISISC offer such a high quality and first-hand approach course on *Sharia Law*. The corresponding expertise of the Institute will be beneficial for the NATO School in relation to the courses touching upon *post conflict* and *rule of law operations*.

In addition to the common areas of academic interest, the Memorandum of Understanding also provides the NATO School with the possibility of taking part in the initiatives and activities organized or hosted by the Institute.

The ISISC is currently a prominent international forum for initiatives in the field of judicial and police cooperation. The NATO School is aware that future developments in the area of judicial cooperation and police cooperation will have an important impact on NATO's military tasks. As a past example, the NATO School fielded cooperation requests from the ICTY to SFOR and IFOR. The implementation of Anti-Terrorism Conventions also illustrates the current impact on military forces. As to the future, border control, as well as the international development of trafficking in human organs may become an issue for NATO.

Legal awareness of these and other ongoing issues will assist NATO in the handling of new challenges.



ISISC in Siracusa, Italy

(source :

<http://www.isisc.org/ISISHome.asp>)

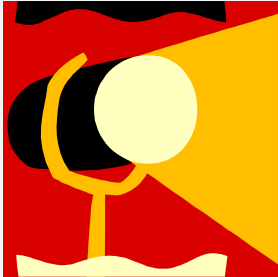
NATO School, Oberammergau signs Memorandum of Understanding with the ISISC

3. Prospect

The NATO School expects to benefit from the wide choice of high-level speakers associated with ISISC both from its resident and non-resident seminars and courses. Further, the NATO School will have the opportunity to join diverse initiatives of the institute in order to gain an early awareness of issues which are of interest for the NATO legal community. Lastly, the NATO School considers the cooperation to be a source of inspiration for topics worthy to be brought into the NATO legal community.

*Dr.Katharina Ziolkowski
NCN 217-1002
Comm +49-8822-9481-1002
Ziolkowski.Katharina@natoschool.nato.int*

Spotlight



Mr. Vincent

Roobaert,

Assistant Legal

Adviser, NC3A



Name: Vincent ROOBAERT

Rank/Service/Nationality: Civilian / Belgian

Job title: Assistant Legal Adviser, NATO Consultation, Command and Control Agency (NC3A)

Primary legal focus of effort: Procurement law, law of contracts, intellectual property law, export control regulations and agreements (MOAs, MOUs, etc...).

Likes: Backpacking in India, London, good coffee, cooking, movies and writing book reviews.

Dislikes: bad coffee and people parking in front of my garage.

When in Brussels, everyone should: Come and visit NC3A, enjoy a good tea or coffee on Place Saint Boniface, (reasonably) indulge in some chocolates and drink a good beer (preferably Chimay).

Best NATO experience: meeting my NATO and national colleagues at the NATO school or in the different lawyer meetings.

My one recommendation for the NATO Legal Community: Let's not hesitate to call each other to share our experience!

Vincent.Roobaert@nc3a.nato.int



HAIL

&

FAREWELL

Hail

HQ SACT : CDR Kimberlie Young (USA N) joined in July 2008

JFTC : Lt Col Norbert Pedzich (POL AF) joined in July 2008

JWC : COL Kevin Luster (USA A) joined in July 2008

CC-Air Izmir : LTCOL Patricia McHugh (USA AF) joined in July 2008

CC-Land Madrid : Major Javier Palacios will join on August 1st 2008

Farewell

HQ SACT : CDR(USA N) Jaimie Orr left in July 2008

JFTC : Mrs. Mette Hartov-Prasse (DNK CIV) left in July 2008

JWC : COL Jody Prescott (USA A) left in July 2008

CC-Air Izmir : LTCOL Sarajane Stenton (USA AF) left in July 2008

CC-Land Madrid : LTCOL Fernando Jimenez Vara left in July 2008

IMS : LTCol Sylvain Fournier (CAN AF) left in July 2008

GENERAL INTEREST/NATO IN THE NEWS

- Allies signed on July 9, 2008 the Accession Protocols with Albania and Croatia, opening the way for the full NATO membership of these two countries. The Minister of Foreign Affairs of Albania, H.E. Mr. Lulzim Basha and the Minister of Foreign Affairs of Croatia, H.E. Mr. Gordan Jandroković participated in the ceremony in the NATO Headquarters. <http://www.nato.int/docu/update/2008/07-july/e0709a.html>
- Headquarters, Supreme Allied Commander Transformation hosted the signing of the Memorandum of Understanding for the tenth NATO Centre of Excellence (CoE), the Military Engineering CoE (MILENG) in Germany, on July 9. <http://www.act.nato.int/news.asp?storyid=277>
- New Step in the Strategic Airlift Capability Project : The fifteen SAC nations, including two Partner nations have agreed to purchase 3 C-17 strategic airlift aircraft for use by participating nations to meet national airlift requirements, including for NATO and EU missions. <http://www.nato.int/docu/pr/2008/p08-080e.html>
- France's Return to NATO Can Complement EU Security : article on President Sarkozy's rapprochement with NATO while strengthening the European Union's defence dimension. <http://www.spiegel.de/international/0,1518,druck-559304,00.html>
- Roles, Missions, and Equipment : Military Lessons from Experiences in this Decade : article by Charles J. Dunlap, Jr., USAF. <http://www.fpri.org/enotes/200806.dunlap.militarylessons.html>
- UNSCR 1822 : Threats to International Peace and Security Caused by Terrorist Acts. <http://daccessdds.un.org/doc/UNDOC/GEN/N08/404/90/PDF/N0840490.pdf?OpenElement>
- NATO's Role in Energy Security. <http://www.spiegel.de/international/0,1518,563210,00.html>
- Law and Language : Stanford Encyclopedia of Philosophy. Article on the importance of the use of language by lawmakers. <http://plato.stanford.edu/entries/law-language/>
- UNSCR 1820 : Women, Peace, and Security. <http://daccessdds.un.org/doc/UNDOC/GEN/N08/391/44/PDF/N0839144.pdf?OpenElement>
- Opinio Juris : Permissible Ruse or Perfidy : The Colombian Hostage Rescue. <http://www.opiniojuris.org/posts/1215111892.shtml>

*An invasion of armies can
be resisted, but not an
idea whose time has
come.*

Victor Hugo

GENERAL INTEREST/NATO IN THE NEWS

- Speaking at the tenth anniversary celebration of the Rome Statute, Dutch Minister of Foreign Affairs stressed that those guilty of war crimes, crimes against humanity and genocide must not escape their punishment.
http://www.minbuza.nl/en/news/speeches_and_articles,2008/07/Speech-Verhagen-at-celebration-10-years-Rome-Statu.html
- Recent articles of interest written by Major General Charles Dunlap, AF/JAG, Headquarters US Air Force, Washington, DC.
<http://www.fpri.org/enotes/200806.dunlap.militarylessons.html>
<http://www2.tbo.com/content/2008/jun/22/bz-take-closer-look-at-air-forces-nuclear-blunder/>
http://www.airforcetimes.com/community/opinion/airforce_backtalk_dunlap_061608/
- CFC Weekly Newsletter – Afghanistan, published by the Civil-Military Fusion Center / Civil Military Overview.
<https://cmo.act.nato.int/Newsletter/CFC%20Newsletter.pdf>

All legal staff in NATO billets will get username and password to access the entire CMO page; if you're not in a NATO billet and wish to have access, please contact jasteena.dhillon@cmo.act.nato.int.

*You cannot escape the
responsibility of tomorrow
by evading it today.*

Abraham Lincoln

GENERAL INTEREST/NATO IN THE NEWS

The SHAPE, HQ SACT, and ACT/SEE Legal Offices are looking for interns. The NATO internship programme provides current and recent students with the opportunity to intern with the SHAPE international community in Mons, Belgium or HQ SACT in Norfolk, Virginia, USA. For SHAPE there are two calls for applications per year. Internship will in principle last 6 months. For HQ SACT there is one call for applications per year.

The programme objectives are :

- To provide the Organisation with access to the latest theoretical and technical knowledge that the intern can apply through practical work assignments, as well as with additional staff resources.
- To provide interns with an opportunity to gain a thorough understanding of the organisation and NATO as a whole.
- To expand understanding of NATO in Alliance countries.

The eligibility criteria are:

- Age: over 21 at the time of internship.
- Nationality: nationals of a NATO member state.
- Studies: at least two years of university study or equivalent.
- Languages: proficiency in one of the official NATO languages (English/French); desirable working knowledge of the other.

All interns will require a security clearance from their national authorities prior to working at NATO. The procedure will be initiated as soon as the candidate is selected. For more information about these two internship programs please go to : <http://www.nato.int/shape/community/internship/index.htm>

<http://www.act.nato.int/content.asp?pageid=1220>

or contact the HQ SACT or the ACT SEE Legal Office for additional information.

UPCOMING EVENTS

- The next **NATO Legal Advisors Course** will be held on October 6 to 10, 2008. Next year's dates for this course are 18-22 May and 28 Sept– 2 Oct 2009.
- **International Panel on the Future of IHL: Challenges and Perspectives** [HPCR International](#), in cooperation with the Program on Humanitarian Policy and Conflict Research and the International Committee of the Red Cross, is organizing an "International Panel on the Future of International Humanitarian Law" in the context of the upcoming Advanced Training on Humanitarian Law and Policy.

The panel discussion will be broadcast live on the web (audio/video) from Harvard University on July 16, 2008, at 3:15 p.m. EST via the [Humanitarian Law and Policy Forum](#).

The event will review practical challenges facing humanitarian professionals in the implementation of IHL and draw a prospective analysis on its development.

- **The 10th International Course on Law of Armed Conflict (LOAC)** for Military Medical Officers will be organized from August 15 to 22, 2008 in Spiez, Switzerland. The course will be held in French and English. Additional information can be obtained by contacting the Course Secretariat of the Medical Services Inspectorate at +41-31 324 62 44 – loac.icmm@vtg.admin.ch
- Within the framework of PfP Partnership Work Programme, Switzerland organizes an **International Workshop** on the role of commanders in the implementation of International Law of Armed Conflict (LOAC) and Rules of Engagement (ROE) in military field operations including Crises Response Operations (CRO). It will be held in Geneva from 14 to 18 September 2008. Registration deadline is no later than 16 June 2008. For further information please contact Mrs. Sigrid Chatton at the Geneva Centre for Security Policy – Phone +41 22 906 16 22 – s.hatton@gcsp.ch



Language is the source of misunderstandings.

Antoine de Saint-Exupery

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)

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