

SPECIAL INTEREST ARTICLES

- Piracy in the Gulf of Aden and South East Asia by Ms. Jasteena Dhillon
- Shari'a Law and Military Operations Seminar held at the NATO School by Mr. Frederick Ischebeck-Baum
- HQ ISAF Claims Office by Ms. Lone Kjelgaard
- Book Review : Territorial Administration by International Organizations by Mr. Vincent Roobaert
- Is the Proportionality Principle in Question by Mr. Sherrod Lewis Bumgardner and Ms. Annabelle Thibault
- Training in the Law of Armed Conflict – Continuing Legal Education Seminar, Kabul, Afghanistan by COL Jody Prescott
- Spotlights :
 - LTCDR Martin Fink, JFC Naples
 - LTC Walter Greco, HQ NATO Sarajevo
- Hail and Farewell

GENERAL INTEREST

- In the News
- Calendar of Upcoming Events

Introduction

Fellow Legal Professionals and Persons Interested in NATO,

This is our first issue of the NATO Legal Gazette for 2009, a continuation of the effort by the legal community of NATO, nations, and international organizations to share knowledge about the diverse legal matters we address.

In this issue we welcome the assignment of Lieutenant Commander Martin Fink to Naples and Lieutenant Colonel Walter Greco to Sarajevo and feature information about them in the Spotlight section of the Gazette. Ms. Jasteena Dhillon writes about the role of the International Maritime Bureau in the current actions against piracy. A report of the successful seminar on Shari'a Law and Operations conducted at the NATO School in December, 2008, is provided by Mr. Frederick Ischebeck-Baum. Ms. Lone Kjelgaard reports her recent experience of working on claims in ISAF in January 2009, and Mr. Vincent Roobaert provides a review of the recent book about Territorial Administration by International Organizations while Ms. Annabelle Thibault and I offer a comment about the application of the principle of proportionality during the recent conflict in the Gaza Strip between Hamas and Israel. Our special interest articles conclude with an update on training in the law of armed conflict conducted in Afghanistan by the ISAF Legal Adviser, Colonel Jody Prescott. Each of the authors is thanked for their contribution to this issue.

We include a number of upcoming seminars or events that may be of interest to our community in the General Interest section of the Gazette. Events of note for this issue include The Legal and Policy Conference on International Cyber Conflict which will be organized in cooperation between the Cooperative Cyber Defence Centre of Excellence (CCD COE) on 9-10 September in Tallinn, Estonia, the dates of the upcoming NATO School legal courses, links to recent NATO documents such as the Strasbourg/Kehl Declaration, and information about the electronic visa program for the United States.

As always, readers of this Gazette are requested to provide articles about legal issues that are of interest to our extraordinarily large community. This Gazette relies upon the willingness of members of our community to share knowledge with each other. I look forward to your contributions for Issue #20.

Sincerely,
Sherrod Lewis Bumgardner
Legal Adviser, ACT SEE

Piracy in the Gulf of Aden and South East Asia

Ms. Jasteena Dhillon – Civil-Military Fusion Centre

Piracy is emerging as a formidable international criminal issue with its most recent upsurge in the Gulf of Aden. The political instability and armed conflicts in North East Africa have created an environment that enables the growth of armed and violent groups who seek to use piracy to facilitate smuggling and trafficking and which have become organized and pervasive in the Gulf. Southeast Asia, formerly a hotspot for piracy, has subsided but continues to require strong vigilance from concerned countries in the region. The International Maritime Bureau (IMB) defines "piracy" as "an act of boarding a vessel with the intent to commit theft or any other crime and with the intent or capability to use force in the furtherance of the act."

According to the IMB (International Maritime Bureau), the number of piracy attacks has increased by more than ten percent worldwide from 239 actual and attempted attacks in 2006, to 263 actual and attempted attacks in 2007. In the African region in 2007, in waters off the coast of Somalia, 31 piracy incidents were reported in which a total of 154 crew were taken hostage. In the most recent [International Conference on Piracy](#), held on 12 December 2008 in Nairobi, Kenya, the Special Representative of the UN Secretary General for Somalia, Mr. Ahmedou Ould-Abdallah stated in his opening remarks that "the threat of piracy in the Gulf of Aden cannot be underestimated anymore." He went on to say that, "over the last two months, since October 2008, pirates have attacked more than 32 vessels, and successfully hijacked twelve, including a large oil super tanker and took about 230 crew members from different countries hostage in these attacks.

In Southeast Asia, another region historically fraught with piracy, the incidents of pirate attacks (which were quite frequent starting in the 1990s and increased during the Asian financial crisis) have since 2007 been largely suppressed as a result of regional and international national support from the US and Japan. In particular, Indonesia has worked quite hard to address piracy by strengthening law enforcement and combating poverty in its coastal areas and this has had a positive effect on reducing piracy activities off its coast. In addition, some of the coordinated efforts of countries in Southeast Asia to deal with piracy include the 2005 agreement between Malaysia, Singapore, Indonesia and Thailand called "Eye in the Sky" (this joint security initiative was formed to provide air surveillance over the Malacca Strait) and the 2006 enactment of the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against ships in Asia. This agreement was aimed at enhancing the multilateral cooperation among the [ASEAN](#) countries plus India, Bangladesh and Sri Lanka.

However, even if Southeast Asia has been successful in fighting piracy, using similar initiatives to combat piracy has been difficult to achieve off the African coast due to ongoing conflicts and pervasive instability. According to reports, piracy in the Gulf of Aden is posing an increasing threat to international humanitarian assistance and navigational security in the countries with coastlines on the Gulf of Aden. Some organisations have launched initiatives to combat piracy in Africa, including the European Union that has launched a 12 month naval operation that started in December 2008 - with its mandate to protect the World Food Programme (WFP) maritime convoys bringing humanitarian assistance to Somalia and to other vulnerable ships. Furthermore, NATO is contributing through its flagship of the [Standing Maritime Group 2 that provides security in the Gulf of Aden](#).

¹ Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Singapore, Philippines, Thailand and Vietnam

Piracy in the Gulf of Aden and South East Asia

A recent example of this protective effort was demonstrated on 17 November 2008 when the Italian Navy destroyer Luigi Durand de la Penne received a distress call from a merchant vessel that was travelling through the Gulf towards the Suez Canal and was being followed by two skiffs (manoeuvring in a high speed piracy attack pattern). The destroyer deployed its helicopter which led the skiffs to changing course. This said, the problem of piracy appears to be growing in sophistication by the pirates and their actions. According to a recent report from 20 November 2008 by the [Monitoring Group in Somalia](#), escalating ransom payments seemed to have contributed to the growth of piracy. Unlike the approach in Southeast Asia, where initiatives were mainly taken by the national governments of the coastal countries, it is the international community which has come together to respond to piracy in the Gulf of Aden and in particular in Somali waters.

As an example, the International Maritime Bureau has called for [warships of navies operating in the Gulf of Aden to take a much stronger role to stop pirates operating from bases in Somalia](#). Furthermore, the Security Council of the United Nations has strengthened the calls of regional organisations and concerned nations, by unanimously adopting [Resolution 1846 \(2008\)](#). In that Chapter VII resolution, the Security Council decided that, “during the next 12 months all States² and regional organisations cooperating with the Somali Transitional Federal Government (TFG) may enter Somalia’s territorial waters³ and use “all necessary means” – such as deploying naval vessels and military aircraft, as well as seizing and disposing of boats, vessels and arms and related equipment used for piracy – to fight piracy and armed robbery at sea off the Somali coast in accordance with relevant international law. In September 2009, the States and regional organisations cooperating with the Somali authorities will be asked to provide the Security Council with a progress report on their actions under this resolution. It is important to note that some of the States that agreed to the Resolution highlighted that their support for this resolution was based on the understanding that its provisions would not affect the rights, obligations and responsibilities of the Member States, under the United Nations Convention on Law of the Sea and should not be considered as customary international law. This “grey area” brings potential conflict between the obligations in the aforementioned Convention and the resolution. The jurisdiction over ships and their goods can be disputed as well as the responsibility of stopping and boarding vessels in the territorial waters of Somalia.

In the next twelve months, with the increased commitment and framework created by the Security Council that allows for robust intervention by the international community to stop piracy, events in the Gulf of Aden will be observed closely by all.

² Includes Canada, Denmark, France, India, Netherlands, Russian Federation, Spain, United Kingdom and the United States.

³ A nation’s territorial waters is within 12 nautical miles off of its national coast.

Piracy in the Gulf of Aden and South East Asia

The following issues will be at stake :

- How will the international community demonstrate its ability to conduct anti-piracy operations effectively and collectively?
- How to balance the aim of those operations with issue of respecting the rights and obligations of Member states under international maritime conventions?
- Do the nations, off whose coast the operation is taking place, have primacy to protect their borders and to take actions such as boarding vessels, confiscating stolen goods and prosecuting pirates in their national courts?
- How does the international community police the system of piracy, what mechanisms are used and what consent do they have to get from involved or observer states?
- And finally, are the bottom lines that the international community has set for this intervention - security of the region, including issues like safe delivery of aid to the populations that are also experiencing humanitarian crises due to internal armed conflict in and conflict in these Gulf coastal countries – justified?

Maybe the lessons learned from the efforts to combat piracy in Southeast Asia (need for collective security while respecting national interests) can be applied to deal with the African region to some extent. The brutal armed conflicts and ongoing humanitarian crises in Somalia, Sudan and to some extent in Ethiopia make it hard to just use the same tools, but there are lessons to be gleaned from in order to create the most appropriate and effective response to this international criminal issue.

Ms. Jasteena Dhillon
Civil-Military Fusion Centre
jasteenadhillon@yahoo.com

Shari'a Law and Military Operations Seminar held at NATO School December 15-19, 2008

Mr. Frederic Ischebeck-Baum – Legal Intern – NATO School

From 15 to 19 December 2008 the NATO School in Oberammergau, Germany offered a Shari'a Law and Military Operations Seminar in co-operation with the International Institute of Higher Studies in Criminal Sciences (ISISC)¹. The idea was to provide instruction to military officers, legal advisers, operational planners, political and policy advisers by internationally pre-eminent scholars on Shari'a. The seminar specifically discussed Shari'a and LOAC², Human Rights, Criminal Justice, Rule of Law, Terrorism and Jihad. ISISC is situated in Syracuse, Sicily, and was founded 35 years ago. It is well known throughout not only the circle of academic experts in the field of International and Domestic Criminal Law but also among practitioners and those working close to the legal world. ISISC co-operates with organisations such as the United Nations (UN), Amnesty International (AI), the Department of Disarmament and Security Studies (DDSS), Human Rights Watch (HRW), the International Bar Association (IBA) and the International Law Association (ILA).

It also co-operates with a number of other bodies such as the Association Egyptienne de Droit Pénal (Egypt), the Institute of Law and State (Russia) as well as the Max-Planck Institute for International and Comparative Criminal Law (MPICCL), Germany, just to mention a few. Furthermore, ISISC is deeply involved in research projects on all sorts of legal issues, may they be of national or international nature. In May 2008 a MOU¹ was signed between NATO School and ISISC in order to establish a mutual co-operation in the field of legal studies and education. Unfortunately the current ISISC President, Professor M. Cherif Bassiouni, could not join the seminar although he was scheduled to be there. Professor M. Cherif Bassiouni is a world-wide distinguished expert in International Criminal Law, Comparative Criminal Law, Human Rights and U.S. Criminal Law. His writings are published in Arabic, English, French, Italian and Spanish and are of high value to international and national courts, among them the International Court of Justice (ICJ), the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Tribunal for Rwanda (ICTR).

Dr. iur. Katharina Ziolkowski, LL.M. (UNSW), Legal Adviser to NATO School, opened the seminar with a warm welcome to the audience and gave a brief overview on what could be expected during the five day seminar, followed by an introduction to the NATO School itself and its facilities. Dr. Giovanni Pasqua, Scientific and Administrative Director of ISISC, took over the floor. He introduced the institute and explained its aims as well as areas of practice.

Dr. Anver M. Emon³, who brilliantly replaced Professor Bassiouni, started the academic day ("Introduction to Shari'a Law: History, Methodology, Different Schools and Approaches") by introducing Islamic Law to the audience. Dr. Emon began his lecture by explaining that there cannot be any understanding of Shari'a Law at all without having an idea of the history of Islam, at least in a nutshell, because in Islam God is considered to be the original and overall authority and therefore it must be internalised that, to a certain extent, studying the law means studying the religion.

¹ Law of Armed Conflict.

² Memorandum of Understanding.

³ Dr. Emon is the Assistant Professor to the Faculty of Law, University of Toronto, and has gained wide reputation in the field of Islamic and Legal Studies. Dr. Emon holds a Doctorate of Philosophy from the University of California, a Masters of Law (LL.M.) from Yale University and is an expert in related research and consultancy projects in the US and abroad. He is a widely published author in both disciplines, Law and History.

Shari'a Law and Military Operations Seminar held at NATO School December 15-19, 2008

The latter tends to be rather diverse, or as Dr. Emon frankly stated: "Shari'a can be anything to anyone". Following this phenomenon, the desired clarity of law is very relative and depends entirely on its regional⁴ understanding; this means that the Law must always be seen in the context of the environment in which it is dealt. Even talking about the relationship between religion and law, it is crucial that an environment, i.e. a region, is always seen under the light of its history, because this is the ground the branches on which Islam has been growing into different directions and they very naturally continue to do so⁵.

From a general understanding point of view, the original sources of the Islamic Law are first of all God Himself as the monotheistic divine and most noble source of all. But God is not a source of law as such. He is the religious authority from which the rules take their ethic and moral justification. The rules themselves are the teachings of the Koran, being a general command in nature and legally speaking yet these teachings cannot be seen as fully defined rules or codes representing a legal regime. There is the Sunna, which is the exemplary conduct and teaching of the Prophet Muhammad⁶. This is regarded as the very implementation or extract of the teachings of the Koran, being put into practice in terms of a leading example for behaviour. Such a code of conduct is written down and is therefore considered as another written source of Law beside the Koran, called Hadith. After these explanations, the audience then enjoyed a first brush of a somewhat exotic case study related to the debate on alcohol consumption and Islamic legal sources. Dr. Emon presented verses from the Koran which were to be examined in terms of their possible binding nature and the question whether they could in fact represent a legal basis for sanctions.

After Dr. Emon's introduction, Judge Dr. Mohamed Ibrahim⁷ took over the floor. Dr. Ibrahim emphasised the aims of Shari'a (maintain religion, protect human life, preserve the mind or reason, protect family and descendants, preserve property) and then, picking up the audience where Dr. Emon had stopped, he explained the categories of crimes in Shari'a. There are three of them, Hudud, Qesas and Taazir.

⁴ For example, there is a different understanding and interpretation in Saudi Arabia, Jordan, Morocco, Lebanon and Turkey.

⁵ As for the modern Muslim world, there are Secularists, Religious Liberals and Fundamentalists, all using Shari'a but interpreting it in different ways.

⁶ The Prophet Muhammad was born in 570 CE, received revelation in 610 CE and died in 632 CE.

⁷ Dr. Ibrahim is currently working with the United Nations Mission in Sudan (UNMIS: <http://www.unmis.org>) as a Senior Human Rights Officer at the Human Rights Unit. He previously worked with the United Nations Assistance Mission in Afghanistan (UNAMA: <http://www.unama-afg.org>) as a Rule of Law Officer. Dr. Ibrahim holds a doctoral degree from Northwestern University School of Law, in the field of International Human Rights Law and Shari'a. He also holds a Master of Law in International Criminal Law from the University of Notre Dame Law School and got his law degree from Cairo University (Licence en Droit). He worked as Legal Adviser at the Egyptian Legislation Department at the Ministry of Justice and participated in drafting Egypt's first Anti-Money Laundering Law, Securities Depository Law, Anti-Trust Law and several other laws. Dr. Ibrahim served as the Presiding Judge at North Cairo Court and before that he was Public Prosecutor at Central Cairo District. His publications cover a wide range of legal fields and he is a Visiting Lecturer at ISISC, Siracusa.

Shari'a Law and Military Operations Seminar held at NATO School December 15-19, 2008

Hudud-crimes⁸ are fixed in the Koran and Hadith and are already laid down offences. So is the sanction and there is relatively little space for interpretation. The second category is called Qesas. This can be homicide, wounding or any kind of physical injury⁹. Apart from Hudud-crimes there are no specific definitions or regulations for penalty and this is entirely left to the judicial evaluation. Finally, Taazir-crimes are those not encompassed by the first two categories. This third rule wants to regulate a conduct resulting in tangible or intangible individual or social harm¹⁰. Again, the measurement and nature of penalty are left to the judge. It could involve imprisonment, the infliction of corporal punishment, deprivation of liberty, the payment of compensation, the imposition of fine as well as admonishment in accordance with the principle of rehabilitation.

The day ended with a very lively discussion on the lectures heard and the audience very much benefitted from the diversity of views and opinions.

The second day ("Shari'a and the Law of Armed Conflict / Human Rights") was started by Dr. Niaz A. Shah¹¹. Dr. Shah lectured on the relationship between Islamic Law and LOAC; he stressed that there are not actually such big differences¹² between the Koran and what is known as the basic LOAC principles¹³. In fact, the LOAC principles are very well recognised by Islamic Law. Moreover, when it comes to the use of force, Islamic Law draws a thin line, very much similar to the one the UN-Charter uses. The Koran, like the UN-Charter, sees the prohibition of the use of force as the desired state. Most naturally, there are some exceptions to this principle. There are two exceptions, to be precise. Throughout history, their overall name has always been seen with a prejudice and also in the modern world today, particularly since 9/11. It is Jihad. The first kind of Jihad, also called "lesser Jihad", is the principle of self-defence, its basic rules are similar to Art. 51 in the UN-Charter¹⁴. The second kind, known as "greater Jihad" or "Jihad bil Saif" is the legitimate use of force which can only be declared by a state against apostates, rebels, highway robbers, violent groups, non-Islamic leaders or non-Muslim combatants¹⁵.

⁸ Such as adultery, defamation or slander, alcoholism, theft, brigandage, rebellion and corruption of Islam.

⁹ The Koran refers to them as "Blood-crimes", such as murder, voluntary homicide, involuntary homicide, international crimes against the person, non-international crimes against the person and other infringements of the person's bodily integrity that do not result in death.

¹⁰ The Arabic meaning of Taazir is corrective penalty, which is of course the very intention of all penalties in relation to an act of revenge. But Taazir explicitly intends regulating the social life of a society.

¹¹ Dr Shah is a lecturer in Law from the University of Hull, United Kingdom. He holds a PhD in Islamic and International Human Rights Law from Queen's University Belfast, an LL.B. and an M.A. in English Literature from the University of Peshawar. Dr. Shah is former Visiting Fellow at the Lauterpacht Research Centre for International Law, University of Cambridge and Protection Assistant for UNHCR as well as Legal Consultant for UNICEF in Islamabad. He is a widely published author in the field of LOAC, human rights law, especially women's and children's rights.

¹² Proportionality, distinction, military necessity and prohibition of unnecessary suffering.

¹³ E.g. Chapter 9 of the Koran on Conduct of War.

¹⁴ The intention of a response to an armed attack is to end it and not to rise to a disproportional act close to what can be considered an act of revenge.

¹⁵ To be understood in terms of LOAC.

Shari'a Law and Military Operations Seminar held at NATO School December 15-19, 2008

The problem is the mere fact that there is no Islamic state as such. As to non-state actors, it should be noted that in fact, according to the Koran, al Qaeda as a non-state actor is not able to declare Jihad at all. The al Qaeda declaration on the Western world can only be considered as a kind of "Fatwa", which is the Arabic word for "religious opinion on Islamic law", i.e. a personal interpretation which can only be issued by a scholar. The problem met by al Qaeda, though, is that none of their leaders is a scholar. Talking about states and their sovereignty, it should also be mentioned that Jihad also means "self-determination" and therefore humanitarian intervention operations like in Kosovo or Rwanda cannot be justified under the light of Islamic Law.

It became clear that what is known as LOAC, arising from The Hague and the Geneva stream, and Islamic Law's understanding of the use of force, have in fact more similarities than one might think – and in the Islamic understanding, properly following the Koran, they do merge.

Dr. Emon then continued on the same topic, emphasizing that the line between religion and law in Shari'a is a very thin one. He used the Danish cartoon incident¹⁶ as an example; the rage caused in the Muslim world by the cartoons of the Prophet Muhammad could be explained because these were regarded as an act of blasphemy. On the other hand this could never be a legitimate basis for a violent act. Compared to that, the Afghan Apostasy Case¹⁷ shows what can happen under the rules of Islamic law when it comes to converting to Christianity. In the case at hand, a Christian convert living in Afghanistan was accused of having rejected Islam and was imprisoned. The decision was based on the Afghan constitution and Shari'a. In the aftermath, Afghan authorities faced severe international protest. Assumingly due to political reasons, the case was then officially dropped on technical grounds because the prosecutor found the accused "mentally unfit". This example shows how close religion and law can be.

The lectures were followed by a general discussion during which the given examples were again examined and discussed.

Dr. Ibrahim then lectured on Islamic law and human rights, explaining where the basic rights can be found in the Koran and other sources. Again, it became clear that there are quite a few similarities with the Western understanding and the effort of reaching a consensus in the Arab world is obvious. Although still arguable in its effects and accuracy from the Western point of view, the Arab Charter on Human Rights of 15 March 2008¹⁸ could represent such an effort. The bottom line Dr. Ibrahim gave the audience was that there are human rights to be found in Islamic Law, even if their understanding and implementation may differ from the Western understanding to a certain extent.

The day ended with a panel discussion during which Dr. Emon, Dr. Ibrahim and Dr. Shah shared their views and opinions not only on human rights in Islamic Law but on several other Shari'a issues.

¹⁶ www.brusselsjournal.com/node/407

¹⁷ http://news.bbc.co.uk/2/hi/south_asia/4853904.stm.

¹⁸ <http://www.diplomacy.edu/arabcharter/default.asp>.

Shari'a Law and Military Operations Seminar held at NATO School December 15-19, 2008

The third day ("Shari'a and Criminal Justice") consisted of one lecture and another general discussion; the rest of the day was left to the seminar participants for individual professional development. Dr. Ibrahim lectured on the interpretation of Shari'a in the Afghanistan Criminal Justice System, entering the field of forensic legal practice in terms of investigation, fact-finding, witnesses in court and evaluation of evidence. These procedural rules are basically influenced by the Western legal thought, the Mujahedin regime from 1992 to 2001 which declared Shari'a as the basis of law further entrenched by the Taliban regime, and the 2001 Afghan Interim Administration. Still, there are eye-catching if not alarming differences from most Western procedural systems, such as the significance of a testimony given by a male or female. The female is likely to be regarded as less reliable, which can be explained by the cultural status of women in the Islamic world. Dr. Ibrahim also presented the Sayed Parweiz Kambakhsh Blasphemy Case¹⁹, in which an Afghan journalist was sentenced to death because he published material on suspected violations of human rights he thought Afghan authorities had committed in northern Afghanistan. Moreover, he published critical articles about the Koran itself. Kambakhsh was tried behind closed doors by a three-judge panel and had little chance to defend himself at all, let alone to enjoy the procedural rights of an accused. His case is still going on to this day.

Again, the academic day ended with lively discussions between the speakers and the attentive audience.

On the fourth day ("Rule of Law Operations in Afghanistan, Iraq, Sudan and Kosovo") Dr. Ibrahim started speaking first and shared his personal experience in establishing the Rule of Law in Afghanistan, Iraq and Sudan. He pointed out some of the difficulties he had met and, for example, he mentioned that the English version of the Afghan constitution lacks accuracy in its wording. This is likely to cause basic misunderstandings not only among local authorities and population, but also among visiting nations. Furthermore there are only few if not any precedents to be found and therefore, it is not easy to establish case-law. Case-law would of course serve what can be called predictability of legal decisions and along with that stability for the whole judicial body. As to the legal problems in Iraq, the former Iraqi Special Tribunal (IST)²⁰ had similar problems and therefore its statute was reassessed. IST is now called Supreme Iraqi Criminal Tribunal (SICT). Meanwhile, the problem in Sudan happens to be of a more basic nature. Indeed while it may be possible to hold a legal infrastructure in northern Sudan this is entirely impossible in the south, where there is no infrastructure at all, leading to many difficulties on a daily basis.

After Dr. Ibrahim finished his lecture, Mr. Charles Tucker²¹ took the floor. Before he started his lecture Mr. Tucker emphasised that seminars like this should be used to establish relationships between nations through networking by participants. He strongly recommended seeing the seminar not only as a welcome opportunity to exchange views and opinions, but also to build bridges and support each other all around the globe.

¹⁹ <http://edition.cnn.com/2008/WORLD/asiapcf/01/23/afghanistan.journalist/index.html>.

²⁰ law.case.edu/saddamtrial/documents/IST_statute_official_english.pdf.

²¹ Mr. Tucker is the Executive Director of the International Human Rights Law Institute (IHRLI), DePaul University College of Law, Chicago. He is a civilian who spent most of his career on active or reserve duty as an US Air Force Judge Advocate (JAG). He holds a JD from DePaul University College of Law and a BA from the University of Notre Dame. Besides his experience in the field of international law and related assignments in the US and abroad, among them an assignment as International Law Adviser in the Office of the US Secretary of Defence and Legal Adviser for the Office of the High Representative in Bosnia and Herzegovina and several other assignments in Central Asia, the Middle East and South America, Mr. Tucker was Senior Field Attorney for the National Labour Relations Board.

Shari'a Law and Military Operations Seminar held at NATO School December 15-19, 2008

As to his presentation ("Experiences in Rule of Law Operations"), Mr. Tucker preferred talking about US foreign policy and its political and strategic goals and intentions, and professionally provoked the audience and encouraged them to participate actively in the lecture.

Throughout the week the subject of the treatment of women and family matters in general had often been raised but yet there had not been any chance to discuss them at length. Hence, to everyone's delight, Dr. Emon spoke about Islamic families in modern states and related issues. The three major subjects Islamic Family Law has to deal with are marriage, divorce and inheritance. Again, for a Westerner, a somewhat ancient image of women comes to mind, but by now everyone was well aware that this is simply one of the issues Islam has to deal with facing the modern world, torn between tradition, belief and emancipation. However, this non-scheduled lecture was very well received and so was the following discussion, both serving well the purpose of the seminar.

On the last day, the seminar was concluded by a panel discussion, which was held by Dr. Emon, Dr. Ibrahim and Dr. Shah, dealing with all sorts of questions related to Shari'a, including international responses to Jihad and the socio-ethical background of suicide-attackers. Every speaker took about a quarter of an hour to share their final ideas and comments. Again, the audience benefited a great deal from these experts' opinions. They disagreed with each other rather regularly in the perfect comfort and astute atmosphere provided by what can only be described as an academic discourse. Between the lines, there was a final message, which was entirely well received by everyone in the room and the panelists absolutely succeeded in getting the point across: Keep your mind, your eyes and your ears open when going to a country belonging to another culture. Know where you are going. As to Shari'a, this also includes that one must not forget that due to cultural, historical and regional differences and moreover due to the diverse nature of Shari'a itself, as mentioned earlier, it is very likely that during an operation one might experience a kind of Islamic Customary Law and not the original Islamic Law itself.

Coming back to operational requirements, such thoughts make perfect sense, because any other is not likely to serve the overall idea nor does it help providing safety on the ground. Military history and presence bear many examples. There was no syndicate work scheduled for this seminar, which was good. Instead, all questions were collectively presented and discussed, so everyone could hear and gather everything. Dealing with a rather exotic subject, this method seemed to be a useful approach. This was a first for the seminar and there is no doubt that such an extraordinary conference will most certainly be of high interest for NATO in the future. It should therefore be held regularly.

Mr. Frederic Ischebek-Baum
NATO School – Legal Intern (Dec 08 – Jan 09)
ischbaum@hotmail.com

The next "Shari'a and Military Operations Seminar" is preliminarily planned for 2 - 6 November 2009. For more information check regularly www.natoschool.nato.int .

**Shari'a Law and Military Operations Seminar held at NATO School
December 15-19, 2008**



HQ ISAF Claims Office

Ms. Lone Kjelgaard – JWC ()*

"20 sheep hit by one car?" "Are you sure?" "And they did all die?" "Well... actually only 16 died, two I could slaughter and two are okay." "But the 16 sheep were all hit by the same one car?" "Yes, an ISAF car." "Did it drive in circles and come around and pick off the survivors?" "No, it drove by in a straight line on the street."

This could be a typical conversation with a claimant, coming to HQ ISAF seeking compensation for damage allegedly caused by ISAF personnel.

Every Wednesday afternoon the HQ ISAF Legal Office conducts a Claims Session by the main gate. This is the opportunity for the local population to forward their claims for compensation to ISAF.

The ISAF Claims Office, located at HQ ISAF, is responsible for the investigation, adjudication and settlement of claims that arise due to damage or injury caused by ISAF personnel. This is true whether such injury or damage occurs between ISAF participants or involves ISAF personnel and local national civilians, international organizations, or non-governmental organizations.

Settling and paying claims can be viewed in many ways. Yet it is most fair to view it as a combination of 'doing the right thing', force protection and a confidence building measure. By settling and eventually paying claims we retain the support of the Afghan population. Because the settlement of claims increases the confidence of the local population and increases the force protection of ISAF personnel, it is important to settle meritorious claims in a speedy, transparent and accurate manner.

According to the Military Technical Agreement between Afghanistan and ISAF, ISAF is not legally liable for any damage to civilian or government property caused by any activities in pursuit of the ISAF mission.

However, COMISAF has made a policy decision to compensate where ISAF is at fault. This may include deaths and injuries as well as vehicle damage and other property damage. ISAF may also settle the claim where the responsible troop contributing nation cannot be identified.

First, claims are a national responsibility, and nations are required to receive, adjudicate and settle claims following their own national procedures. The ISAF claims office happily assists, if a nation needs help.

So what does the HQ ISAF Claims Office do?

The HQ ISAF Claims Officer is the overall point of contact for claims against ISAF in general, but particularly in the Kabul area. The Claims office investigates all claims against HQ ISAF. If it turns out that a nation can be identified as the nation involved in the incident, the Claims Office will forward the claim to that nation. Before this is done, the ISAF Claims Office helps the claimant gather all the information that is needed to make a decision on the claim. The ISAF Claims Office can also give advice to the nations, but the nations will be bound by their national law, rules and regulations alone.

() Visiting HQ ISAF in January 2009*

HQ ISAF Claims Office

There are, of course, certain types of claims that the HQ ISAF Claims Office does not process. These include claims arising directly from combat, combat-related activities or operational necessity. What does that mean? In short, practical terms it means that ISAF will not pay for the damage caused to a compound that was bombed when insurgents used it for planning an attack against ISAF. On the other hand, if a civilian local national is hurt by accident in such an attack, they can seek compensation.

Claims arising from land use will not be processed. ISAF has a Land Consignment Agreement with Afghanistan which provides that Afghanistan shall give ISAF the land and premises that ISAF needs for its mission free of charge, and that land claims will be handled by the Afghan Ministry of Defence.

Lastly, claims presented more than six months after the claimant has, or could have, reasonably discovered the damage, will not be processed unless the claimant had a valid reason for not coming to ISAF earlier.

By settling and paying claims HQ ISAF is reaching out to the local population.

There are numerous different types of claims. Some, like the above example, are not at all that trustworthy. Others are fully documented---- in an Afghan sense of understanding. Their fully documented claims wouldn't perhaps satisfy an insurance company back in your home country, but it works here.

A lot of the payments made are *ex gratia*, which means that ISAF will pay compensation without acknowledging legal responsibility for having caused the incident. The decision will be based on a plausible reconstruction of what happened. Elements such as the time of the day, the location of the incident, the driving patterns of ISAF, an eventual IMP report, knowledge of ISAF troops in the area and the threat level, will all be taken into consideration before a decision is made.

The typical types of claims are road traffic accidents where cars, livestock, pushcarts or other property get damaged.

The more adventurous claims are land claims, tent fires, gun shots and claims where allegedly lots of animals are killed by one car. On a number of occasions, ISAF troops unfortunately must shoot warning shots to get a car or motorcycle which is approaching too closely to stop. We consider those claims as well. But why – when the driver wasn't doing what he was supposed to do? Because when he turns out to be a regular guy, who just wasn't paying attention to traffic, ISAF can help him financially with getting his car or motorcycle repaired. ISAF has also provided medical assistance to a police officer, who got hit by glass and needed small pieces of glass removed from his face and neck. This sort of settlement is called "in kind", rather than "in cash" like most.

Nevertheless the ISAF Claims Office needs your help and therefore has a plea to all ISAF members, not just the ones at HQ ISAF. If you have been in an accident, however small, please report it to the IMP and/or the Legal Office. This is also valid if you think that you might have for example touched a pushcart on the side of the road, while driving after dark – please report it. This will be a tremendous help in deciding the right amount of compensation to be paid to a claimant. Further, it will help a claimant actually prove that an incident did indeed happen.

HQ ISAF Claims Office

We need your help to adjudicate the claims and reach a fair decision. Unless you have behaved in an absolutely reckless manner, reporting the claim will not have any consequence. Claims between the nations inside ISAF are waived. That is, the costs for repair are being paid by ISAF, and no blame is directed towards the driver.

"Sir, let me go over this one more time." "You own a shop, where you sell dried fruit, dry goods of various kinds?" "Yes." "...and an ISAF vehicle drove into your shop and destroyed everything?" "Yes." "...and these are the pictures showing your shop?" "Yes." "Sir, with all due respect, this is a sea container that has been blown up from the inside; no vehicle could ever have done that." "Well, maybe the vehicle drove inside my shop and blew up." "Maybe it didn't. Good day!"

This sort of discussion is just a cost of business in the conduct of modern operations; but as noted above, paying for real damages is crucial in maintaining our presence among the Afghan people, and indirectly furthers the development of rule of law.

Mrs. Lone Kjølgaard
JWC
COM +47-5134-2114
Lone.Kjolgaard@jwc.nato.int

Book Review : Territorial Administration by International Organisations

Mr. Vincent Roobaert, Assistant Legal Adviser – NC3A(*)

Since the end of the Cold War and the 'rebirth' of the Security Council, international organizations, such as the United Nations, have been more and more involved in the administration of territories. After the end of the war in the former Yugoslavia, for example, various organizations participated, to various extent, to the administration of Bosnia, Kosovo and Eastern Slavonia. The United Nations was also involved in the administration of East Timor before it became independent. The origin of such operations, nowadays known as "nation building", can be traced back to the period directly following World War I.

In this issue of the NATO Legal Gazette, two books on international territorial administration are reviewed. While this topic only raised limited academic interest in the past, due to lack of practice, the literature on this topic has increased in recent years¹. The two books reviewed below are complementary. In *International Territorial Administration. How the trusteeship and the civilizing mission never went away*², Ralph Wilde aims at determining whether the various occurrences of international territorial administration projects can be considered to constitute a policy institution, i.e. an established process aimed at implementing particular policies. Dr. Wilde also aims at assessing whether international territorial administration varies from or, rather, shares commonalities with, other institutions such as protectorates, colonialism, mandate, trusteeship, representative bodies and belligerent occupation. In *Humanitarian Occupation*³, Mr. Gregory Fox reviews the aims and legal basis of what he refers to as 'humanitarian occupation'. Both books provide a thorough analysis of international territorial administration and raise many interesting issues that may, ultimately, impact the legality and legitimacy of this practice.

Dr. Wilde's starting point is the observation that the Kosovo and East Timor operations are usually considered to be, or are presented as, exceptional phenomena. This does not fit with his understanding of international territorial administration which he traces back to various projects starting just after World War I. He argues that there have been many international territorial administration projects since then. His historical survey includes the Free City of Danzig, the Saar Basin, Leticia, Memel and, later on, ONUC in the Congo, West Irian (Indonesia), Western Sahara up to Mostar, Eastern Slovenia, Kosovo and East Timor. As Mr. Wilde's purpose is to understand the nature and purposes of international territorial administration, he then carries out a thorough analysis of the impact of such projects on the sovereignty of the State concerned to determine whether the aim of these projects could be the creation of international territorial sovereignty. The same analysis is carried out for territories in which the right of self-determination has been invoked.

Sovereignty includes both a right of administration and a title on the territory. Based on his analysis of the international administration projects carried out to date, while the administration of territories have been transferred fully or partially to international organizations, title over these territories has not been transferred to these organizations.

(*) This review does not reflect the views of NATO, NC3A or the NATO Member States.

¹ See also CARSTEN STAHN, *The Law and Practice of International Territorial Administration: Versailles, Iraq and beyond*, Cambridge University Press, 2008.

² RALPH WILDE, *International Territorial Administration. How Trusteeship and the Civilizing Mission Never Went Away*, Oxford University Press, 2008, ISBN 978-0-19-927432-1, £60 (hardback).

³ GREGORY FOX, *Humanitarian Occupation*, Cambridge University Press, 2008, ISBN 978-0-521-85600-3, £ 23,99 (paperback), ISBN 978-0-521-67189-7, £ 60,00 (hardback).

Book Review : Territorial Administration by International Organizations

This analysis is of course important to determine the effect of international territorial administration on the continued existence of a State, for example. After reaching the conclusion that the purpose of international territorial administration does not consist in the transfer of title to an international organization, Dr. Wilde investigates which purposes have been associated with international territorial administration projects. Again, this inquiry is made to determine whether these various projects share commonalities. Dr. Wilde argues that the projects to date have been carried out to respond to either a sovereignty problem (e.g., freezing the situation on the ground pending the settlement of a territorial dispute) or to a governance problem (e.g., react to some behaviours which are considered unacceptable under international law). International territorial administration projects are therefore considered to serve similar purposes and, moreover, to constitute implementation tools in certain areas of international law such as the prevention and the settlement of international disputes and the promotion of international peace and security.

After concluding that the various projects do indeed share common purposes, Dr. Wilde considers it necessary to determine whether or not these projects also share purposes and means with other mechanisms used by States (it will be recalled that international territorial administration is carried out by international organizations) such as protectorates, colonialism, mandate, trusteeship, representative bodies and occupation law. Having reached the conclusion that these mechanisms do have similarities, Dr. Wilde examines how international territorial administration has been legitimized, distinguishing the institution from colonialism. In his view, four elements explain this legitimization. First, international territorial administration is based on the consent of the State concerned or a resolution of the United Nations Security Council. Second, it seeks to enforce legitimate policies, such as compliance with human rights. Third, it is carried out by legitimate actors which are considered to be impartial. Finally, these projects are temporary in nature.

Dr. Wilde's review of the nature and purposes of international territorial administration is definitely a must read. Dr. Wilde has carried out an extensive and well documented analysis of this mechanism demonstrating his deep knowledge of international territorial administration projects. The link made between international territorial administration projects and other institutions of international law which are now seen as illegitimate (e.g., colonialism) raises very interesting and important questions about the legitimacy of contemporary international territorial administration projects. This is definitely an element to be considered to ensure that this practice remains acceptable to the international community.

The issue of legitimacy is also reviewed in Mr. Fox's book in which he examines the reasons and legal basis for territorial administration. Mr. Fox's thesis is that the purpose of what he refers to as 'humanitarian occupation' is to create a liberal democratic order and to preserve the maintenance of existing borders and demographic profiles of the territories concerned, although he recognizes that his thesis could be overcome by events (the book was published before the declaration of independence of Kosovo).

Mr. Fox's historical review of international occupation distinguishes those early projects carried out to the benefit of external stakeholders from those later ones which were implemented to benefit the population of the territories concerned (e.g., to solve a governance issue). In his view, projects carried out after the Cold War aimed at maintaining territorial integrity, develop democratic politics and ensure the protection of human rights. According to Mr. Fox, these projects were part of a larger scheme to re-imagine the State and reject certain models unacceptable to the international community.

Book Review : Territorial Administration by International Organizations

Mr. Fox then critically assesses the validity of the traditional justifications to humanitarian occupation, *i.e.* State consent and the resolutions of the Security Council. He considers that both these justifications do not constitute valid legal basis for humanitarian occupation. First, consent in case of territorial administration is usually coerced, thus leading to an argumentation that it is void. Second, he examines whether there are any limits to the power of the Security Council to divest a State from its authority over its own territory. Considering that these two legal bases are not satisfactory, Mr. Fox develops new arguments for justifying humanitarian occupation, based on the law of belligerent occupation. This thesis faces several hurdles, however. First, occupation law traditionally applies to States, not to international organizations. Second, the traditional law does not allow an occupier to carry out wide reforms of the occupied State whereas such reforms have been put in place in Kosovo for example. He also examines the arguments put forward in relation to the Allies' occupation of Germany after World War II and the Iraq occupation in 2003 to justify the reforms that were put in place in these States. To conclude, Mr. Fox considers that the current legal framework is not adapted as it was created to constitute a framework for State behavior rather than govern the actions of international organizations. Accordingly, it is the author's view that by authorizing humanitarian occupation, the Security Council has actually changed the governing law.

While Mr. Wilde's book is focused on an analysis of the nature and purposes of international territorial administration, Mr. Fox takes a more empirical view of the institutions, shedding light on the shortcomings of the traditional justifications given to these operations and underlining the legitimating role that the Security Council serves in relation to occupation by international organizations. Without doubt, the many questions raised in these two books should be addressed by the relevant international actors when creating new nation building missions.

Mr. Vincent Roobaert

NCN 255-8298

Comm +32-2-707-8298

Vincent.Roobaert@nc3a.nato.int

Is the Proportionality Principle in Question ?

Mr. Sherrod Lewis Bumgardner, Legal Adviser – ACT/SEE
Ms. Annabelle Thibault, Legal Intern – ACT/SEE

Protocol Additional to the 1949 Geneva Convention Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977:

- Article 51.4: "Indiscriminate attacks are prohibited"
- Article 51.5.b): "The following types of attack are to be considered as indiscriminate (...): an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated"
- Article 57.2.a): "Those who plan or decide upon an attack shall: i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilians objects (...), ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding and in any event to minimizing, incidental loss of civilian life, injury to civilians and damages to civilian objects, iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damages to civilian objects (...) which would be excessive in relation to the concrete and direct military advantage anticipated".

Introduction

Discussion abounds in the media and professional forums about the principle of proportionality in modern war. The recent 23-day hostilities between Israel and Hamas in Gaza provide an opportunity for analysis of the application of this principle during a current asymmetrical conflict.

This chapter of the Israeli-Palestinian dispute ignited when Hamas decided not to renew an existing truce with Israel and intensified area rocket attacks from the densely populated areas of the Gaza Strip into Israel. On 27 December 2008, Israel responded to these indiscriminate attacks with a bombardment campaign of Hamas bases, police headquarters, offices and training camps. Israel also targeted civilian facilities where Israel claimed weapons were stocked or rockets were launched. On 3 January 2009, the Israel Defence Forces (IDF) launched a ground incursion into the Gaza Strip. Despite Israel's air and ground efforts, Hamas managed to maintain firing mortars and rockets into Israeli territory and at Israeli cities. On 18 January 2009, Israel unilaterally halted its response to the Hamas attacks in parallel with a ceasefire initiative led by the United Nations and *inter alia*, Egypt, Jordan, Great Britain, France, Italy, and Spain.

This short article does not intend to judge the attitude of the parties in the overall Palestinian-Israeli conflict. Instead, it seeks to initiate a discussion on the adequacy of the principle of proportionality to regulate the use of force in contemporary asymmetric conflicts.

Is the Proportionality Principle in Question ?

The principle of proportionality and asymmetric conflicts

The concept of proportionality in armed conflict combines a humanitarian admonition with a negation. It derives from, "the most fundamental customary principle (...) that the right of belligerent to adopt means of injuring the enemy is not unlimited"¹. The principle of proportionality aims to moderate the use of force in *jus ad bellum* ("proportionality of a military action taken in response to a grievance") and *jus in bello* ("proportionality in the conduct of armed hostilities")². The Gaza Strip conflict highlights both aspects of proportionality because, paradoxically, the tactics of Hamas that dismiss *jus in bello*, successfully challenged Israel's response in *jus ad bellum*.

Identified in various early declaration and conventions³ on the law of war, the 1977 Additional Protocol I, Article 51 (5) (b) states the accepted definition of proportionality in the conduct of armed hostilities—damages must not be "excessive in relation to the concrete and direct military advantage anticipated."⁴ This statement is complemented by Article 57.2.a, Precautions In Attack, that may be construed as a restriction against applying military force during operations where collateral damage cannot be reasonably predicted.

Applying the principle of proportionality in military operations means balancing two conflicting elements, i.e. the "military advantage" (military necessity) and the humanitarian consequences of a military attack (humanitarian interest). In its consideration of Article 57 of Additional Protocol I, the Eritrea-Ethiopia Claims Commission offered a realistic appraisal of the application of the concept, "[T]he law requires all feasible precautions, not precautions that are practically impossible."⁵ Simply, the Commission's assessment recognizes that International Humanitarian Law is not a suicide pact⁶.

¹ Documents on the Laws of Wars, Adam Roberts, Oxford University Press, 3rd edition, 2000, p.9.

² Ibid.

³ Cf. for example: 1874 Brussels Declaration, 1899 and 1907 Hague Regulations

⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I). See: <http://www.unhcr.ch/html/menu3/b/193.htm>

⁵ Eritrea-Ethiopia Claims Commission, Partial Award *Central Front - Ethiopia's Claim 2*, paragraph 110, page 27. April 28, 2004. See <[http://www.pca-cpa.org/upload/files/ET%20Partial%20Award\(1\).pdf](http://www.pca-cpa.org/upload/files/ET%20Partial%20Award(1).pdf)

⁶This point is inspired by the January 4th 2009, article in the Jerusalem Post, Louis René Beres titled "International law in not a suicide pact." See <http://pqasb.pqarchiver.com/jpost/results.html?QryTxt=Beres>. Professor Beres analogizes the rules of international law to a long-running discussion on individual rights and the proper degree of textual obedience to the United States Constitution that reaches back to the U.S. Civil War. See *Terminiello v. Chicago*, 337 U.S. 1 (1949), Jackson's dissent, "...if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact." (Emphasis added). See also, *Not A Suicide Pact: The Constitution In A Time of National Emergency*, by Richard A. Posner. New York: Oxford University Press, 2006.

Is the Proportionality Principle in Question ?

The original notion of asymmetric conflicts simply described a war between belligerents whose military powers differed significantly. The 21st Century phenomenon is broader. It encompasses asymmetries of strategy, tactics and includes unconventional or irregular warfare by the "weaker" belligerent who attempts to gain victory despite a lack of manpower, training, material or weaponry.

The Gaza Strip conflict showed Hamas attacking Israel's conventional superiority by using terror tactics such as indiscriminate rocket firings and suicide bombings. Hamas protected this capability by deploying its forces inside civilian areas, in an attempt to prevent Israel from responding with overwhelming force that would certainly cause civilian casualties and damage to the property of non-combatants. The Hamas tactics posed a single challenge to Israeli compliance with the principle of proportionality. How to direct modern combat operation against an irregular armed force voluntarily or involuntarily shielded by the civil society?

Israel has often argued that the proportionality of its military operations should be considered in the light of the accumulation of Palestinian attacks and not in relation to each individual action undertaken by the militias⁷. When the Hezbollah forces attacked Israel from Lebanon on July 12th 2006, for example, Israel responded with extensive air bombardment. In the ensuing month of conflict, more than a thousand civilians were killed and almost a million people were displaced. Israel insisted that its action was proportionate, "*not when weighed against one triggering incident but to the overall problem caused by Hezbollah in the north of Israel.*"⁸

The Security Council has never accepted this argument. However, the Security Council has always avoided assessing the proportionality of Israel's exercise of its right of self-defence by characterizing its military operations as unlawful acts of reprisal, instead⁹. This practice of the Security Council does not help in understanding which actions should be regarded as proportionate and which should be regarded as excessive. Additionally, it is not easy to identify customary law when there is clear dichotomy between the declared respect of international humanitarian law by Israel and Hamas and the considerable number of civilian casualties in this conflict condemned by the Security Council in UNSCR 1860¹⁰. Does this mean, however, that the principle of proportionality is in question?

⁷Judith Gardam , *Necessity, Proportionality and the Use of Force*, Cambridge University Press, 2004, p.181.

⁸ Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, *American Journal of International Law*, Volume 102, n°4, October 2008, p.733.

⁹ *Ibid*, p.181.

¹⁰ "*Expressing grave concern at the escalation of violence and the deterioration of the situation, in particular the resulting heavy civilian casualties since the refusal to extend the period of calm; and emphasizing that the Palestinian and Israeli civilian populations must be protected...*"
<http://daccessdds.un.org/doc/UNDOC/GEN/N09/204/32/PDF/N0920432.pdf?OpenElement>

Is the Proportionality Principle in Question ?

Conclusion

The firm answer must be that the principle of proportionality is not in question. A quality of asymmetric war is that irregular forces work to establish inextricable links to the civilian populations and are often dependent upon their support. This certainly complicates the task of a regular military force that must distinguish between the civilians who directly participate in the violent activities of the irregular force and those who are not¹¹. But analysts, commentators, and legal advisers must also realize that, while proportionality remains the element that balances military necessity and humanitarian interests, resourceful practitioners of asymmetrical strategies such as Hamas invite and accept significant civilian casualties and collateral damage to attack the moral authority of the conventionally stronger belligerent, here Israel, to resort to force.

There is no doubt that a country such as Israel has *"the right to hit back when attacked but any response should be proportional and, above all, based on sober political calculation rather than violence for its own sake."*¹² This observation correctly captures the two aspects of proportionality: tactics and legitimacy. While the reprehensible and indiscriminate attacks of Hamas required a defensive response, Israel's technical legal position lost its significance when its action became perceived as disproportionate and illegitimate by the public opinion.

The lesson this conflict teaches is that while Israel has always asserted that its actions are proportional and in compliance with international law, this does not seem to be satisfactory.¹³ Past studies have shown that in previous conflicts *"Israel had lost the war for public opinion by bombing too many targets of questionable importance to its aims, and by not explaining, in convincing terms of military necessity why it had bombed what it had."*¹⁴

For NATO, as it conducts a campaign in Afghanistan and prepares for future asymmetrical conflicts, one lesson to be learned about the application of the principle of proportionality is that providing explanations for tactical military actions and why coalition forces are required to fight at all is of strategic importance.

Mr. Sherrod Lewis Bumgardner
NCN 254-5499
Comm +32-65-445499
Sherrod.Bumgardner@shape.nato.int

Ms. Annabelle Thibault
NCN 254-8409
Comm +32-65-448409
Annabelle.Thibault@shape.nato.int

¹¹ The International Committee of the Red Cross is expected to publish its long awaited report on *Direct Participation in Hostilities* shortly. See <http://www.icrc.org/web/eng/siteeng0.nsf/html/participation-hostilities-ihl-311205>

¹² Roger Cohen, 'Eyeless in Gaza: An exchange', *The New-York Review of Books*, March 26 2009, Vol. LVI, n°5.

¹³ See a detailed description of Israel's efforts at www.mfa.gov.il/NR/rdonlyres/373A5558-7B68-4A70-BF19-36CD4AABB241/0/IDFLimitingHarmtoCivilians.pps

¹⁴ Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, American

Training in The Law of Armed Conflict – Continuing Legal Education Seminar, Kabul, Afghanistan

Colonel Jody Prescott, Legal Adviser – ISAF

On 31 January 2009, HQ ISAF hosted the latest in a series of monthly continuing legal education seminars sponsored by the Afghan Ministry of Defence, U.S. Forces Afghanistan, and ISAF. The seminar, "Training in the Law of Armed Conflict," was attended by legal representatives from the Afghan Supreme Court, the Ministry of Justice, the Ministry of Defence General Counsel's Office and The Judge Advocate General's Office. The International Committee of the Red Cross (ICRC) participated, along with legal advisors from U.S. Forces Afghanistan (USFOR-A), HQ ISAF, Regional Command Capital, and the HQ ISAF Italian National Support Element.

Major General Bertolini, the HQ ISAF Chief of Staff, opened the conference and welcomed the participants. Major General Bertolini noted the success of the last seminar on "Military Environmental Working Practices," hosted by the Ministry of Defence, and expressed his support for the continuing legal education seminars both at the national level and as a model for legal engagement at the regional command and tactical levels. He then turned the seminar over to the host, Brigadier-General Blanchette, the HQ ISAF Spokesperson. Brigadier-General Blanchette opened the seminar with a video paying tribute to the patriotism and fighting qualities of the Afghan soldier, which had been produced by the ISAF.

The first presentation was given by Major General Nooristani, the Ministry of Defence General Counsel. Major General Nooristani explained to the seminar that he viewed Afghanistan as a home, and that the Afghan National Army (ANA) was like the gate to this home. He noted, "This is true of all countries; if there is no gate, there is no security for the citizens. This gate must be very strong." Major General Nooristani stated how important it is after 30 years of civil war to rebuild the Army, and how implementation of law of armed conflict training, and training on human rights, are very important parts of this effort. This effort includes ensuring soldiers understand that they are responsible for following these principles, and that they and their officers are accountable to their fellow citizens for their actions.

Colonel Karim, the Judge Advocate General, gave the next presentation. Colonel Karim explained that from his perspective, the benefit of the seminar would be for all participants to better understand how to effectively implement law of armed conflict training in the ANA. Colonel Karim noted, "We need to educate and to train our Army, and to all know our law of armed conflict and human rights obligations. To have good order and discipline among our soldiers, we need to know how to properly treat civilians in all of our operations." Colonel Karim concluded by noting the value of working together with the legal mentors from the Combined Security Transition Command Afghanistan (CSTC-A), and the good cooperation between the members of his staff and the legal mentors.

The third presentation was given by Supreme Court Justice Bahuaddin Baha, Deputy Chief Justice and head of the Criminal Division of the Supreme Court. Justice Bahuaddin Baha took a broader view of the significance of training in the law of armed conflict, because as he explained, he saw this training as an important part of the implementation of Rule of Law not just in Afghanistan, but in the world as a whole. Emphasizing the passages in the Holy Quran that require the safeguarding of non-combatants, Justice Bahuaddin Baha noted that this highlights the responsibility of soldiers to their fellow citizens. "We had a good Army once, we lost it, and now we want to bring it back," he said.

Training in The Law of Armed Conflict – Continuing Legal Education Seminar, Kabul, Afghanistan

Justice Bahauddin Baha concluded, "Conducting military operations in compliance with the law of armed conflict promotes Rule of Law, and I hope for the day when Rule of Law will exist throughout the world. I hope for a completely peaceful world, where we may have strong armies, but fighting will not be necessary."

Following Justice Bahauddin Baha's comments, Mr. Hamilton, the Deputy Head of Delegation for the ICRC in Afghanistan, gave a presentation entitled, "Integration of LOAC Education and Training into the Afghan National Army." This thorough presentation set out the role of the ICRC, and how it interacted with arms carriers regardless of which side they might be on. Regarding ANA training in particular, Mr. Hamilton explained the ten step process for inculcating law of armed conflict training within an armed force, beginning with the necessity of an order from the highest command directing that it be taught and followed. In this regard, Mr. Hamilton specifically noted ANA Policy No. 0174, "Law of Armed Conflict (LOAC) for the Afghanistan National Army," of 19 January 2009, which directed that the law of armed conflict be trained and followed in the ANA. Mr. Hamilton also displayed for the participants some very useful training materials that had been translated into Dari and Pashto, and which used pictures to help convey the concepts given the large number of ANA recruits with insufficient literacy skills.

On behalf of the Ministry of Defence, there were two presentations by Afghan legal advisors. The first, given by Judge Rasool, emphasized the need to ensure that all military operations, particularly those involving civilians, follow the appropriate laws. Judge Rasool noted in this context that implementation in this case also meant fully investigating reports of civilian injuries or property damage. The second, given by COL Zardar, focused on the practical realities of developing a legal officer corps for the ANA. To fulfill the Tashkeel, or manning document, for the legal corps, the ANA was stepping up its recruiting efforts in order to bring more young attorneys into the legal officer corps, including the use of television commercials. As part of this development, COL Zadar described the work done by his section, the Operational Law and Personnel Department, in creating a law of armed conflict training program in conjunction with CSTC-A legal mentors and the ICRC, and the training that was already occurring among the ANA units.

Colonel Prescott, HQ ISAF Chief LEGAD, gave the final presentation, which was on the NATO perspective on law of armed conflict training as set out by STANAG 2449. Colonel Prescott first explained briefly what a STANAG was and how it was agreed upon, and how it was used by the nations that sign up to it. He then described the major annexes of the STANAG, and the basic principles and objectives that the NATO nations used in implementing law of armed conflict training in their armed forces. COL Prescott concluded by explaining the use Norway had made of the STANAG in its recent restructuring of its law of armed conflict training, and how it is important for each nation to find the culturally appropriate means to implement law of armed conflict training.

Training in The Law of Armed Conflict – Continuing Legal Education Seminar, Kabul, Afghanistan

Throughout and in conclusion, Brigadier-General Blanchette led discussion among the participants on the issues that had been raised during the seminar. Topics discussed included the importance of minimizing civilian casualties in the counter-insurgency effort in Afghanistan, the challenges of dealing with an insurgency that does not recognize LOAC, and the need for cultural sensitivity on the part of ISAF and USFOR-A soldiers in working with Afghan civilians. Brigadier-General Blanchette was pleased with the results of the seminar, and said, "It was an honor to be part of this conference, which focused on the critical tenant all nations must accept – that those entrusted to bear arms on behalf of their nation must be trained to use their power to protect the innocent, whenever and wherever their duty requires them to use force."

Colonel Jody Prescott
ISAF

jody.prescott@hq.isaf.nato.int



Spotlight



Lieutenant

Commander

Martin Fink, Chief

of Plans, JFC

Naples



Name: Martin Fink

Rank/Service/Nationality: LieutenantCommander/Royal Netherlands Navy/Netherlands

Job title: JFCNP Chief of Plans

Primary legal focus of effort: Plans

Likes: New places to discover

Dislikes: Seafood that has shells. I know this is strange for a sailor in Naples.

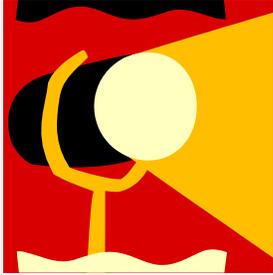
When in Naples, everyone should: Take time to explore historical Naples. There is a lot of history packed in this region, from Roman times to contemporary Italian history.

Best NATO experience: Legad ISAF Election Support Force (2nd battalion RNLMC), Northern Afghanistan (2005). To wake up every morning, coming out of your tent and see the Hindu Kush: it was like living in your own screensaver.

My one recommendation for the NATO Legal Community: Let me first get to know you before I do this!

mflink@afsouth.nato.int

Spotlight



Lieutenant

Colonel Walter

Giuseppe Greco,

Chief Legal

Adviser, NHQ

Sarajevo

Name: Walter Giuseppe GRECO

Rank/Service/Nationality OF 4 , AMMCOM, ITA

Job title: Chief Legal Adviser NHQSa

Primary legal focus of effort: Financial and Logistic National training – Legal and Administrative training within NATO

Likes: Dancing, playing soccer, being at the beach, my dog, traveling to new places, playing (organ) and singing

Dislikes: Physical and moral violence, cruelty to children, arrogance

When in Sarajevo, everyone should: Visit the centre, enjoy skiing, eat local food, handicraft shopping

Best NATO experience: Work in international environment and in co-operation with colleagues coming from different Countries

My one recommendation for the NATO Legal Community: Be bound, co-operative, pro-active and in agreement for the best of our NATO Community



HAIL

&

FAREWELL

Hail

HQ SACT: Mr. Ulf-Peter Haeussler (DEU Civ) joined in January 2009.

ACT/SEE: Ms. Annabelle Thibault (FRA Legal intern) joined in February 2009.

ACT/SEE: LTCOL Zoltan Hegedus (HUN A) joined in March 2009.

HQ SACT: Mrs. Mette Hartov-Prassé (DNK Civ) joined in March 2009.

ARRC: COL Alan Moore (GBR A) joined in February 2009.

CC-Mar Northwood: LT Rob Hunt (GBR N) joined in Mar 2009.

NATO Special Operations Coordination Centre(SHAPÉ): LTCOL Stein Johannessen (NOR A) joined in March 2009.

Farewell

ARRC : LTCOL Darren Stewart left in January 2009

CC-Mar Northwood : LCDR Darren Reed (GBR N) left in February 2009

GENERAL INTEREST

There are many mistaken assumptions about ESTA (the "Electronic System for Travel Authorization"), and its applicability to NATO travellers, and it has proven to be quite confusing for many folks. Linked is a fact sheet from US Customs and Border Protection regarding ESTA:

http://www.cbp.gov/linkhandler/cgov/newsroom/fact_sheets/travel/esta/fact_sheet_esta.ctt/fact_sheet_esta.pdf

Relevant information is below:

1. **ESTA is only for use by** (i.e., required for) **individuals who are nationals of visa waiver countries who are entering the United States on visa waiver for purposes of tourism and certain types of business for periods 90 days or less.** US Department of State policy is that **NATO representatives posted in Europe travelling to the United States for purposes of conducting NATO business should not enter the United States on the visa waiver program.** This has been the policy for years but not necessarily exercised by NATO personnel posted abroad as it was/is unknown. Thus, ESTA really should have no impact on NATO personnel travelling to the United States as they should not be entering under the visa waiver program.
2. **VISAS ARE REQUIRED** for NATO or national civilian personnel travelling to the United States in support of a NATO mission. Similar requests to US Consulates have resulted in issuance of NATO-4 visas. NATO or national civilian personnel who intend to apply for a NATO category visa should consult the information on the US Consulate at which they will be applying.
3. **VISAS ARE NOT REQUIRED** for:
 - a. NATO and PfP military personnel travelling on NATO or National orders. As such, they are exempt from passport and visa requirements, and immigration inspection, pursuant to the NATO Status of Forces Agreement. Therefore, uniformed personnel are not required to obtain NATO visas, but should ensure they carry their original NATO or National travel orders and their national military identification card (showing name, date of birth, rank and photo).
 - b. Dependents (who are from visa waiver participating countries) of NATO or PfP personnel who wish to accompany their spouse/parent to the United States for a short-term visit (less than 90 days). Below are links to detailed information on the US visa waiver program (http://travel.state.gov/visa/temp/without/without_1990.html), which includes links to ESTA (<https://esta.cbp.dhs.gov>) and to passport requirements (http://travel.state.gov/visa/temp/without/without_1990.html#mrprequirements).

GENERAL INTEREST/NATO IN THE NEWS



- NATO Secretary General welcomes Albania and Croatia as NATO members

http://www.nato.int/cps/en/natolive/news_52342.htm?mode=pressrelease

- The full text of the Strasbourg /Kehl Summit Declaration Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Strasbourg /Kehl on 4 April 2009 may be found here: http://www.nato.int/cps/en/natolive/news_52837.htm

- An article on Comparative Law by Mr. Paul Norman who was senior Reference Librarian at the Institute of Advanced Legal Studies at the University of London from 1970 to 2006 can be found at:

http://www.nyulawglobal.org/Globalex/Comparative_Law1.htm#_What_is_Comparative_Law?

- An article written by Lord Robertson on the 60th anniversary of NATO is available on:

<http://www.fco.gov.uk/en/newsroom/latest-news/?view=News&id=15678624>

- An article titled 'the Outbreak if Cooperation among Success-driven individuals under noisy conditions' is available on:

<http://www.pnas.org/content/early/2009/02/20/0811503106.full.pdf+html>

- An article on the Chinese perspective about NATO has been published on:

http://www.nato.int/docu/review/2008/08/FUTURE_OF_NATO/EN/index.htm

- "The Conscience of Europe" is a film describing the European Court of Human Rights and its working practices and activities. In particular, the film presents examples of cases examined by the Court and considers its future prospects and the challenges facing it. It can be viewed on:

<http://www.echr.coe.int/ECHR/EN/Header/The+Court/Introduction/Video+on+the+Court/>

GENERAL INTEREST/UPCOMING EVENTS

- Free electronic service to assist with international law research. For more information, please consult:

<http://www.nyulawglobal.org/globalex/index.html>

- Afghanistan Report 2009 is available. The Report offers an overview for each of the three mainlines of efforts in which NATO-ISAF is involved, directly or in a supporting role: security, governance and development.

http://www.nato.int/ebookshop/afghanistan_report_2009/afghanistan_report_2009_en.pdf?bcsi_scan_5539C8B482BD0478=cR9vyHfR8BsQoskFge1+bAIAAADcl4kA&bcsi_scan_filename=afghanistan_report_2009_en.pdf

- Please be advised that HQ SACT is currently soliciting applications for the **HQ SACT 2010 Internship Programme**. The aim of the Internship Programme is to provide current or recent students with the opportunity to work within the international military and civilian environment at HQ SACT and to gain an understanding of how ACT leads the transformation of the Alliance. Applications have to be sent before May 30, 2009.

For more information, go to

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

- The International Institute of Higher Studies in Criminal Sciences is pleased to inform that the 9th Specialization Course in International Criminal Law for Young Penalists on "**The Legal Status and Responsibilities of Nonstate Actors Under International Humanitarian Law, International Criminal Law and International Human Rights Law**" will be held from May 24 to June 3, 2009 in Siracusa, Italy.

For more information, go to www.isisc.org

- **The Legal and Policy Conference on International Cyber Conflict** will be organized in cooperation between the Cooperative Cyber Defence Centre of Excellence (CCD COE) and the George Mason University Centre for Infrastructure Protection on September 9 and 10, 2009. The conference is intended to promote closer collaboration between the international community of leaders and experts in government, private sector and academia on the development of new legal and policy aspects for cyber conflict. More information is available on www.ccdcoe.org or by sending an email to legalconference@ccdcoe.org

"Let me tell you the secret that has led me to my goal. My strength lies solely in my tenacity"

Louis Pasteur

GENERAL INTEREST/UPCOMING EVENTS

- The NATO Legal Gazette is available in Russian on the Marshall Center website:

<http://www.marshallcenter.org/mcpublicweb/ru/nav-col-int-law-ressources.html>

- The next **NATO Legal Advisers Course** will be held on May 18 - 22, 2009.

http://www.natoschool.nato.int/internet_courses/courses_guide.htm

- The **NATO Legal Conference** will be organised from June 8 - 12, 2009 in Strasbourg, France.

- The next **Advanced NATO Operational Law Course** is scheduled at the NATO School from July 6 - 10, 2009

http://www.natoschool.nato.int/internet_courses/courses_guide.htm

- The Viadrina European University in Frankfurt (oder), Germany is pleased to offer a new programme: **Master of International Human Rights and Humanitarian Law**. The program prepares graduates for career opportunities in policy making, international, public and governmental service, public and private practice, work in NGOs etc. For all enquiries regarding the Master's program please see the website

http://www.rewi.euv-frankfurt-o.de/de/studium/master_ihl/index.html

"Honest differences are often a healthy sign of progress."

Mahatma Ghandi

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, Ministries of Defence, and selected authors. However, this is not a formally agreed NATO document and therefore may not represent the official opinions or positions of NATO or individual governments.