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Introduction

Dear Fellow Legal Professionals and Persons Interested in NATO,

Our 25th issue of the NATO Legal Gazette is perhaps one of our most substantive. We benefit from the response of Gert-Jan Van Hegelsom and Frederik Naert to Commander Jean-Paul Pierini's article about the EU's counter-piracy operations published in Issue 23. Thanks are owed to Lieutenant Colonel Alexander Chotkowski for providing his views on the NATO and US security interests and Vincent Roobaert for his most recent book review.

In addition to these articles, Mr. Taimar Peterkop, Undersecretary for Legal and Administrative Affairs, Estonian Ministry of Defence, provides the goals and details of the NATO SOFA Conference Estonia will host during the last week of June, 2011. A short summary of the 2010 NATO Legal Conference, wonderfully hosted by the Institute of International Humanitarian Law in San Remo, Italy, is also provided in English and French.

Four members of the NATO legal community are spotlighted in this issue, hails and farewells are offered to our arriving and departing colleagues, and a large number of general interest items, recent news, and announcements of the many upcoming events are also provided. Included among these items is a description of CLOVIS, the web portal that is being developed as an Allied Command Transformation experiment on legal knowledge sharing.

As always, this Gazette is written by legal professionals on topics of interest to our extended legal community. Please consider submitting an article for our next issue. We welcome short articles concerning the issues you, our readers, are presently addressing during this exceptionally busy time for the Alliance and its partners.

Best Regards,
Lewis

Sherrod Lewis Bumgardner
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Of Green Grass and Blue Waters: A Few Words on the Legal Instruments in the EU's Counter-Piracy Operation Atalanta

Mr. Gert-Jan Van Hegelsom and Mr. Frederik Naert (*)

Introduction

In this short contribution, we would like to address some points raised in the contribution entitled 'Is the Grass Always Greener on the other side?' by Cdr. Pierini in a previous issue of the NATO Legal Gazette (No. 23 of 25 October 2010, pp. 2-10).

It is not our aim to provide an exhaustive overview of the legal framework of EU military operations more generally,¹ nor of Atalanta more specifically.² Nor is it our aim to respond to all the issues raised in said contribution. Rather, we merely seek to clarify the legal nature of the Atalanta Council Joint Action/Decisions³ and of the Transfer Agreements⁴ adopted in the framework of this operation, in particular in relation to the European Convention on Human Rights (ECHR) and to offer some reflections in relation to remedies under the ECHR in this respect.

The core assertion of Cdr. Pierini is that the EU legal framework is irrelevant as the adoption of legislative acts is excluded in the Common Foreign and Security Policy (CFSP). In his view, the legal basis required by the ECHR for apprehension, detention and prosecution of pirates can only be found in national legislation of the Member States.

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¹ See generally F. Naert, 'Legal Aspects of EU Operations', 15 *Journal of International Peacekeeping* 2011, pp. 218-242 and F. Naert, 'EU Crisis Management Operations and Their Relations with NATO Operations', in Z. Hegeüß, D. Palmer-De Greve & S.L. Bumgardner (eds.), *NATO Legal Deskbook, 2010* (2nd ed.), pp. 281-300.

² See T. Heinicke, 'Piratenjagd vor der Küste Somalias: Überlegungen zu den rechtlichen Rahmenbedingungen der EU NAVFOR Somalia/ATALANTA-Operation', 42 *Kritische Justiz* 2009, pp. 178-195 and F. Naert, *International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights*, Antwerp, Intersentia, 2009, pp. 179-191. See also generally <http://www.consilium.europa.eu/showPage.aspx?id=1518&lang=en>; <http://www.eunavfor.eu> and <http://www.mschoa.eu>

³ Council Joint Action 2008/851/CFSP of 10 November 2008, O.J. L. 301, 12 November 2008, p. 33 (corrig. O.J. L. 10, 15 January 2009, p. 35 and O.J. L. 253, 25 September 2009, p. 18), as modified and extended by Council Decisions 2009/907/CFSP of 8 December 2009, O.J. L. 322, 9 December 2009, p. 27; 2010/437/CFSP of 30 July 2010, O.J. L. 210, 11 August 2010, p. 33; and 2010/766/CFSP of 7 December 2010, O.J. L. 327, 11 December 2009, p. 49.

⁴ Exchange of Letters between the EU and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the European Union-led naval force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer, O.J. L 79, 25 March 2009, p. 49 and Exchange of Letters between the European Union and the Republic of Seychelles on the Conditions and Modalities for the Transfer of Suspected Pirates and Armed Robbers from EUNAVFOR to the Republic of Seychelles and for their Treatment after such Transfer, O.J. L 315, 2 December 2009, p. 37.

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1. The Legal Nature of EU Legal Instruments on Operation Atalanta under EU Law

It is correct that the EU cannot adopt legislative acts in the sense of the EU Treaties (i.e., after the Treaty of Lisbon, the Treaty on European Union (TEU) and Treaty on the Functioning of the European Union (TFEU)⁵) in the framework of the CFSP, which includes the Common Security and Defence Policy (CSDP).⁶

However, in EU law the term "legislative act" has a very specific meaning linked to the procedure for adoption of these acts (mainly by "co-decision" of the Council and the European Parliament).⁷ It does not mean that other EU legal acts are not legally binding instruments. This is obvious in non-CFSP (i.e. ex-European Community) matters, where there are inter alia decisions⁸ and delegated and implementing acts,⁹ which may bind or otherwise create legal effects for individuals and may be subject to the jurisdiction of the EU's Court of Justice.¹⁰

It is also the case for decisions and agreements in the area of the CFSP. In particular, Article 216(2) TFEU on the conclusion of international agreements by the Union provides that "Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States". This provision now also covers agreements in the area of the CFSP.¹¹ Furthermore, Article 28 TEU provides that Council decisions on operational action by the Union "shall commit the Member States in the positions they adopt and in the conduct of their activity".

⁵ Consolidated versions in O.J. C 83, 30 March 2010 and available online at <http://eur-lex.europa.eu/en/treaties/index.htm>.

⁶ See Articles 24(1), second subparagraph, and 31(1) TEU.

⁷ See Article 289(3) TFEU: "Legal acts adopted by legislative procedure shall constitute legislative acts".

⁸ See Article 288, fourth paragraph TFEU: "A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them".

⁹ See Articles 290 and 291 TFEU.

¹⁰ Pursuant to Article 263 TFEU, first paragraph, the ECJ shall not only review the legality of legislative acts but also of "acts of the Council, of the Commission ..., other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties" and of "acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties". Pursuant to the fourth paragraph of this same article, "Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures".

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Although there may initially have been doubts as to whether Council joint actions were legally binding,¹² it is now clear that this is the case. Similarly, pursuant to Article 29 TEU, "Member States shall ensure that their national policies conform to the Union positions" laid down in Council decisions which define the approach of the Union to a particular matter of a geographical or thematic nature.¹³ Such decisions may clearly be legally binding and may affect individuals. In fact, when such decisions provide for restrictive measures against natural or legal persons (usually referred to as sanctions),¹⁴ their legality may be reviewed by the Court of Justice, even though this court has, as a rule, no jurisdiction in the area of the CFSP.¹⁵ The Council has also adopted other legal acts under the CFSP which directly affect individuals, notably decisions adopting the staff regulations of EU agencies in this field.¹⁶

It is also important to note that the Council Joint Action on Atalanta sets out the mission and the mandate of the operation in clear terms. This can easily be explained by the awareness of the importance of the legal issues related to the prosecution of suspected pirates and armed robbers at sea, including human rights aspects. The operation's mission includes to contribute to "the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast" (Article 1(1)) and its mandate (Article 2, as amended) includes the right to:

(d) take the necessary measures, including the use of force, to deter, prevent and intervene in order to bring to an end acts of piracy and armed robbery which may be committed in the areas where it is present;

(e) in view of prosecutions potentially being brought by the relevant States under the conditions in Article 12, arrest, detain and transfer persons suspected of intending, as referred to in Articles 101 and 103 of the United Nations Convention on the Law of the Sea, to commit, committing or having committed acts of piracy or armed robbery in the areas where it is present and seize the vessels of the pirates or armed robbers or the vessels caught following an act of piracy or an armed robbery and which are in the hands of the pirates or armed robbers, as well as the property on board;

(f) ...

¹² Prior to the Lisbon Treaty, these instruments were Council Joint Actions, governed by the former Article 14 TEU.

¹³ Prior to the Lisbon Treaty, these instruments were Council Common Positions, governed by the former Article 15 TEU.

¹⁴ In the EU, external sanctions, whether in the implementation of UN sanctions or on the EU's own initiative ('autonomous sanctions'), are adopted under the CFSP and are subsequently implemented by the Union and/or the Member States depending on the nature of the sanctions (see also Article 215 TFEU).

¹⁵ See Article 275 TFEU.

¹⁶ Council Decision 2009/747/CFSP of 14 September 2009 concerning the Staff Regulations of the European Union Satellite Centre, O.J. L 276, 21 October 2009, p. 1.

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The conditions for the transfer of suspected pirates and armed robbers at sea with a view to their prosecution are laid down in Article 12 of the Joint Action, which has led to the conclusion of transfer agreements¹⁷ and arrangements with third States participating in the operation.¹⁸ Furthermore, a specific provision has been added to the mandate because "In the light of experience ..., amendments ... are required in order to allow for the collection of physical characteristics and transmission of certain personal data, such as fingerprints, of suspected persons, with a view to facilitating their identification and traceability and their possible prosecution. Such processing should be carried out in accordance with Article 6 [TEU]".¹⁹ The amendment and the reference to Article 6 TEU, which sets out the EU's human rights obligations, demonstrates the efforts to ensure that human rights are respected in the conduct of the operation, inter alia by providing a very clear and adequate legal basis for specific activities. Indeed, two new points were inserted in Article 2 of the Joint Action and reading as follows (they are quoted in full to illustrate the level of detail):

(h) collect, in accordance with applicable law, data concerning persons referred to in point (e) related to characteristics likely to assist in their identification, including fingerprints;

(i) for the purpose of circulating the data via INTERPOL's channels and checking it against INTERPOL's databases, transmit to the National Central Bureau ('NCB') of the International Criminal Police Organisation – INTERPOL located in the Member State where the Operational Headquarters is stationed, in accordance with arrangements to be concluded between the EU Operation Commander and the Head of the NCB, the following data:

— personal data concerning persons referred to in point (e) related to characteristics likely to assist in their identification, including fingerprints, as well as the following particulars, with the exclusion of other personal data: surname, maiden name, given names and any alias or assumed name; date and place of birth, nationality, sex; place of residence, profession and whereabouts; driving licenses, identification documents and passport data. This personal data shall not be stored by Atalanta after its transmission to INTERPOL,

— data related to the equipment used by such persons.²⁰

It is important to note that the EU has no, nor does it aspire to acquire, competence to prosecute itself any suspected pirate or armed robber. It conducts a military operation and as part of this operation the forces put under its command are authorised to arrest and detain such persons with a view to their subsequent prosecution by a competent State.

¹⁷ *Supra* note 4. The definition of these categories of persons has been clarified by a subsequent amendment: see Council Decision 2010/766/CFSP of 7 December 2010, O.J. L. 327, 11 December 2009, p. 49, recital 6 and the amendment of Article 12 of the Joint Action.

¹⁸ See e.g. Article 3 of the Agreement between the European Union and the Republic of Croatia on the participation of the Republic of Croatia in the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Operation Atalanta), O.J. L 202, 4 August 2009, p. 84, and the Annex to this agreement.

¹⁹ Council Decision 2010/766/CFSP of 7 December 2010, O.J. L. 327, 11 December 2009, p. 49, recital 7.

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This is fully within the competences of the Union under the current Treaties. Detention with a view to criminal prosecution has also occurred in other operations, e.g. IFOR/SFOR.²¹

2. EU Legal Instruments on Operation Atalanta and the ECHR²²

Do these EU legal instruments qualify as "law" under the ECHR, including its article 5 on deprivation of liberty? The reply to this question is affirmative. To substantiate this view, we will not make an exhaustive analysis of all the relevant aspects of Article 5 ECHR, but will highlight some of the key features of this provision in relation to the EU legal instruments.

First, suspected pirates and armed robbers at sea are being arrested and detained with a view to their prosecution for criminal offences. It is clear that this is a ground for deprivation of liberty recognized by Article 5(1)(c) and/or (f) ECHR, which cover "the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so" and "the lawful arrest or detention of a person ... against whom action is being taken with a view to ... extradition".²³

Secondly, Article 5(1) ECHR not only stipulates that no one shall be deprived of his liberty save in the cases enumerated, but also that any deprivation of liberty must be done "in accordance with a procedure prescribed by law".

²¹ See e.g. M. Frulli, 'A Turning Point in International Efforts to Apprehend War Criminals. The UN Mandates Taylor's Arrest in Liberia', 4 *Journal of International Criminal Justice* 2006, pp. 351-361 and P. Gaeta, 'Is NATO Authorized or Obligated to Arrest Persons Indicted by the International Criminal Tribunal for the Former Yugoslavia', 9 *E.J.L.L.* 1998, pp. 174-181. The ICTY has not found arrests by SFOR to be illegal. Moreover, the ECtHR has ruled that the ICTY 'in view of the content of its Statute and Rules of Procedure, offers all the necessary guarantees' (4 May 2000, *Naletilic v. Croatia*, Application No. 51891/99, § 1.b)

²² See also D. Guilfoyle, 'Counter-Piracy Law Enforcement and Human Rights', 59 *International and Comparative Law Quarterly* 2010, pp. 141-169 and A. Fischer-Lescano & L. Kreck, 'Piracy and Human Rights: Legal Issues in the Fight Against Piracy Within the Context of the European "Operation Atalanta"', 52 *German Yearbook of International Law* 2009, pp. 525-561. On human rights in EU operations generally, see F. Naert, *supra* note 2, pp. 541-658 and F. Naert, 'Accountability for Violations of Human Rights Law by EU Forces', in S. Blockmans (ed.), *The European Union and International Crisis Management: Legal and Policy Aspects*, The Hague, TMC Asser Press, 2008, pp. 375-393.

²³ See also ECtHR, Grand Chamber, *Medvedyev v. France*, 29 March 2010, § 82.

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The notion of "law" in the sense of the ECHR, including its Article 5, does not only cover 'formal' legislative acts (in the usual sense, i.e. formal acts of parliament) but also other 'material/substantive' law, both written and unwritten²⁴ and includes both domestic and international law. The latter was clearly recognized and restated *inter alia* in the Grand Chamber's 2010 judgment in *Medvedyev*, where the Court said that "where the "lawfulness" of detention is in issue ...the Convention refers essentially to national law *but also, where appropriate, to other applicable legal standards, including those which have their source in international law.* ... It is ... essential that the conditions for deprivation of liberty under domestic *and/or international law* be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention ...".²⁵ While in that case the Court found that there was a lack of a "legal basis of the requisite quality to satisfy the general principle of legal certainty" (§ 102, emphasis added), this was due to the insufficiently precise language and *ad hoc* nature of the diplomatic note concerned (§§ 99-100).

The latter brings us to the requisite quality of the law. It is constant case-law of the Court that to qualify as law under the ECHR, a source must be sufficiently clearly defined and foreseeable in its application. This too was reaffirmed in *Medvedyev* in the following terms: "*it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic and/or international law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention, a standard which requires that all law be sufficiently precise to avoid all risk of arbitrariness and to allow the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances of the case, the consequences which a given action may entail ...*".²⁶

The precise formulation of the mandate of forces operating in *Atalanta* to arrest and detain suspected pirates and armed robbers at sea and to transfer them to competent States is defined in legally binding instruments (the Joint Action and Agreements) published in the EU's Official Journal and on its public internet website.

²⁴ See e.g. *Korbely v. Hungary*, 19 September 2008, § 70 ("when speaking of "law" Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability").

²⁵ *Medvedyev v. France*, 29 March 2010, §§ 79-80 (emphasis added). See also, in relation to Article 7 ECHR, *Streletz, Kessler and Krenz v. Germany*, 22 March 2001, §§ 50-51 and 105-106; *Korbely v. Hungary*, 19 September 2008, § 73. Article 7 ECHR provides that "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national *or international law* at the time when it was committed. ... 2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according the general principles of law recognized by civilized nations".

²⁶ *Medvedyev v. France*, 29 March 2010, § 80. See also *Korbely v. Hungary*, 19 September 2008, § 70 (cited *supra* note 24) and 73, as well as Grand Chamber, *Kononov v. Lavia*, 17 May 2010, §§ 185 and following.

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In combination with the references to the UN Convention on the law of the sea (including as regards the definition of piracy)²⁷ and relevant UN Security Council resolutions,²⁸ as well as the publicity which these measures have received *inter alia* in the press, there can be little doubt that the requisite precision, accessibility and foreseeability are met. Pirates and armed robbers at sea operating in Atalanta's area of operations are aware that they are committing criminal offences for which they may be arrested by naval forces operating there, including as part of Atalanta, and may subsequently be brought to justice by any competent State.

In addition, once a pirate or suspected armed robber at sea has been transferred to a competent State, he/she will be brought promptly before a judge or other officer authorised by law to exercise judicial power and will be able to challenge the lawfulness of his/her deprivation of liberty before the courts of that State. Furthermore, the ECtHR has accepted that the particular nature of maritime operations may justify a certain delay in bringing a suspect before a judge²⁹ and all efforts are made to obtain a timely decision on prosecution and transfer or release. This should ensure compliance with Article 5, paragraphs 3 and 4 ECHR, which provide that:

3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. ...

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

3. Remedies under the ECHR

The legal framework of Atalanta makes a difference. That is the assessment of at least a number of Member States, for some of which this was an important consideration in their choice to participate in Atalanta.

That does not mean, however, that the domestic laws of the participating States are irrelevant. In particular, EU operations never require a Member State's forces to act in violation of their own domestic law.

²⁷ See Articles 1, 2 and 12 of the Joint Action (as amended).

²⁸ The Joint Action (as amended) and amending decisions *inter alia* refer to resolutions 1814 (15 May 2008), 1816 (2 June 2008), 1838 (7 October 2008), 1897 (30 November 2009) and 1950 (23 November 2010). Furthermore, the transfer Agreement with Kenya (*supra* note 4) refers to resolutions 1846 (2 December 2008) and 1851 (16 December 2008) and successor resolutions.

²⁹ See *Medvedyev v. France* (10 July 2008 and, on appeal, 29 March 2010) and *Rigopoulos v. Spain* (12 January 1999). In the appeals judgment in the former case, the 13-day detention on board that was necessary to reach France was not deemed in breach of art. 5§3 ECHR. In the second case, Spain was not condemned even though a drug trafficker was detained on board a ship for 16 days. This was because an investigative judge had authorized a search of the ship and had confirmed the arrest within 72 hours (the Spanish constitutional threshold), the 16 days were necessary to transport the individual to Spain, and he was immediately brought before a judge upon arrival.

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Therefore, if a given Member State's domestic law imposes specific additional requirements and/or requires the involvement of its domestic courts, this will be respected.³⁰

An EU legal framework does not necessarily preclude responsibility of the Member States, e.g. for their own actions in relation to decision making and implementation in the framework of EU military operations.³¹ In this context, one may refer to the obligation of EU Member States under EU law to respect the human rights laid down in the EU's Charter of Fundamental Rights "when they are implementing Union law" (Art. 51 (5) of this Charter³²).

In any event, remedies require the involvement of Member State courts given the lack of jurisdiction of the ECJ on CFSP issues. Indeed, pursuant to Article 19(1), second subparagraph TFEU, "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law". This is a horizontal provision that also covers the CFSP. In this context, one further point is of importance: pursuant to Article 274 TFEU, "Save where jurisdiction is conferred on the [ECJ] by the Treaties, disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States". While the Union shall enjoy in the territories of the Member States such privileges and immunities as are necessary for the performance of its tasks, under the conditions laid down in the Protocol of 8 April 1965 on the privileges and immunities of the European Union³³ (Article 343 TFEU), this Protocol does not (unlike for most other international organizations) grant the EU immunity from jurisdiction before the courts of its Member States, but merely provides that the Union's premises and buildings are inviolable and exempt from search, requisition, confiscation or expropriation and that its property and assets shall not be the subject of any administrative or legal measure of constraint without the authorisation of the ECJ (Art. 1).³⁴

³⁰ For the requirements under Belgian law, in particular when prosecution takes place in Belgium, see F. Naert, A. Vanheusden & M. Benatar, 'The Belgian Approach to Maritime Piracy in an International Context', NATO Legal Gazette, issue 22, 14 May 2010, pp. 2-7, discussing the laws of 30 December 2009 regarding the fight against maritime piracy and the modification of the Code of civil procedure and regarding the fight against maritime piracy, Belgisch Staatsblad [official bulletin], 14 January 2010. This legislation has been applied in December 2010 in relation to one person detained in the framework of Atalanta.

³¹ See F. Naert, 'Binding International Organisations to Member State Treaties or Responsibility of Member States for Their Own Actions in the Framework of International Organisations', in J. Wouters, E. Brems, S. Smis & P. Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations*, Antwerp, Intersentia, 2010, pp 129-168 and F. Naert, 'Accountability for Human Rights Violations by International Organisations', NATO Legal Gazette, Issue 4, 30 March 2007, pp. 2-3.

³² O.J. C 83, 30 March 2010, p. 389.

³³ I.e. now Protocol (No 7) on the Privileges and Immunities of the European Union, as amended by the Treaty of Lisbon.

³⁴ In addition, the archives of the Union shall be inviolable (Art. 2) and the official communications and the transmission of the documents of the institutions of the Union shall enjoy the treatment accorded to diplomatic missions (Art. 5).

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Consequently, when the ECJ has no jurisdiction, as in the case of *Atalanta*, the Union does not enjoy immunity from the jurisdiction of Member States' courts. This has to be taken into account *inter alia* in assessing whether the EU offers an equivalent protection in the sense of the ECtHR's case-law.³⁵

4. Conclusion

The legal framework provided by the European Union for operation *Atalanta* has an added value in relation to the domestic legislation of Member States. The alleged violation of the ECHR based on the exclusion of legislative acts in the CSDP does not correctly reflect EU law and the ECtHR's interpretation of the ECHR.

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³⁵ See especially *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, 30 June 2005, Application No. 45036/98, especially § 155.

The Future of Armed Conflict in NATO's Combined Joint Operations

LTCOL Alexander J. Chotkowski(*)

"There is only one thing worse than fighting with allies, and that is fighting without them."

- Sir Winston S. Churchill, 1 April 1945

I. The end of the Cold-War and a new beginning for NATO¹:

The North Atlantic Treaty Organization, NATO, a Cold War relic saw its days numbered following the end of the Cold War. By the end of the 1980's the iconic image of NATO standing guard in Europe to prevent a preemptive attack by the U.S.S.R. faded into history – leaving behind the question of whether NATO would remain relevant in world affairs and in U.S. national security policy. In the midst of this debate, by late 1990 war erupted in the Balkans. In the Balkan conflict², NATO found a new cause, intervening in regionally significant conflicts when the United Nations (UN) or independent states could not or would not intervene. NATO's role and relevance continued to evolve in peace keeping and stabilization missions, notably in Kosovo (KFOR), where it continues to maintain a security presence.³

More recently, NATO is the lead organization in the war in Afghanistan (ISAF)⁴ and in the anti-piracy maritime patrols in the waters of northern Africa. Operation OCEAN SHIELD reflects NATO's continuing contribution to international community efforts to enhance the safety of commercial maritime routes and international navigation in the area.

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This paper is the final research paper for graduation certification for the U.S. Joint Forces Staff College, Advance Joint Professional military Education course, Norfolk, Va."

¹ The North Atlantic Treaty Organization (NATO), also officially recognized as (Organisation du traité de l'Atlantique Nord (OTAN)), and often referred to as the (North) Atlantic Alliance, is a military alliance based on the North Atlantic Treaty, signed on 4 April 1949.

² The Balkan conflict is also known as The Yugoslav Wars, which consisted of three related wars: War in Slovenia (1991), Croatian War of Independence (1991–1995) and the Bosnian War (1992–1995).

³ The Kosovo Force (KFOR) is a NATO-led international peacekeeping force in Kosovo. KFOR entered Kosovo on June 12, 1999 under a UN mandate, pursuant to the UN Security Council Resolution 1244. At the time of Resolution 1244, Kosovo was facing a humanitarian crisis, with military forces from the Federal Republic of Yugoslavia (FRY) and the Kosovo Liberation Army (KLA) in daily engagement.

⁴ The International Security Assistance Force (ISAF) is a NATO-led security mission in Afghanistan established by the UN Security Council on 20 December 2001 by Resolution 1386, established by the Bonn Agreement. In October 2003, the UN Security Council authorized the expansion of the ISAF mission throughout Afghanistan.

The Future of Armed Conflict in NATO's Combined Joint Operations

Since 2009, NATO ships have assisted in international efforts to deter, defend against, and disrupt pirate activities off the Horn of Africa. "In this era of globalisation, economic security is inextricably linked to physical security," said General John Craddock, Supreme Allied Commander Europe. "This operation demonstrates the continuing importance of the NATO Alliance in addressing our collective security concerns."⁵

Since the inception of the UN, the national security interests of the United States and its allies have been impacted by the veto powers of Russia, France and China (and others) on the UN Security Council. Conversely, NATO has been a cooperative partner towards supporting U.S. policy. This partnership has entered a new dawn; NATO has evolved to become a global multi-national force-in-readiness that can effectively provide results that are aligned with U.S. political and security policy. On May 17, 2010, NATO published; *NATO 2020: ASSURED SECURITY; DYNAMIC ENGAGEMENT*,⁶ this seminal report on NATO doctrine, last published in 1999, details NATO's plans and expectations for the future:

The new Strategic Concept should provide direction for the further transformation of NATO's defence capabilities. Given the nature of the modern security environment and constraints on fiscal resources, NATO will need a flexible, deployable, networked, and sustainable military force posture that can meet the full range of Alliance responsibilities at an affordable cost.⁷

NATO reflects the highest principles of combined joint operations, international inter-agency cooperation and political legitimacy.

A. Thesis:

NATO represents the future of armed conflict and humanitarian assistance. Therefore, U.S. Joint Forces doctrine must be developed that enables U.S. Joint Forces to more effectively and professionally perform within the context of NATO-led military operations and contribute towards shaping the mission and capabilities of NATO.

⁵ "NATO resumes anti-piracy operations," ACO/SHAPE News Release. 13 Mar. 2009. <http://www.nato.int/shape/news/2009/03/090313a.html> (accessed 1/19/2011).

⁶ "Analysis and Recommendations of the Group of Experts on a New Strategic Concept for NATO," *NATO 2020: Assured Security; Dynamic Engagement*, 17 MAY 2010.

⁷ "Analysis and Recommendations of the Group of Experts on a New Strategic Concept for NATO," *NATO 2020: Assured Security; Dynamic Engagement*, 17 MAY 2010, p. 38.

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II. Armed Conflict in the 21st Century must be supported by political legitimacy:

The importance of political legitimacy in an armed conflict has become critical in meeting U.S. domestic and foreign policy goals of national security and economic development. Since NATO possesses significant political legitimacy as an international organization, U.S. Joint Forces training and operational doctrine must include a closer focus on NATO missions. In an article titled; "NATO's Future Strategic Concept", NATO's refined global role is ambitious:

In reality, it [NATO] remains the only military organisation which has the clout and political will to guarantee global security and stability, although it took some time to adapt itself to the new international realities, and it no doubt needs to change further to be able to face new challenges over the next decade.... This new policy will deal with challenges such as terrorism, nuclear proliferation, missile defence, cyber attacks, energy security, piracy, climate change, relations with Russia, further expansion and strengthening its partnerships around the world.⁸

The end of the Cold War era marked the end of large scale international armed conflicts for territory or political philosophical dominance and ushered in a series of small scale wars, often ignited by cultural and nationalistic passions. From war in the Balkans, genocide in Sudan, and then declaration of war by Al-Qaeda against the Western culture, warfare has taken on a complex composition. The complexity of these cultural conflicts is that they can be distant from the traditional regional concern of NATO and will involve many asymmetric threats like: cyber attacks, piracy, narcotics trade, and terrorism, as well as humanitarian crises. From a political and military perspective, NATO is capable of taking the lead in addressing these threats. NATO is composed of the international political representation, as well as the military strength, to respond quickly and decisively to address the modern trend of warfare.⁹ U.S. national security policy can harness the political and military strength of NATO's global reach by ensuring a fully dedicated U.S. Joint Force presence within NATO.

⁸ Manduca, Anthony, "NATO'S Future Strategic Concept," *Times of Malta.com*. (Sept. 5, 2010). <http://www.timesofmalta.com/articles/view/20100905/opinion/nato-s-future-strategic-concept>. (accessed 1/13/2011).

⁹ Kendall, Bridget. "NATO Searches for Defining Role", *BBC News*. <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/europe/4232381.stm>. (accessed 9/19/2010), p.1.

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III. Multilateralism of action promotes political legitimacy in armed conflict:

Unilateral military action by any nation, but in particular by the United States, is subject to extreme international scrutiny due to the perception that the U.S., or any other nation, engages in military action for cultural, economic or political advantages. The approach towards multilateralism has gained a broader appeal since the end of the Cold War. This concept has been voiced by Admiral James G. Stavridis, USN, SACEUR, in an interview for the *Journal of International Peace*:

And the fifth thing is partnering. NATO is a partnership as well as an alliance of 28 nations. But the idea of working with a broader set of partners in the world – as we are in Afghanistan with a total of 49 troop contributing nations and 70 resource contributing nations – is the future of security. Unilateral operations are not successful: it is about multilateral operations together, which we can call partnership.¹⁰

The multilateral approach towards armed conflict has been demonstrated significantly in Operation DESERT SHIELD / DESERT STORM (DS / DS), Kosovo, Iraq / Operation IRAQI FREEDOM (OIF), Somali, and Afghanistan / Operation ENDURING FREEDOM (OEF). In the Persian Gulf War, the United States carried the unwieldy burden of holding the coalition together, just as it would do in 2003 in leading a new coalition to topple Saddam Hussein's dictatorship in Iraq. In both cases, the United States faced enormous domestic and international challenges in maintaining unity among its coalition partners and defending its Middle East policy to the international community.

Despite the sizeable coalition of nations in Iraq for OIF, it became clear that as the war prolonged, the commitment of the coalition would not endure. The loss of key political partners, like Italy and Spain, weakened the international support that the United States sought in order to continue with the aggressive tactics that were necessary to defeat the insurgency in Iraq. Although, many NATO nations participated in the U.S.-led coalitions, NATO itself was not a major partner in either the Persian Gulf or OIF efforts. A keen lesson learned from Iraq is that the United States cannot afford, financially or politically, to be viewed as the lone wolf in any future armed conflict.

¹⁰ "Navigating the Future of NATO," *Peaceops.com: Journal of International Peace Operations*, Nov. 1, 2010. <http://web.peaceops.com/archives/1061>. (accessed 1/13/2011), p.3.

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In September 2008, an opinion poll published by the German Marshall Fund found a decline in European public opinion towards U.S. leadership since 2002. The desirability of U.S. leadership in the world, mainly due to the result of the U.S. invasion of Iraq, fell from 64% in 2002 to 36% in June 2008; the approval rating of former President Bush in these same countries dropped from 38% in 2002 to 19% in 2008.¹¹ This decline in support for the U.S. complicated the efforts of allied governments to sustain public support for the ISAF mission, the concern was that the NATO effort in Afghanistan was merely a proxy war for the U.S., while it was more involved with Iraq. In February 2008, Secretary of Defense Robert Gates acknowledged the political impact of Iraq by stating that; "I worry that for many Europeans the missions in Iraq and Afghanistan are confused... Many of them ... have a problem with our involvement in Iraq and project that to Afghanistan."¹² It is this very political dilemma that the United States can ill afford, but that NATO can best prevent.

The underlying value of NATO operations since the Cold War is the stamp of legitimacy that is provided by the international community when there is a multi-national presence to the war fighting effort. It is this political legitimacy that the United States must have to best achieve its policy objectives for national security, economic stability and anti-terrorism efforts – now and for the future.

IV. U.S. joint operations must invest in improving the capabilities of NATO:

Even before the events of September 11th, 2001, NATO's Secretary-General, Lord Robertson, emphasized that the Alliance's future depended on "capabilities, capabilities, capabilities."¹³ For U.S. political and military planners, improving the capabilities of NATO has gained broad international appeal due to ever increasing global threats. "Long-range ballistic missiles pay no heed to national borders," stated Germany's defense minister, Rudolf Scharping, at the 2002 International Institute for Strategic Studies in London. He emphasized that NATO must be ready to act where its vital security interests are at stake, whether in Europe "or some other corner of the world".¹⁴ NATO's focus is tightly aligned with US security policy.

¹¹ "Transatlantic Trends," *The German Marshall Fund, September 2008*. See also, CRS Report for Congress, "NATO in Afghanistan: A Test of the Transatlantic Alliance," Congressional Research Service, 7-5700, www.crs.gov (R1.33627), p. 4.

¹² "Gates asks Europeans to face Afghan threat," *International Herald Tribune*, Be. 9-10, 2008, p.3. See also, CRS Report for Congress, "NATO in Afghanistan: A Test of the Transatlantic Alliance," Congressional Research Service, 7-5700, www.crs.gov (R1.33627), p. 4.

¹³ "The future of NATO: A Moment of Truth." *The Economist*. <http://www.economist.com/node/1109654/print>. (accessed 1/13/2011), p.3.

¹⁴ "The future of NATO: A Moment of Truth." *The Economist*. <http://www.economist.com/node/1109654/print>. (accessed 1/13/2011), p.3

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Due to the composition of NATO member states, some of which have significant leadership roles in the UN, NATO represents both a powerful political and military force for rapid international military action. In a 2006 speech given by Maj. Gen. Giovanni Marizza¹⁵, then serving with NATO, he outlined NATO's view as to the roles that international organizations would ideally perform in future military operations:

Concluding, what will be NATO's operations of tomorrow? In my opinion there will be a sort of "division of labour" among International Organizations:

- UN will do low intensity operations (PK);
- EU will carry out medium intensity operations (NEO, stabilization and reconstruction, nation building);
- and NATO will carry out high intensity operations (peace enforcement) not limited to a specific geographical area but worldwide.¹⁶

While other international organizations will continue to perform important roles in future armed conflicts, NATO stands at the front as America's most powerful international partner. This is, in part, because The North Atlantic Treaty provides for a collective defense of NATO members. Article 5 of the NATO charter states:

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.¹⁷ (*emphasis added*).

For the first time since the creation of NATO, Article 5 was invoked after the attacks of "9-11."¹⁸ The activation of Article V was a largely symbolic gesture, nevertheless NATO's Art. 5 act provided a mark of international support for the U.S. This declaration was followed by a UN denouncement of the attack and support for the U.S. Clearly, NATO's sway on international political relationships is a value that the United States must better recognize and incorporate into U.S. Joint operational doctrine.

¹⁵ Chairman, NATO, PBIST (Planning Board for Inland Surface Transport) Working Group.

¹⁶ Marizza, Maj. Gen. Giovanni "NATO'S Past, Present, and Future Operations," *Comitato Atlantico Italiano*, Sept. 25, 2006. (Rome, Center for High Defense Studies).
http://www.comitatoatlantico.it/articolo/186/nato_s_past_present_and_future_operations.
 (accessed 1/13/2011), p.3.

¹⁷ North Atlantic Treaty, Art. V.

¹⁸ Kendall, Bridget. "NATO Searches for Defining Role", BBC News.
<http://news.bbc.co.uk/1/hi/europe/4232381.stm>.
 (accessed 9/19/2010), p.1.

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V. Future use of military force for humanitarian assistance (HA) will involve NATO:

Another area of conflict that has required and will continue to require a combined U.S. and NATO military commitment is in humanitarian assistance (HA) operations. Humanitarian crises are either man made, in cases of a civil revolt, or natural disasters, like those that occurred in Indonesia, Haiti and Myanmar. Since the mid-1990's, U.S. Armed Forces have deployed to Sierra Leone, Somalia, Indonesia, Beirut, Haiti and Myanmar (Burma) for humanitarian missions. A leading political scientist in this area is Taylor Seybolt, a program officer with the United States Institute of Peace (USIP) since 2002.¹⁹ Seybolt is the author of *Humanitarian Military Intervention*, wherein he argues that there is an international obligation for military intervention when there is the need to protect humans in, "...a hostile environment, where the political order is contested and the national government does not have the capacity or the will to respond to the basic needs of people for safety, shelter, food, water and medical services."²⁰

Military humanitarian efforts have altered the way in which military power is viewed by those who had been opposed to military intervention during the Cold War era. As a reflection of America's respect towards human rights, HA missions have and will likely remain an important part of U.S. foreign policy programs. As noted by Seybolt:

Once considered an aberration in international affairs, humanitarian military intervention is now a compelling foreign policy issue. It is on the front line of debates about when to use military force; it presents a fundamental challenge to state sovereignty; it radically influences the way humanitarian aid organizations and military organizations work...²¹

¹⁹ Seybolt holds a Ph.D. in political science from MIT. From 1999 to 2002 he was director of the Conflicts and Peace Enforcement Project at the Stockholm International Peace Research Institute (SIPRI) in Stockholm, Sweden. Seybolt received an Institute grant when he was at SIPRI to write the book *Humanitarian Military Intervention*. From 1997 to 1999 he was a research fellow at the Belfer Center for Science and International Affairs at Harvard University's Kennedy School of Government. While at the Massachusetts Institute of Technology (MIT), he was awarded a dissertation fellowship funded by the MacArthur Foundation. See, United States Institute of Peace. <http://www.usip.org/specialists/bios/archives/seybolt.html>

²⁰ Seybolt, Taylor B. *Humanitarian Military Intervention: The Conditions for Success and Failure*. Oxford University Press, (2007). P. 6.

²¹ Seybolt, Taylor B. *Humanitarian Military Intervention: The Conditions for Success and Failure*. Oxford University Press, (2007), P. 1.

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Another proponent for the use of the military in humanitarian crises is Thomas G. Weiss.²² Weiss explains that the, "...most likely and desirable peace dividend would be the application of military might and expertise to dampen violence and help victims under the auspices of a strengthened United Nations."²³ NATO's role in the post Cold War policy on the use of military force for humanitarian causes is consistent with Weiss's vision of humanitarian intervention.

America's involvement with HA is also a foreign policy mechanism to craft and promote a positive image of America and its democratic values, the least of which includes national security and domestic economic prosperity. USAID²⁴ supports and seeks to advance U.S. foreign policy objectives by supporting: "economic growth, agriculture and trade; global health; and, democracy, conflict prevention and humanitarian assistance."²⁵ According to USAID:

The United States has a long history of extending a helping hand to those people overseas struggling to make a better life, recover from a disaster or striving to live in a free and democratic country. It is this caring that stands as a hallmark of the United States around the world -- and shows the world our true character as a nation...U.S. foreign assistance has always had the twofold purpose of furthering America's foreign policy interests in expanding democracy and free markets while improving the lives of the citizens of the developing world...²⁶

²² Presidential Professor of Political Science at The City University of New York (CUNY) Graduate Center and Director of the Ralph Bunche Institute for International Studies, where he is co-director of the UN Intellectual History Project. Weiss is also President (2008-9) of the International Studies Association, chair (2007-9) of the Academic Council on the UN System (ACUNS), and was awarded the "Grand Prix Humanitaire de France 2006." As Research Professor at Brown University's Watson Institute for International Studies (1990-98), he also held university administrative posts (Associate Dean of the Faculty, Director of the Global Security Program, Associate Director), was the Executive Director of ACUNS, and co-directed the Humanitarianism and War Project. *See*, The Graduate Center, The City University of New York, Thomas G. Weiss. http://www.unhistory.org/jac_res/weiss.htm

²³ Weiss, Thomas G. *Military-Civilian Interactions: Humanitarian Crises and the Responsibility to Protect*. Rowman & Littlefield Publishers, Inc., (2005, 2nd Ed). P. xxiii.

²⁴ USAID was created from the Marshall Plan reconstruction of Europe after WW-II and the Truman Administration's Point Four Program. In 1961, the Foreign Assistance Act became law and USAID was created by executive order. Since then, USAID is an independent federal government agency that receives policy guidance from the Secretary of State. *See*, USAID. http://www.usaid.gov/our_work/humanitarian_assistance/disaster_assistance/

²⁵ USAID. http://www.usaid.gov/our_work/humanitarian_assistance/disaster_assistance/

²⁶ USAID. http://www.usaid.gov/our_work/humanitarian_assistance/disaster_assistance/

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The U.S. has a robust military force with forward deployed forces, like Marine Expeditionary Units (MEUs), and is therefore strategically positioned to act in times of a humanitarian crisis. The challenge for the U.S. continues to be one of political legitimacy, partnering with NATO for HA operations can effectively address that problem. U.S. Joint Forces doctrine towards HA missions must assume a combined role with NATO, and thus planning for this contingency must be fully recognized.

VI. The Future of NATO requires a more engaged and dynamic U.S. Joint presence:

The combined influence of political legitimacy and the inevitable future of armed conflict have provided NATO with its most relevant mission since the end of the Cold War. A reflection of NATO's resurgence is revealed in the expansion of NATO to 28 members within the past 10 years, including France rejoining the alliance in 2009.²⁷ In rejoining the Alliance since its departure in 1966, French President Sarkozy recognized NATO's significant new role in providing global security. "The time has come," he said in a speech to France's *Strategic Research Foundation*, that, "Our strategy cannot remain stuck in the past when the conditions of our security have changed radically."²⁸ While the U.S. has always been the major financial and military resource partner to NATO, the growing influence of NATO means that the United States must lean even further towards involvement with NATO in training, planning, exercises and technology.

In a 2001 report published by the RAND Corporation, the research team led by John E. Peters, examined how the U.S. and NATO would prepare for future joint operations.²⁹ The RAND study concluded that the United States should expect to continue to play the major role in future coalition operations. The study found that NATO's training exercises provide an opportunity for Alliance members and potential members to practice the skills needed for coalition warfare, including the consultations and deliberations required for consensus.

²⁷ The Treaty of Brussels, the precursor to NATO, was signed on 17 March 1948 included Belgium, the Netherlands, Luxembourg, France and the UK. The North Atlantic Treaty, signed on 4 April 1949 included the original 5, plus the US, Canada, Portugal, Italy, Norway, Denmark and Iceland.

²⁸ Cody, Edward. "After 43 Years, France to Rejoin NATO as Full Member." *The Washington Post*, (Washington Post Foreign Service). http://www.washingtonpost.com/wp-dyn/content/article/2009/03/11/AR2009031100547_pf.html. (accessed 9/16/2010).

²⁹ Peters, John E., Stuart Johnson, Nora Bensahel, Timothy Liston, and Traci Williams. "OPERATION ALLIED FORCE: Lessons for Future Coalition Operations," (from the Report titled: "European Contributions to Operation Allied Force: Implications for Transatlantic Cooperation"), RAND Corporation. http://www.rand.org/pubs/research_briefs/RB72/index1.html. (accessed 1/13/2011).

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U.S. Joint doctrine recognizes that in addition to the services having inter-operational competency, U.S. Joint Force must also be proficient in interagency efforts. Due to the heightened political ramifications of military action, US Armed Forces have needed to work more closely with non-military agencies, like the DoS, USAID, CIA, other OGA's and NGOs. This relationship dynamic extends into the international environment with NATO. NATO's presence in any armed conflict will also involve the representation of international NGOs and OGAs. U.S. Joint Forces personnel will need to not only be able to work with allied nation's armed forces, but also with civilians from the allied nations' own government, whether that is in intelligence, police training, legal services, humanitarian assistance or logistics.

NATO's led ISAF mission in Afghanistan has presented a more unified international presence and thus an enhanced sense of legitimacy in the now 9 year old war against the Taliban and Al-Qaeda. This effort, combined with NATO's role in Kosovo, reflects that future armed conflicts will benefit from NATO's leadership in the conflict or operation. As such, it is necessary that the effort within NATO be reflective of all U.S. services in a joint combined effort. Therefore, U.S. Joint Forces must have a sustained representation in NATO leadership and in all functional areas of NATO; infantry, aviation, logistics, communication and intelligence.

VII. Conclusion – Combined Joint operations with NATO must be more integrated:

Should the nature of armed conflict continue as it has since the end of the Cold War, NATO provides the most viable option to lead the effort of armed intervention. This value has been embodied in the doctrine set forth by *NATO 2020: ASSURED SECURITY; DYNAMIC ENGAGEMENT*:

Without NATO in the future, the prospects for international stability and peace would be far more uncertain than they are. The Alliance is not alone in its commitment to these objectives, but its combination of military capability and political solidarity make it both singularly valuable and irreplaceable.³⁰

³⁰ "Analysis and Recommendations of the Group of Experts on a New Strategic Concept for NATO," *NATO 2020: ASSURED SECURITY; DYNAMIC ENGAGEMENT*, 17 MAY 2010.

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U.S. Joint Forces training, doctrine and experience must evolve with a greater focus on NATO exercises, capabilities, billets and training. U.S. Officers and senior NCO's must have experience with NATO, either in billets or through a NATO Combined Joint Exercise. Committed billets to SHAPE, ACT and ACO³¹ will ensure a long term investment and experience with NATO command and staff functions. These efforts to hone U.S. Joint Forces doctrine towards a broader NATO application, will ensure that U.S. Armed Forces are prepared to integrate with NATO at all levels and can effectively work within the alliance structure to advance U.S. interests. The dividend paid from this cooperation will be a reduced burden on U.S. troop commitments, the national defense budget and the reduction of adverse political pressure. A more integrated joint force composition with NATO will ultimately provide for an optimized delivery of United States national security policy abroad.

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³¹ In 2003, a restructuring of the NATO military commands occurred as the Headquarters of the Supreme Allied Commander, Atlantic was replaced with Allied Command Transformation (ACT), in Norfolk, Virginia, and the Supreme Headquarters Allied Powers Europe (SHAPE) became the Headquarters of Allied Command Operations (ACO). ACT is responsible for driving transformation (future capabilities) in NATO, and ACO is responsible for current operations.

Comparative Legal Approaches to Homeland Security and Anti-Terrorism¹

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

After the 9/11 attacks, the United States put in place new legislation (e.g., Patriot Act) and set up new structures (i.e. Homeland Security) to defend the United States from further acts of terrorism. The subsequent attacks in London and Madrid also triggered some changes in the legislations of various European nations.

In *Comparative Legal Approaches to Homeland Security and Anti-Terrorism*, James Beckman examines the development of counter-terrorism legislation through the comparative lens. He reviews the counter-terrorism legislation of several States especially affected by terrorism (United States, United Kingdom, Germany, Spain, Russian, Japan and Israel). The result of this analysis is interesting for two reasons. First, the author reviews the legislation as it existed before and after 9/11, Madrid and London attacks. Second, this analysis allows the reader to assess how various nations have reacted differently to the same type events. This difference may stem from an earlier history of terrorism attacks or e.g. particular emphasis on human rights protection limits.

The first and main chapter of the book is devoted to an examination of the U.S. legal framework including the Alien and Sedition Acts in 1798, the Espionage and Sedition Acts of 1917 and the Alien Registration Act of 1940. The author then examines the changes implemented post 9/11. First, he examines the Patriot Act, which expanded the powers of law enforcement agencies, among others through an increasing use of administrative subpoenas to gather evidence or carry out investigations and the use of legislation on material witness to detain individuals. Second, the author addresses the reorganization of federal law agencies through the Homeland Security Bill. Third, he reviews the use of military forces abroad including the use of preemptive actions, renditions and the presidential order setting out military commissions.

The second country chapter reviews the situation of the United Kingdom, which was faced with a terrorist threat from Northern Ireland before the current threat from Islamism. Accordingly, the UK already had a set of provisions dealing with counter-terrorism such as the UK Anti-Terrorism Act of 2000, which codified various anti-terrorism legislation and insured compliance with relevant provisions of the European Convention of Human Rights. The Act also puts in place various means for tracking terrorism financing. The 2000 Act was reviewed in 2001 to incorporate some provisions which had been rejected in 2000. Two further acts were implemented in 2005 and 2006, namely the Prevention of Terrorism Act and the Terrorism Act to include some provisions related to immigration and to implement the European Convention on the Prevention of Terrorism. These legislations, for example, allowed for the prosecution of religious clerics advocating and glorifying terrorism.

¹ JAMES BECKMAN, *Comparative Legal Approaches to Homeland Security and Anti-Terrorism*, Ashgate, 2007 (ISBN 978-0-7546-4651-8).

(*) This review does not represent the views of NATO, NC3A and/or the NATO Member nations.

Comparative Legal Approaches to Homeland Security and Anti-Terrorism

The third country chapter deals with Germany. Although Germany had faced a serious terrorist threat in the 1970's and 1980's, the German legal framework, strongly influenced by the atrocities committed during WWII, underlined the importance of human rights protection. While the legal framework was somewhat modified after the 9/11 attacks, the main areas of changes concerned the protection of airports and the collection of evidence (through wiretapping or other electronic means). The protection of religious organizations may now also be limited when the group concerned promoted intolerance, violence and terrorism.

The fourth country chapter reviews the situation of Spain which has both been the subject of attacks from domestic and foreign terrorists. The Spanish legislation was not substantially modified as a reaction to the Madrid attack of 2004, except for extending the possibility to intercept communications. In Spain, terrorism remains handled as a law enforcement issue.

The next country chapters, much shorter, deal respectively with Russia, Japan and Israel. In both Russia and Israel, for example, the military forces are much more involved in anti-terrorism than in other countries. James Beckman's book is well documented and gives a good basic overview of the differing approaches to counter-terrorism legislation. It helps understanding the influence of constitutional rules and human rights standards in the development of anti-terrorism legislation.

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NATO SOFA Conference in Tallinn, Estonia 28 – 30 June 2011

In London, on June 19, 1951, twelve NATO Nations signed the **“Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces”**, in daily terms referred to as the London SOFA or the NATO SOFA. It entered into force on August 23, 1953, thirty days after four of the signatory States had deposited their instruments of ratification with the Government of the United States of America. More Nations followed as NATO enlarged the number of members. Additionally, the Alliance developed new partnerships, and in 1995 the Agreement among the States Parties to the North Atlantic Treaty and the Other States Participating in the Partnership for Peace Regarding the Status of their Forces (PfP SOFA) extended the application of the NATO SOFA provisions to facilitate partner activities.

The NATO SOFA is an important instrument as it has withstood the test of time and changes in the security environment. Today it applies either directly or through the PfP SOFA in more than 40 NATO and PfP Nations, and has supported the relations and cooperation of Allies and that of Partners for more than half a century. The principles set out in the NATO SOFA have inspired other status of forces agreements. Yet, it is one of the few status agreements which provide reciprocal status for sending and receiving States, a balancing element of the NATO SOFA and – perhaps - one of the significant circumstances which foster unprejudiced considerations in terms of its: who is today a sending State may tomorrow be a receiving State.

The Estonian Ministry of Defence is marking the 60th anniversary of the conclusion of the NATO SOFA by gathering experts from NATO and PfP Nations for a 3-day conference. The event is hosted and sponsored by the Estonian Ministry of Defence and is co-chaired by HQ SACT and SHAPE Legal Offices. The goal is to inspire and facilitate discussions on the NATO and PfP SOFA in the context of contemporary international law, to examine equivalent arrangements in other international organisations or as applied in current operations, and through this broader review reflect on the application of the Agreements in a historical framework and in the context of present challenges. Distinguished keynote speakers from Nations and from legal offices throughout NATO are invited to speak and to lead panel discussions.

NATO SOFA Conference in Tallinn, Estonia 28 – 30 June 2011

The Estonian Ministry of Defence is hopeful that the conference will provide a special occasion for SOFA experts and accomplished practitioners to come together and discuss, across borders and commands, to accurately reflect the scope of activities supported by the NATO and PfP SOFA. The conference is also a recognition of the importance which Estonia attaches to both the PfP SOFA and the NATO SOFA; the agreements have consistently supported the Baltic military cooperation projects throughout the 1990's, and implementation of NATO SOFA and related status agreements became a cornerstone of Estonian fulfilment of its Membership Action Plan (MAP) prior to joining NATO. Estonia launched, as a part of its coordinated efforts to become a member of NATO, a programme to not only ensure passing of the necessary legislation but also to provide inter-ministerial synchronisation and training for Estonian civil servants and military. In order to establish the international context of the status agreements, the Estonian Ministry of Defence reached out to legal offices within NATO and NATO nations.

This effort has later proved very useful to Estonia in our relations with other NATO and PfP Nations, and the approach and valuable experience gained in this process has been shared with other interested Nations either in bilateral contacts, in multinational initiatives, or in cooperation with HQ SACT, to support the dissemination of NATO and PfP SOFA. By marking the 60th anniversary of the signing of the NATO SOFA we hope to pay tribute to the NATO SOFA as a unique and very practical tool to facilitate military cooperation and to the international context in which the Agreement is to be understood and applied.

The conference takes place in Tallinn from 28 – 30 June, 2011. Invitations are being distributed by the Estonian Ministry of Defence to Nations signatory to the NATO and PfP SOFA, and to legal offices throughout NATO. More information regarding the conference can be obtained from the Ministry of Defence by contacting Ms Mari Kruus (Mari.Kruus@kmin.ee) or Ms Ingrid Muul (Ingrid.Muul@kmin.ee).

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Undersecretary for Legal and Administrative Affairs
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(source: www.Tallinn24.info)

Summary Report (*) of the 2010 NATO Legal Conference (27 – 30 September 2010, International Institute of Humanitarian Law, San Remo, Italy)

The NATO legal community held its annual conference at the International Institute of Humanitarian Law (IIHL) in Sanremo, Italy on 27-30 September 2010. Using a lecture format followed by panel discussion and questions from the audience, 20 speakers addressed the topic, *Implementing NATO's Strategy In Afghanistan — Legal Responsibilities And Challenges*, during six plenary sessions of the conference.

These sessions provided a strategic overview of the Alliance's engagement in Afghanistan, views from legal advisers serving on-the-ground in Afghanistan, the responsibilities of international organizations, a discussion of the concept of direct participation in hostilities, detention of non-state actors, detention, contractors in international military operations and the rule of law in Afghanistan.

A total of 106 legal advisers and legal personnel from NATO legal offices, Ministries of Defence and Ministries of Foreign Affairs of NATO and partner nations and selected international organizations attended. All benefited from the superb hospitality of the IIHL and the active support provided by the Government of Italy.

Based upon the valuable, candid discussions of NATO's legal situation in Afghanistan conducted in a positive spirit by this mix of officials, experts, and legal advisers, this conference format will be used again during the 2011 NATO Legal Conference.

LEGAL OFFICE, STAFF ELEMENT EUROPE, ALLIED COMMAND TRANSFORMATION (NATO)



(*) A DETAILED REPORT WILL BE SENT TO ALL PARTICIPANTS OF THE 2010 NATO LEGAL CONFERENCE

Résumé - Rapport (*) de la Conférence Juridique de l'OTAN de 2010 (27 – 30 septembre 2010, Institut International de Droit Humanitaire, Sanremo, Italie)

La communauté juridique de l'OTAN a tenu sa conférence annuelle à l'Institut International de Droit Humanitaire à Sanremo, en Italie du 27 au 30 septembre 2010.

Le format utilisé consistait en des présentations données par les orateurs suivies de séances de discussions ouvertes et questions posées par les participants. En six sessions plénières, 20 conférenciers ont détaillé le sujet « *Comment Appliquer la Stratégie de l'OTAN en Afghanistan - Responsabilités et Défis Légaux* ».

Au cours de la conférence, un aperçu stratégique de l'engagement de l'Alliance en Afghanistan a été présenté, des conseillers juridiques servant en Afghanistan ont exprimé leur point de vue, les responsabilités des organisations internationales ont été analysées, une discussion sur le concept de la participation directe dans les hostilités a été menée, le problème de la détention et des contractants impliqués dans des opérations militaires a été examiné, et l'état de droit en Afghanistan a été discutée en détail.

Un total de 106 conseillers juridiques et membres du personnel juridique des bureaux juridiques de l'OTAN, des Ministères de la Défense et des Affaires Etrangères des pays appartenant à l'OTAN et aux pays partenaires ainsi qu'à une sélection d'organisations internationales ont assisté à la conférence. Tous les participants ont bénéficié de la superbe hospitalité offerte par l'IIDH ainsi que du soutien actif du gouvernement italien.

Suite aux discussions franches et utiles portant sur la situation juridique de l'OTAN en Afghanistan, menées par la combinaison d'officiels, experts et conseillers juridiques, ce format de conférence sera utilisé à nouveau lors de la conférence juridique annuelle de l'OTAN en 2011.

ELEMENT D'ETAT-MAJOR DU COMMANDEMENT ALLIE TRANSFORMATION EN EUROPE (OTAN)

() UN RAPPORT DETAILLE SERA ENVOYE A TOUS LES PARTICIPANTS DE LA CONFERENCE JURIDIQUE DE L'OTAN DE 2010.*

Spotlight



Major Maria

Eugenia Ruiz

Hernandez,

Assistant Legal

Adviser

Force Command

Madrid



Name: Maria Eugenia Ruiz Hernandez

Rank/Service/Nationality: Major/Spanish

Job title: Legal Adviser, Force Command Madrid

Primary legal focus effort: Support and provide legal advice on any legal issue. Deploy to operational theatres. Assist in exercise planning. Liaise with National and Local authorities in relation with Agreements and negotiate and draft agreements on behalf of FC HQ

Likes: To enjoy time with the family, to travel and to go skiing

Dislikes: Bad mannered people

When in Madrid, everyone should: go to El Monasterio del Escorial and el Palacio de Aranjuez

Best NATO experience: This is a new experience for me. I have been a member of a Martial Court for the last five years and I have always been working in the military justice

My one recommendation for NATO legal Community: To be in touch in order to share professional experiences

Maria.ruiz@lamd.nato.int

Spotlight



**Captain Anne-
Marij Strikwerda,
Legal Adviser,
CIMIC Centre of
Excellence
(CCOE)**



Name: Anne-Marij Strikwerda

Rank/Service/Nationality: Captain/Army/NLD

Job title: Legal Adviser

Primary legal focus of effort: Anything legal that comes up, such as drafting contracts, answering legal questions (for example MOU related issues) and giving lectures on legal aspects during our courses. Furthermore, I am the main writer of a Rule of Law publication CCOE wants to have by the end of this year.

Likes: my horse, nice sunny weather, good food and Ireland

Dislikes: traffic jams, running late and rainy days

When in Enschede, everyone should: enjoy the nice surroundings and visit CCOE

Best NATO experience: my deployment to Afghanistan as a LEGAD in HQ RC(S)

My one recommendation for the NATO Legal Community: keep in touch with each other and share your knowledge

Strikwerda.a@cimic-coe.org

Spotlight



Ms. Claudia

Linden, Legal

Adviser, NATO

School



Name: Claudia Linden, LL.M.

Rank/Service/Nationality: DEU-CIV (OF3), Major Reserve, Germany

Job title: Legal Advisor and Operational Law Instructor

Primary legal focus of effort: Operational Law, NATO School Issues

Likes: Modern Art, Photography, History, Rugby

Dislikes: PowerPoint Overload

When in Oberammergau, everyone should: Take a hike into the mountains, enjoy the wonderful scenery and the Bavarian food and beer afterwards

Best NATO experience: My time as LEGAD in the NATO NRDC GE/NL and NATO School

My one recommendation for the NATO Legal Community: Come to NATO School in Oberammergau, enjoy interesting lectures and make contacts in an international environment

Linden.claudia@natoschool.nato.int



HAIL

&

FAREWELL

Hail

Force Command Madrid : Major Maria Ruiz (ESP A) joined in April 2011.

Allied Command Counter Intelligence : Mr. Richard Prgent (USA CIV) joined in April 2011.

NATO School : Ms. Claudia Linden (DEU CIV) joined in April 2011.

Farewell

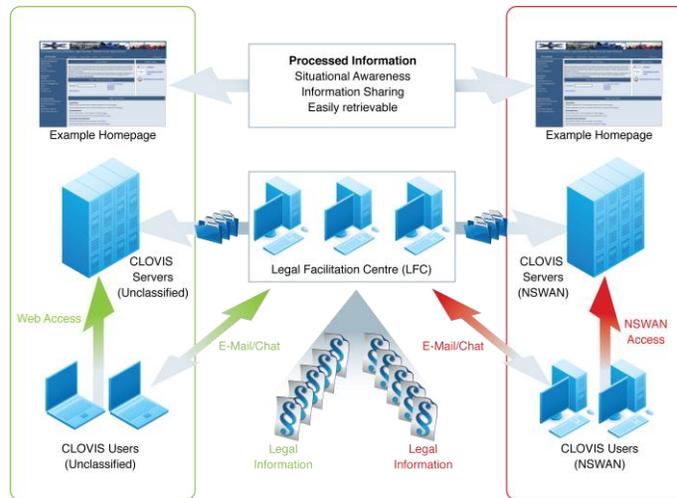
C-IED Centre of Excellence : Dr. Ramon Candil (ESP) left in April 2011.

NATO School : Dr. iur. Bjoern Schubert (DEU CIV) left in April 2011.

GENERAL INTEREST/NATO IN THE NEWS

CLOVIS (Comprehensive Legal Overview Virtual Information System)

The North Atlantic Alliance requires the capability to reliably access legal documents and knowledge in an era where rapid responses are vital, versatility is critical, and resources are constrained. To move beyond traditional approaches of knowledge sharing Allied Command Transformation is pursuing ways to encourage an interactive professional dialogue among legal advisers within NATO that ultimately may involve outside partners and civil society actors.



The Comprehensive Legal Overview Virtual Information System (CLOVIS) concept is part of an experiment to improve the maintaining, sharing and use of collective legal knowledge that is valuable to NATO, its member and partner nations, and potentially other international organizations and selected non-government organizations. CLOVIS is a tool to improve institutional awareness of controlling law and legal guidance, encourage collaboration for problem-solving.

The experiment intends to be a highly customized answer to the unique challenges facing the NATO legal community by connecting resources that better enable the NATO legal community to support Alliance goals, activities, and operations.

A repository of legal documentation and knowledge will be an important element of the community support; however, the central element of the portal will be the creation of a coherent community that actively engages together on the common issues it addresses.

The portal will facilitate a move from static knowledge collecting and mere display of information, to a dynamic tool that will facilitate interactive information sharing, interoperability and user centered approach. Users themselves will be invited to contribute to the content of the portal, to discuss contemporary legal issues relevant to the community and add value for the benefit of the entire community.

If you have any questions or comments about CLOVIS, please contact:

Lewis Bumgardner, Sherrod.bumgardner@shape.nato.int, (+32) 65 44 5499; or
 Laurent Zazzera, Laurent.zazzera@act.nato.int, (+1) 757 747 3684

GENERAL INTEREST/NATO IN THE NEWS

"Those who cannot remember the past are condemned to repeat it."

George Santayana

- Article on "Mercenaries" and Somalia has been published at the following link:

<http://hpcrresearch.org/blog/dustinlewis/2011-01-21/mercenaries-and-somalia>

- "Should the United States, as the strongest military power in the world be bound by stricter humanitarian constraints than its weaker adversaries ?" – the paper to be found at the following link offers an analytical framework through which to examine this question and others:

http://www.harvardilj.org/2011/02/issue_52-1_blum/

- Information on the US Law of War Manual can be found at :

http://www.americanbar.org/content/dam/aba/migrated/natsecurity/hays_parks_speech11082010.authcheckdam.pdf

- A review of the book titled "The Information" and written by James Gleick and which describes the history of Information can be consulted at:

http://www.nytimes.com/2011/03/20/books/review/book-review-the-information-by-james-gleick.html?_r=2&ref=books

- The Military Law and the Law of War Review / Revue de Droit Militaire et de Droit de la Guerre is calling for papers to be included in the Review's 2011 Volume which will deal with "The Role and responsibilities of Legal Advisors in the Armed Forces: Evolution and Present Trends".

Articles related to this topic should be submitted by 15 July 2011 at the latest to soc-mil-law@scarlet.be

<http://www.soc-mil-law.org/>

GENERAL INTEREST/NATO IN THE NEWS

- Lecture papers such as "The Current Situation of the International Court of Justice and its Future" or "The relationship between the UN Charter and General International Law regarding the Non-use of Force: the Case NATO's Air Campaign in the Kosovo Crisis of 1999" can be read on the Lauterpacht Centre for International Law website

http://www.lcil.cam.ac.uk/lectures/lecture_papers.php

- The Journal of Terrorism research is pleased to invite papers for consideration in a Special Edition on Terrorism Law to be published at the end of 2011. For further information on the Journal and the submission guidelines please visit University of St Andrews' site:

<http://www.st-andrews.ac.uk/intrel/home/>

- A Conference organised by the Armed Forces Law Association of New Zealand in conjunction with the Asia Pacific Centre for Military law, University of Melbourne, the Lieber Society and the American Society of International Law will be held in Melbourne, Australia from August 26 to 28, 2011. Subject is: Military Law in a New Dimension: Armed Forces Deployed Against Transnational crime and Terrorism.

More details on <http://www.law.unimelb.edu.au/>

- On November 13-15, 2011, the Minerva Center for Human Rights at the Hebrew University of Jerusalem will hold an international conference that seeks to examine the potential impact of transitional justice mechanisms in ongoing conflicts. Proposals to present a paper at the conference can be sent to Emchr@savion.huji.ac.il. Authors of selected proposals will be offered full or partial flight and accommodation expenses.

- Lecture Papers by Sir Michael Wood, DCMG can be read at www.lcil.cam.ac.uk/lectures/2006_sir_michael_wood.php. Subject is the UN Security Council and International Law.

- Article on munitions intended to reduce collateral damage can be found at:

<http://www.popularmechanics.com/archive/technology/military/planes-uavs/0/10>

UPCOMING EVENTS

“Anyone who takes himself too seriously always runs the risk of looking ridiculous; anyone who can consistently laugh at himself does not.”

Vaclav Havel

- The next NATO Legal Conference will take place in Lisbon, Portugal from October 24 to 28, 2011. Host is Joint Force Command Lisbon. For more information, please contact Mr. Lewis Bumgardner at sherrod.bumgardner@shape.nato.int or Mrs. Dominique Palmer-De Greve at Dominique.degreve@shape.nato.int

- The next Legal Advisors Course will be held at the NATO School from May 23 to 27, 2011.

For more information on courses and workshops, please visit

<http://www.natoschool.nato.int>

- The Head of International Law Department of the HQ of the Israel defense Force will talk about “The Challenges in Asymmetrical Warfare: an Israeli Experience” on Wednesday May 25, 2011 at the International Law Association in Brussels, Belgium. For more information please contact Professor Dr. K Van der Borgh at kvdborgh@vub.ac.be
- A Contemporary Workshop on Private Military Security Companies (PMSCs) will be held at the International Institute of Humanitarian Law from May 31 to June 2, 2011. This workshop will consider the current phenomenon of PMSCs from a LOAC perspective. More information on www.ihl.org
- The 3rd International Conference on Cyber Conflict will be organized by the NATO Cooperative Cyber Defence Centre of Excellence on June 7-10, 2011 in Tallinn, Estonia. It will focus on the topic of Generating Cyber Forces. The technical, legal and policy aspects will be covered. Please visit

<http://www.ccdcoe.org/ICCC/>

UPCOMING EVENTS

- The International Security Law Conference will take place at the NATO School from 20 to 24 June 2011. The conference will examine the domestic and international legal framework that shape NATO, EU and UN policy and international relations. More information at:

<http://www.natoschool.nato.int>

- The 3rd Annual Senior Officers' Security and Law Conference will happen at the Geneva Centre for Security Policy on July 4-7, 2011. Topics will be Command and Legal Advice in Operations, Disaster Response and Humanitarian Aid Operations, Cyber Security and Cyber-warfare etc. More information at:

<http://www.gcsp.ch/Security-and-Law/Events/3rd-Annual-Senior-Officers-Security-and-Law-Conference>

- The 34th Round Table on current Issues of International Humanitarian Law will take place at the International Institute of Humanitarian Law in Sanremo, Italy. Please visit

<http://iihl.org/Default.aspx?itemid=34&pageid=page12203>

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.