



Issue 32  
*December 2013*



# Legal Gazette

Issue dedicated to the

2013  
NATO LEGAL CONFERENCE

24-28 June, Tallinn, Estonia

hosted by the  
Ministry of Defence of Estonia





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## Introduction

Dear Colleagues and  
Persons Interested In NATO,

with pleasure we publish our 32<sup>nd</sup> issue of the *NATO Legal Gazette*, this time focused solely on the NATO Legal Conference hosted by the Ministry of Defence of Estonia. The extraordinary support and personal

attention provided by the Minister of Defence **Mr Urmas Reinsalu** and the Ministry's high-level conference team composed of **Ms Mari Kruus**, Adviser to the Ministry, **Ms Ingrid Muul**, Deputy Director of the Legal Department, and **Ms Silvi Palmet**, Chief Protocol, ensured the Conference's great success as a memorable professional event.

This, our eighth annual Conference, took place in beautiful Tallinn from 24 to 28 June with the topic "*Responding to Change – Legal Challenges in the Future Security Environment.*" Just nine months after the successful 2012 NATO Legal Conference in Tirana, Albania, a record 142 participants journeyed north to enjoy the hospitality, friendship and wonderfully long summer days in this historic capital of Estonia.

For all of you who attended and all of you who could not be with us physically in Tallinn to benefit from the excellent speakers and discussions this issue provides highlights of the Conference.

First, the Executive Summary Report will provide you an overview of each speaker and panelist. Second, you will have pleasure of reading contributions from three senior legal authorities: Mr. Peter Olson, Legal Adviser and Director of Legal Affairs, NATO HQ, Brussels; Mr. Stephen Rose, former Allied Command Transformation (ACT) Legal Adviser, Norfolk; Mr. Stephen Mathias, the Assistant Secretary-General for Legal Affairs in the UN Office of Legal Affairs, New York.

I hope that you will enjoy this issue and its articles with the goal of sharing the understanding we gained in Tallinn of the legal challenges for NATO in the future security environment.

Sincerely yours,  
Dr. Petra Ochmannova



**2013 NATO LEGAL CONFERENCE  
Executive Summary Report  
“Responding to Change  
– Legal Challenges In the Future Security Environment”**

by Annabelle Thibault  
ACT SEE Legal Office

**Introduction**

The eighth annual NATO Legal Conference, hosted by the Estonian Ministry of Defence, was held in Tallinn from 24 to 28 June 2013. The theme of this year’s Conference, consistent with NATO’s Strategic Concept, was **“Responding to Change – Legal Challenges in the Future Security Environment.”**

First and foremost the Conference Organisers would like to thank the Estonian Ministry of Defence for hosting the 2013 NATO Legal Conference and for their outstanding support prior to and during the whole event. In particular, **Ms Mari Kruus**, Advisor to the Ministry, **Ms Ingrid Muul**, Deputy Director of the Legal Department, and **Ms Silvi Palmet**, Chief Protocol, showed exceptional professionalism and personal dedication to make this Conference a remarkable event.

This year's Conference topic built on the work of the 2012 Legal Conference, which focused on legal aspects of NATO-partner relationships, and concentrated on the broader legal implications for NATO in a world that is undergoing rapid geo-political and technological change. A record of 142 people representing thirty NATO organizations, fourteen NATO nations, three partner nations, the United Nations, the European Union and the International

Committee of the Red Cross attended this year's Conference around a programme which provided scope for active participation by various communities of interest, such as Ministries of Foreign Affairs, Ministries of Defence, Senior Military Legal Advisers, NATO Command Structure, NATO agencies, and other large international organizations. About half of the participants were first-time attendees and included, inter alia, five General or Flag Officers responsible for national legal matters from the United Kingdom, the Netherlands, Italy, and the United States, three Legal Advisers to the Ministries of Foreign Affairs of Canada, the Netherlands, and Finland, and the United Nations Assistant Secretary General for Legal Affairs.



The programme of this year's Conference, excellently orchestrated by the Maître de Cérémonie, **Dr. Iur. Katharina Ziolkowski**, followed a proven working schedule applied at previous NATO Legal Conferences: the NATO day for NATO personnel only was followed by the Conference Plenary and break-out sessions open to all participants from MoD, MFA, IO, NGO, etc. Many social events punctuated this week of fruitful debates, and provided more opportunity for participants to share ideas and opinions.

### **NATO day - Monday 24th June**

Individuals assigned to NATO legal offices and serving in NATO Command Structure, Force Structure, Crisis Establishment, and North Atlantic Council activated organisations held an all-day session to address issues common to their practice within the Alliance. These issues comprised, inter alia: Status Arrangements in ISAF and in support of anti-piracy operations, settlement of claims and NATO Claims Policy, exemption of taxes under Status Agreements, use and status of contractors, NATO dispute resolution system, and legal support to current operations and legal perspectives on the new security environment. The presence of key Legal Advisers from NATO HQ, HQ SACT, and SHAPE allowed for extremely high-quality debates.

## Conference Plenary - Tuesday 25<sup>th</sup> June



**Mr Urmas Reinsalu**, Estonian Minister of Defence, opened the 2013 NATO Legal Conference to all participants with warm welcoming remarks. Whilst highlighting the prominent role of Estonia in International Law, most recently through the publication of the Tallinn Manual on Cyber Warfare,

**Mr Reinsalu** briefly presented his country's view on the future of NATO and the legal challenges which it faces. He emphasized that as defence budgets have been hit hard by the financial crisis and subsequently, capabilities are reducing. In such times of austerity, pooling and sharing of resources has become of crucial importance for the Allies. NATO therefore needs to ensure even further interoperability. Cyber security is another issue **Mr Reinsalu** mentioned, as its relative novelty will

require thorough legal processing. Finally, the increasing monitoring role played by the civil society thanks to the spread of new communications technologies was briefly touched upon. In this regard, a solid legal framework to NATO's work appears crucial to guarantee the success and legitimacy of the Alliance's missions.

**Mr Peter Olson**, Legal Adviser to the NATO Secretary General, then took the floor to talk about changes NATO has undergone in recent years and the difficulties the organization currently faces in an environment of financial constraints. He noted challenges to the legal assumptions under which NATO lawyers operate, observing in particular the growing influence and role of human rights law in situations previously considered exclusively the subject of international humanitarian law as *lex specialis*. The interaction between these two bodies of law has become more than an academic discussion: it has had crucial consequences on decisions held in national, regional and international courts and may well be influencing decisions by Nations on when and in what circumstances they are prepared to deploy their forces.

Mr. Olson then introduced the **Rt Hon Dr Liam Fox** to the audience for the first panel of the morning on “**The Developing Security Environment – A Overview of Present and Future Geopolitical Challenges**” and moderated by **Mr Steve Rose**, ACT Legal Adviser.



**Rt. Hon Dr Liam Fox** presented an overview of the various issues NATO is facing or is likely to face in the near future in the context of globalisation, diminishing sovereignty and economic crisis. Many international organisations established in the past find it difficult to exist and operate in the current world of financial instability and shortage of essential resources, where global economy directly impacts global security. In particular, NATO's role raises questions: what will the Alliance's natural area of operation be? What constraints will NATO have to operate under? Currently, the organisation does not function as well as it should: it does not have a cyber doctrine for instance. But institutions are in place and Member States will always manage to use them and find solutions to problems whenever they arise. **Dr Fox** concluded his speech by reminding the audience that “we need to shape the world around us, otherwise we will be shaped by the world surrounding us”.

Mr Rose then invited **Mr Jonatan Vsevirov**, Adviser to the Estonian Ministry of Defence, to present his views on “**NATO's Next Decade: A Perspective on Meeting the Alliance's Challenge of Constant Change**”. Estonia's independence is a testament of NATO's success in its mission to deter Soviet domination, but 25 years later, NATO Allies no longer share a common threat perception and decision-making within the Alliance has become very difficult. However, NATO still has a role to play: Europeans are essential to the United States' interests as they achieved interoperability and

share common views and culture. And from the Eastern European countries' perspective, there is not any alternative to NATO, because NATO represents the only forum where their voices can be heard on the international scene. The two pillars which will make NATO work are the interoperability of its Member States' armed forces as well as its Command Structure. NATO needs to change from a deployed organisation to a prepared Alliance through the planning of, inter alia, multinational exercises including as many allies as possible. In conclusion, Mr Vsevirov brought the attention of the audience to four main issues NATO should be focused on: solidarity, in particular with regards to defence expenditure; mindset, as the current aura of pessimism is not based on fact and convincing others of our own weaknesses is not a smart thing to do; understanding that others may have different perspectives and interests will facilitate NATO's definition of its own goals and perspectives; and finally, the maintenance of an active NATO bureaucracy in the post-ISAF world, as widespread cuts would make it extremely difficult to reinvigorate NATO in case of a new crisis in the future.



A presentation on “**Planning for the Future – A Military Legal Perspective**” was then given by **Brigadier General Richard Gross**, Legal Adviser to the Chairman of U.S. Joint Chiefs of Staff. The main question raised by **Brigadier General Gross** was what kind of Legal Advisers (LEGADs) do we need to be in the future? LEGADs of the future will have to be fully engaged in their clients

business at all times, present at meetings and included in emails. They will have to be proactive to prevent problems rather than having to fix them. LEGADs should be both generalists in order to identify a broad range of issues and specialists to solve the issues identified. Moreover, LEGADs should not be “nationalists” or solely focused on domestic law. They should become experts in all aspects of International Law-- from international humanitarian law to the Law of the Sea-- and will have to understand basic principles of law from other countries. Finally, LEGADs ought to be concerned about the future, think about new concepts in areas such as cyber defence and transnational terrorism, and take into account the increased pressure to apply principles of human rights law to armed conflicts.

Following this presentation, the audience was given the opportunity to ask questions to the speakers. Questions mostly revolved around autonomous weapon systems and the urgent need to develop related framework and policies, the legal regime under which counter-terrorism operations should be conducted and the consequences of applying law enforcement methods

rather than considering them an armed conflict, NATO's expansion and the necessity to focus on strategic rather than political factors to take decisions, and the relevance of international humanitarian law principles in the 21<sup>st</sup> Century.

**Mr Olson** opened the afternoon's panel on "**The Future of NATO-led Missions – Foreign Ministry Perspective**" by introducing three distinguished speakers: **Mr Alan Kessel**, Legal Adviser to the Department of Foreign Affairs and International Trade of Canada, **Ms Liesbeth Lijnzaad**, Legal Adviser and Head of the International Law Department of the Ministry of Foreign Affairs of the Netherlands, and **Ms Paivi Kaukoranta**, Director General for Legal Affairs of the Ministry of Foreign Affairs of Finland.

According to **Mr Kessel**, NATO was initially a Cold War Alliance which has had to adapt to a changing security environment, operate under new mandates and undergo a growing push for human rights law to have a leading role in the framework of any armed conflict. Another growing trend military lawyers have to face is the idea of "responsibility while protecting", which emerged following the Operation Unified Protector in Libya with its clear mandate for protecting civilians.



**Ms Lijnzaad** then highlighted the interrelations which exist between policy developments and legal framework assessment. The future of NATO missions requires flexibility both in terms of variety of tasks and variety of participants. It is also important to understand that law and communication must go hand in hand in order to gain public support. Finally, the increased role for Human Rights mechanisms was also mentioned as being something the military world will have to learn to live with.

The final presentation of the day was given by **Ms Kaukoranta**, who shared with the audience the views of a NATO Partner nation, Finland. There has been intensive cooperation between NATO and NATO Partners in the past which is expected to continue in the future. The role of MFA lawyers with regards to cooperation in the conduct of crisis management operations entails also further development of Partner Nations legislation to enable them to fully participate in such operations, including NATO-led missions and to avoid caveats which could prevent fruitful cooperation.



### Conference Plenary - Wednesday 26<sup>th</sup> June

**Dr. Petra Ochmannova**, ACT-SEE Deputy Legal Adviser, introduced the first speaker of the day, **Sir Daniel Bethlehem QC**, and moderated discussion that followed his keynote speech on the theme “**Applying Legal Norms in a Developing Security Environment – Meeting the Challenges of the Future**”. **Sir Daniel** began his presentation with some observations on the role of law and the role of lawyers. First, the complexity of the law should not be used as an excuse for inaction and lawyers have a responsibility to give clear and concise advice in any given context. Second, there is a legitimate space between legal advice and political decision, but the latter should always be taken with respect to the former. It is incumbent upon lawyers to ensure that appreciation of law and legality is at the heart of any decision-making process. Third, lawyers face a challenge to be effective. This requires as a minimum access to and the trust of the decision-maker, presence around the table when the issues are being addressed, and a willingness to take responsibility for advice given.



**Sir Daniel** went on developing seven themes and challenges for the future: 1. Decision-making processes should always include a LEGAD; 2. The changing concept of geography in conflict and battlefield space, especially with regards to cyber; 3. The applicability of law and the determination of the body of law which should apply in a given situation. For instance, what is the threshold for *jus ad bellum*? Who is to determine when a country

is unable or unwilling? etc;

4. Interoperability and the attribution of responsibility to a Nation in a coalition-led operation; 5. Detention and the issues of law relating to the conditions of detention; 6. New technologies and the outbreak of autonomous weapon systems in particular; and 7. Transparency and accountability, which should lead to greater appreciation of the law in the long run.

**Sir Daniel's** concluding note related to the European Court of Human Rights' competence in international humanitarian law cases. In the light of the *Al Skeini* and *Al Jedda* cases, states should be prepared to argue the international humanitarian law merits of the case, not simply the merits of the matter under substantive European Convention on Human Rights rules, quite apart from of any challenges to jurisdiction or admissibility that may be warranted.

During the discussions that followed, **Mr Thomas Randall**, ACO Legal Adviser, briefly commented on decision-making processes within SHAPE and many questions were then asked about the links between policy advice and legal advice.



The second and final panel of this day was presented by **Mr Richard Pregent**, Allied Command Counter Intelligence Legal Adviser. He introduced the three speakers of the panel, **Brigadier General Richard Gross**, **Brigadier Stuart Lythgoe**, UK Army Legal Services, and **Air Commodore Peter Hebly**, Directorate Legal Services, Ministry of Defence of the Netherlands, and invited them to comment on the theme "**Senior National Military Legal Advisers' Perspective on Legal Support for NATO Missions**". **Mr Pregent** asked many questions to the speakers, who answered in turn, allowing for lively discussions and fruitful debates with all participants.

The first question related to future operations and how the UK, USA and the Netherlands respectively anticipated them. **Brigadier Lythgoe** foresees the UK will be involved in smaller scale missions of varied and varying intensity. NATO is likely to be deployed at very short notice and to meet unexpected challenges. LEGADs therefore need to be trained on broad panoply of topics to be fully operational when deployed. **Brigadier General Gross** added that a future large scale “nation- on- nation” international armed conflict has become difficult to envisage. And **Air Commodore Hebly** explained that smaller countries such as the Netherlands see NATO as a vehicle to participate in the conduct of operations alongside their Allies. He therefore stressed the need to focus on interoperability and to remain adaptive to the environment.



The discussions then shifted to the question of the classification of conflicts. The classification of a conflict as an international armed conflict, non-international armed conflict and situations that do not amount to armed conflict has direct implication on the body of law to be applied which, in turn, directly impacts the soldiers on the ground. For instance, the legal obligations upon states undertaking detention operations vary depending upon whether international humanitarian law or human rights law is applicable.

Speakers and participants were then asked whether there is a duty to use smart weapons to minimize collateral damage. A brief debate concluded that compliance with the generally accepted principles of international humanitarian law did not impose such a duty. The only duty with regard to the use of weapons in cases of expected involvement of civilians and/or civilian objects which exists under international humanitarian law is to respect principle of proportionality. It was emphasized that this proportionality aims at preventing excessive harm and/or damage.



Another topic for discussion was the appropriate role of military operational lawyers in Rule of Law missions. NATO effectively supports Rule of Law programs but their implementation by military personnel becomes problematic. Rule of Law should involve civilians and Civil Law principles on a much broader scale. Also, the end state should be measured by effectiveness, not performance and this is the reason why Rule of Law missions needs to tie in with NGOs and government agencies in theatre.

### Conference Plenary and Break-out Sessions - Thursday 27<sup>th</sup> June



**Ms Mette Prassé Hartov**, Assistant Legal Adviser, HQ SACT, moderated the morning panel on “**Aspects of Emerging Security Threats That Will Stress the Framework of International Law**”.

A first presentation on “**New Technologies and International Law – What is the Litmus Test**” was given by **Dr Rain Liivoja**, Research Fellow at the Melbourne Law School. His thoughtful presentation produced more questions than answers but allowed for extremely fruitful conversations. Four categories of new technologies might raise issues in international humanitarian law: Information technology, robotics,

neuro- and biotechnology and nanotechnology. Cyber, for instance, precipitates the “end of geography”: lawyers are going to have address problems related to the law of neutrality and will have to discuss if data can be seen as an object and whether it can be targeted or protected. The difficulty concerning robotics lies in the issue of accountability: should end-users be responsible over programmers, manufacturers or designers? Should negligence of designers also trigger responsibility? Neuro-technologies offer new possibilities for the soldier of tomorrow, especially in the area of performance-enhancement. Could soldiers be forced to take particular drugs, allowing longer survival without food for instance? All these various technological improvements have put pressure on international humanitarian law to evolve but it is probably too early to know what will be the result.



**Mr Jonatan Vseviov** then took the floor to talk about “**Smart Defence and Matters of Sovereignty and State Responsibility – Is the Law Smart?**” NATO’s Smart Defence echoes the European Union “Pooling and Sharing” idea according to which Europe and North America no longer have the means to maintain their required capabilities and therefore need to specialise and join their efforts to keep up their level of ambition. However, Smart Defence raises two issues: the question of sovereignty, as pooling and sharing could amount to delegating some elements of national security to others; and the question of availability, especially in a time of crisis. Therefore, this concept can only function if partners are ready to commit both politically and

economically for the long term and, most importantly, if they are ready to trust each other.

Finally, Ms Hartov invited **Mr Erki Kodar**, Director of the Legal Department of the Estonian Ministry of Defence, to present his views on “**Containing the Cyber Genie through Law**”. In the area of cyber, the challenges arise from questions concerning geography, attribution, enforceability and values. No common definitions for cyberspace, cyber war, attack or information exist nor can be foreseen in the near future due to ambiguity and political reasons. There are various attempts to contain the “genie”, such as the Budapest Convention of Cybercrime, the NATO Cyber Defence Policy and even the Tallinn Manual but it is a fact that the bulk of international law remains silent on cyber. Therefore, existing norms will have to be adapted and interpreted in the same manner as for nuclear weapons or autonomous weapon systems.

An active Q&A session concluded the Thursday morning panel with further debates on Smart Defence.

On Thursday afternoon, Conference participants were encouraged to join one of the two breakout sessions organised. One session revolved around the theme “**Post Conflict Missions: Rule of Law Operations and Security Sector Reform – A New Line of Work for Legal Advisers?**” and was moderated by **Colonel Max Maxwell**, JAGC USA. The other session moderated by **Ms Hartov** was on “**Climate Change: Emerging Legal and Resource Challenges (including the High North)**”.

A. *Post Conflict Missions: Rule of Law Operations and Security Sector Reform – A New Line of Work for Legal Advisers?*

The speakers invited by **Colonel Max Maxwell** to intervene on this session were: **Mr Kwai Hong Ip**, EU Special Investigative Taskforce, **Lieutenant Colonel Robert Chatham** and **Mr Ajmal Anar**, Chief and Senior Adviser of ISAF Rule of Law Mission, **Mr Richard Pregent**, Allied Command Counter Intelligence Legal Adviser and **Mr Will Thomas**, NATO HQ Sarajevo Legal Adviser. The starting point of the discussion was that NATO does not have a Rule of Law doctrine. Nevertheless, in practice, NATO/NATO-led missions often supports Rule of Law missions and the reason often brought forward is that “Peacekeeping is not a job for soldiers but only soldiers can do it”. One of the main goals of Rule of Law is to maintain law and order and all panellists briefly described how their functions were related to the establishment of Rule of Law in Kosovo, Afghanistan, Iraq and Bosnia-Herzegovina. First, the work of the EU Special Investigative Taskforce (SITF) in Kosovo was presented to the audience. The SITF conducts an independent criminal investigation into war crimes and organised crime allegations contained in a 2011 Council of Europe report, as well as other possible crimes connected to those allegations and functions under the authority of the EULEX mission.

In Bosnia-Herzegovina, NATO HQ Sarajevo is mainly tasked with assisting the country with defence reform processes along three main pillars: collaboration with relevant actors, implementation and the question of enforceability and evolution once a reform is implemented. From a legal standpoint, this task mainly consists of assisting the authorities with the drafting of laws and amendments in order to make Bosnia-Herzegovina a credible candidate for NATO membership.

In Iraq, the Rule of Law mission was never clearly defined and that probably led to its failure. A substantial amount of money was spent on Rule of Law efforts in Iraq but that did not prove to be a solution. Instead, what was needed was the experience and expertise of local lawyers, judges and law enforcement officers, unity of command with a single point of contact for the whole Rule of Law spectrum and unity of effort with all Rule of Law actors aspiring for a common end-state.

As opposed to Iraq, the Rule of Law in Afghanistan started from scratch. Afghanistan had and still has a formal justice system in place, but it is weak. The end state therefore consists of finding the balance between informal justice and dispute resolution systems and state “owned” courts. Overall, it appears that Rule of Law missions suffer from lack of unity and coordination. Moreover, the military should not necessarily always be in the lead but rather in a support role for civilians taking on these missions.

B. *Climate Change: Emerging Legal and Resource Challenges (including the High North)*.

During this panel, **Ms Hartov** introduced **Mr Gudmundur Ingolfsson**, Attorney at Law from Iceland and **Mr Alan Kessel**, the Legal Adviser at the Department of Foreign Affairs and International Trade of Canada. Despite the fact that NATO does not have a policy on the High North, both speakers addressed issues related to Arctic, an important area of cooperation rather than confrontation. In this regard, they described the role of the Arctic Council, which serves as a forum for cooperation and discussion and focuses, inter alia, on environmental issues, socio-economic and development issues. The speakers described the emerging role of the Arctic Council as a norm-setting body (binding agreements on Search and Rescue and Pollution). Canada is the current chair of the Arctic Council and is promoting a strong development agenda to create sustainable communities in the region. All Arctic states are confronting problems related to diminishing ice coverage and opportunities created for new shipping routes.

The speakers demonstrated that there is no legal vacuum in the Arctic and the legal framework for Arctic governance can be found in the Law of the Sea Convention and existing customary international law; for instance, the rights and obligations pertaining to territorial seas, the extension of the continental shelf and rules applying within the exclusive economic zone of a state. With regards to the legal status of the waters within baselines, Canada is of the view that these are internal waters of Canada over which it exerts navigational and environmental control. Other nations have indicated that it is their view that these waters are considered either territorial sea or an international strait with the applicable law pertaining including the right of innocent passage and transit. The issue remains under discussion. A Polar Code is under development within the International Maritime Organisation and will address international standards with regards to hazards specific to polar shipping.

## Conference Plenary - Friday 28th June

The very last panel of the week was moderated by **Mr Lewis Bumgardner**, ACT-SEE Legal Adviser, and focused on **“Applying Legal Norms in a Developing Security Environment – Perspective of International Organisations”**.



— **Mr Stephen Mathias**, UN Assistant Secretary-General for Legal Affairs, opened the debate with a presentation on **“UN Efforts in Crisis and Conflict Management: Common Threads, Lessons Learned and Future Applications”**. NATO is an important UN partner organization, especially in peace enforcement. While the Security Council refers to NATO in the context of Chapter VIII regional arrangements, it has usually referred to it as an intergovernmental organization. Depending on the Security Council mandate, the Alliance is usually expected to implement enforcement measures in high-intensity military operations, as in Afghanistan and Libya while UN peacekeeping forces or special political missions are tasked to conduct peace building tasks and to assist political processes, etc. The burden should therefore be shared with UN forces conduct peacekeeping, operations using force at the tactical level including to protect civilians while Member States and/or regional organizations undertake enforcement operations using force at the strategic level with Security Council authorization. To enhance accountability, human rights and the rule of law, the UN Security Council has also established ad hoc international criminal tribunals and has adopted thematic resolutions on women, on children and on sexual violence in armed conflicts.

Following Mr Mathias' presentation, **Mr Frederik Naert**, a member of the Legal Service of the Council of the European Union, who advises the EU Military Committee, shared his views on the **“European Union Perspective on Responding to Developing Security Environment”**. The European Communities/Union were not established as security organizations but

gradually acquired competences in the security field. These include the Common Security and Defence Policy (CSDP), which primarily comprises military and civilian crisis management operations but now also includes a mutual assistance clause. They also include many other competences that are relevant to (new and old) security issues, e.g. on internal security, counter-terrorism, sanctions, space, cyber, arms trade, etc.

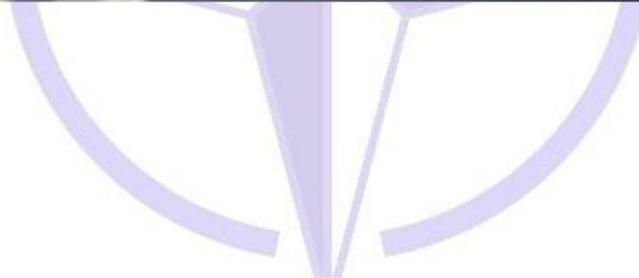
The EU increasingly employs all its instruments in a coordinated manner as part of a “comprehensive approach.” The EU Treaty (TEU) also requires that the EU cooperate in its external relations with like minded States and organizations. Consequently, from the early planning stages the potential role of other actors is taken into account. NATO is one of the EU’s key partners and the TEU explicitly provides that the CSDP must be compatible with the NATO framework.

When the CSDP was created, it was to provide the Europeans with the capacity to act when NATO was not engaged, either autonomously or with recourse to NATO assets. The latter case is covered by the “Berlin+” arrangements which currently apply to operation Althea in Bosnia-Herzegovina. Moreover, permanent EU-NATO consultation mechanisms are in place including joint meetings. Formal cooperation at Brussels level has been limited, but informal cooperation and cooperation in the field has evolved significantly, especially where the EU and NATO have operations in the same theatre (e.g. in Kosovo, Afghanistan and off the coast of Somalia). Legal advisers can facilitate such cooperation.

The EU’s security and defence policy faces various challenges. Internally, its comprehensive objectives and approach have to be implemented through distinct instruments with different decision-making rules and procedures and this may give rise to internal disputes about the competences of the different EU actors involved.

Externally, the relationship between EU law and international law can be problematic (in addition to questions about the relationship between different areas of international law). Also, like NATO, the EU is facing increasing scrutiny and has to address accountability and transparency issues in this field. Finally, one area in particular is the question of attribution for actions of an EU operation to either the EU or member States for the purposes of international responsibility. There is no consensus of this issue but it might be clarified to some extent in the course of the EU’s accession to the ECHR.

In his concluding remarks, **Mr Randall** summed up NATO's relationship with both the EU and the UN as follows: "*NATO works WITH the European Union and FOR the United Nations*". Operation Althea is a good example of the efficient cooperation arrangements between NATO and the EU: the ALTHEA Operation HQ is located at SHAPE with Deputy SACEUR being the Operational Commander for ALTHEA. One last Q&A session ended the 2013 NATO Legal Conference on themes such as the process of drafting a UNSC Resolution, and attribution and command responsibility.



## Social Events

The NATO Legal Conference would not be the same without the social events which punctuate the week.

On Monday evening, all Conference participants and their spouses met at an ice breaker generously hosted by Estonian Ministry of Defence and held at the newly opened Lennusadam, Seaplane Harbour Museum, in Tallinn. This architecturally unique complex was initially completed as part of "Peter the Great's Naval Fortress" in 1916-1917 and displays a British built submarine *Lembit* and a full-scale replica of Short Type 184, a British pre-World War II seaplane.



On Wednesday afternoon, all Conference participants were invited to join a guided tour of the beautiful medieval Old Town of Tallinn, organized and hosted by the Estonian Ministry of Defence. Participants first visited the Tallinn Song Festival Grounds or *Lauluväljak* and then proceeded to the centre of Tallinn.

On Thursday night, the Conference culminated with a stunning Conference Dinner, co-hosted by Estonian Ministry of Defence, and which took place at the beautifully renovated *Kadriorg* Palace. The *Kadriorg* Palace was built for Catherine I of Russia by Peter the Great as a summer residence and currently houses the *Kadriorg* Art Museum displaying a large collection of Russian and Western European art spanning from the 16<sup>th</sup> to 20<sup>th</sup> centuries.



## Conclusion

This year's Conference on the "**Legal Challenges in the Future Security Environment**" was not a vain exercise of futurology. Instead, it provided an excellent opportunity for speakers and participants to exchange their views on the many challenges ahead of NATO. In particular, it seems that military lawyers and legal advisers working in the defence area will have to specifically address the emergence of Human Rights in the area of armed conflict and further specialize in this field. They will also be required to understand the consequences new technologies have on the conduct of operations and should ideally become experts in applying international law in new fields.

Finally, the Conference Organisers express their deepest gratitude to all participants for their active contribution throughout the week.



## Introductory Comments 2013 Tallinn NATO Legal Advisers' Conference

Peter Olson<sup>1</sup>  
NATO HQ Legal Office  
Legal Adviser and Director of Legal Affairs



The annual NATO Legal Advisers' Conference is a genuinely unique event. The entire NATO community is here, ready and able to engage in a week of intense operational, policy & intellectual interaction across the range of legal and law-related policies affecting the Alliance. So far as I am aware our conference is the only

occasion on which an entire NATO "community" gathers -- military and civilian; operators and policymakers; NATO staff and national officials; Defence Ministry and Foreign Ministry; representatives of Allies and of partner countries; and, of course, representatives of intergovernmental organizations, NGOs and outside experts and other friends. Although most of the hundred legal professionals in NATO are with us this week, half of those here are from outside the Organization -- a vivid testimonial to the importance of this gathering, to the value we and our policymaking colleagues and chiefs place on our work, and to the continuing vital role of NATO itself. It is a testimonial as well to the extraordinary work of Lewis Bumgardner, Steve Rose and the entire ACT team in putting this conference together.

This level of interest reflects in part the continuing high level of achievement on the part of the Alliance. As insiders, we may tend to focus on the problems with which we must contend on a daily basis, but even over the past three years there is much to celebrate. NATO has responded to the clear desire of the international community by successfully initiating, conducting and concluding a major military operation to protect civilians in Libya<sup>2</sup>, confirming that on those occasions when military force is required to

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<sup>1</sup> Mr. Olson is the principal legal adviser to Secretary General Anders Fogh Rasmussen, and the Organization's senior legal officer. This article is an adaptation of welcoming remarks made at the 2013 NATO Legal Advisers' Conference held in Tallinn, 24-28 June 2013. The views expressed herein are those of the author and do not necessarily reflect the official views of NATO.

<sup>2</sup> UNSCR 1973 (2011).

carry out the wishes of the international community NATO is capable of providing that muscle. The NATO-led mission in Afghanistan, ISAF, has shifted from a major combat role to one of support following transfer of countrywide security responsibilities to Afghan authorities and is beginning an orderly withdrawal. At the same time, NATO has begun working with the fully sovereign Afghan authorities for a new and very different mission to train, advice and assist in the post-2014 period.<sup>3</sup> Over the same period, NATO has held two summits and promulgated a new Strategic Concept<sup>4</sup> addressing new security challenges such as ballistic missile defence and cyber attack -- all while conducting a series of ambitious internal reforms designed to ensure that the Organization remains "fit for purpose" within the current constrained financial situation.

These developments all reflect the continual ferment within an Alliance that continues to be central to the security not only of its members, but of the world at large. And they all involve unending hard work and sage counsel on the part of the NATO legal community.

This conference is about the challenges that the next several years will present us with, but one broader issue is not directly addressed in our panels -- the changing legal environment within which we work. NATO has long operated in something of a bubble, in which we have taken as a given public appreciation and Allies' support for the Alliance, and in which we have been principally accountable to the members of the Council rather than to the broader public or national parliaments. We have had our own internal law, adapted to our specific needs; even military operations -- our "signature activity" -- has been governed by its own *lex specialis* of international humanitarian law, which we have traditionally seen as fully occupying the legal field when it comes to armed conflict. Moreover, the operational content of IHL has largely been determined by the practice of the Alliance and its members. Finally, our very wide jurisdictional immunities have left us largely free of judicial accountability.<sup>5</sup>

But now that bubble has popped. In the 21st century, defence is not necessarily linked to territorial defence or even to conventional military forces,

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<sup>3</sup> NATO and Afghanistan undertook to work to establish such a mission in the 21 May 2012 Chicago Summit Declaration on Afghanistan, paragraphs 13 and 14.

[http://www.nato.int/cps/en/natolive/official\\_texts\\_87595.htm](http://www.nato.int/cps/en/natolive/official_texts_87595.htm)

<sup>4</sup> Active Engagement, Modern Defence: Strategic Concept for the Defence and Security of the Members of the North Atlantic Treaty Organization, Adopted by Heads of State and Government at the NATO Summit in Lisbon, 19-20 November 2010.

[http://www.nato.int/strategic-concept/pdf/Strat\\_Concept\\_web\\_en.pdf](http://www.nato.int/strategic-concept/pdf/Strat_Concept_web_en.pdf)

<sup>5</sup> Agreement on the Status of the North Atlantic Treaty Organization, National Representatives and International Staff, done at Ottawa 20 September 1951, entered into force 18 May 1954 ("Ottawa Agreement"), Article V; Protocol on the Status of International Military Headquarters Set Up Pursuant to the North Atlantic Treaty, done at Paris 28 August 1952, entered into force 10 April 1954 ("Paris Protocol"), Article XI, paragraph 2.

leaving unclear the relevance of the "NATO model" to the defence requirements of the era. The political landscape is not what it was: the Cold War self-defence model is largely superseded, leaving NATO far more subject to international and domestic criticism and doubts when it acts (and when it does not). In 1999, NATO could act alone on Kosovo: could it, or would it, act alone again today? Or is a UN Security Council Resolution a political, even a legal, *sine qua non* for NATO action? Many assert that NATO is past its "sell-by" date; pragmatically, the question is whether Allies still value NATO enough to pay for it.

The legal environment, too, is mutating in ways that seriously affect NATO. It was long undisputed that the core of public international law was state sovereignty and the relations among states and other subjects of international law such as international organizations; today, however, there is a growing view that human rights are equally -- or even more -- important in structuring public international law.

Once-clear lines between the spheres and enforcement of international and domestic law have become blurred -- particularly here in Europe. This blurring manifests itself in the widespread, if not always clearly articulated, view that there should always be legal accountability for failure to comply with legal obligations. A direct consequence of this perspective is an increasing questioning of the scope and legitimacy of the treaty-based immunities afforded to international organizations -- and relied on heavily by NATO itself. With those questions has come a tendency on the part of courts, particularly lower courts, to narrow or even set aside immunities no matter how definitively stated or solemnly enacted.

Perspectives are changing as well with respect to the status of IHL as the governing body of law with respect to armed conflict. Whether as flat rejection of IHL's status as a superior *lex specialis*, or more subtly by insisting on even strained readings that "reconcile" allegedly inconsistent provisions of IHL with human rights law, or which read human rights law obligations into IHL, there is no question that IHL is under unprecedented challenge -- and cannot simply be applied without reference to other bodies of law as well.

These changes are not simply matters for discussion in academic or NGO circles, but rather are reflected in a growing body of court cases (and even decisions) seeking to privilege human rights considerations. To name just two areas of concern in the courts of Belgium, the host nation for both NATO headquarters in Brussels and SHAPE/ACT in Mons: We have in recent months seen an increasing readiness of local courts considering staff/labor relations cases or commercial disputes involving NATO contractors to simply disregard the very broad immunities established by the Ottawa Agreement and accepted by Belgium as legally binding on all state institutions, including the courts. Even more worryingly, we have seen a series of lawsuits in local

courts that directly challenge NATO operations on the basis of alleged violations of human rights obligations deriving from the European Convention on Human Rights.<sup>6</sup> We have been successful in these cases to date, but the readiness of local courts to seriously consider such claims hints at problems to come.

Finally, there has been a significant growth of supranational bodies exercising jurisdiction over NATO directly or indirectly. In Europe, the European Court of Human Rights has on multiple occasions ruled on staff cases arising from NATO bodies, although NATO is not and cannot be a party to the European Convention and cannot even represent its own interests in Strasbourg. A recent report to the UN by the Office of the Prosecutor at the International Criminal Court purported to "clear" the NATO Council and operational commander of Operation Unified Protector of any war crimes in the Libya operation, but pointedly refused to do the same for the individual nations whose forces conducted that operation even though it could cite no credible basis for imputing any wrongdoing to them.<sup>7</sup> And, finally, Commissions of Inquiry are an increasingly popular methodology for creating ad hoc mechanisms of quasi-judicial accountability, despite the lack of established standards for their mandates or working methods.<sup>8</sup>

These changes are by no means entirely bad: Accountability is entirely consistent with the fundamental democratic values on which the Alliance is based, and the institutions just referred to exist and operate on the basis of decisions involving the members of the Alliance to create them, to extend their jurisdiction and to invoke their use in particular cases. But it is not always clear that in doing so Allies have fully taken into consideration all the implications, including that they may significantly undercut the ability of NATO to act confidently and effectively when called upon.

These developments are realities, and it falls to us as NATO's lawyers to address the challenges they present -- in our advice to policymakers, in defending cases before judicial tribunals, and by engaging in debates over them in both public and professional fora.

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<sup>6</sup> E.g., Filed 10 August 2011 before the Tribunal of First Instance, 11<sup>th</sup> Chamber: *El Hamidi v. NATO* (asserting that the NATO air campaign over Libya violated plaintiffs' rights under Articles 2 and 6 of the European Convention on Human Rights).

<sup>7</sup> Third Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970 (2011), 16 May 2012, paragraphs 51, 55-57. Although it did not identify any credible allegations of violations of applicable law, the Office of the Prosecutor noted the responsibility of individual states to determine whether their own forces had engaged in criminal activities. Paragraph 58.

<sup>8</sup> Commissions of Inquiry have been established, e.g., for Libya, Syria, Darfur, Gaza, Darfur, Sri Lanka, Bahrain, Georgia and many others. See, e.g., EJIL Talk! International Commissions of Inquiry: A New Form of Adjudication?, <http://www.ejiltalk.org/international-commissions-of-inquiry-a-new-form-of-adjudication/>

## The “New” Security Environment and the NATO Legal Community

Stephen Rose<sup>9</sup>  
Former ACT Legal Adviser



It seems only last year and not 2003 that the Headquarters in Norfolk changed from ACLANT [Allied Command Atlantic] to ACT (Allied Command Transformation). ACT's 10<sup>th</sup> anniversary was celebrated in June 2013, a week prior to the Conference, and in the spirit of the new, more austere and business-like NATO, the celebrations were

internal to the staff and not for a larger, outside audience. To reinforce this point on a larger scale, consider the following observations by one of NATO's leaders:

*“One cannot help but feel a rather deep sense of uneasiness when reading about the Alliance in the headlines of many of our leading newspapers in the Western world. They seem to indicate, apart from a few optimistic assessments, that NATO really is in disarray and is undergoing a deep crisis. This is especially true since the transatlantic discussions about the problems of balance of payments and economy have received growing attention and have been linked to defence questions. ....I do not need to elaborate once again on the insufficiency of most of the defence budgets of the individual NATO members, nor on the personnel dilemma which has made it increasingly difficult for some nations to meet their manpower requirements for defence.”<sup>10</sup>*

<sup>9</sup> In a farewell address at the 2013 NATO Legal Conference, Mr. Stephen Rose took the opportunity to reflect on ACT's perspective on the new security environment and the NATO Legal Community. In doing so he shared his own personal observations looking back on more than 10 years of NATO service and also looking ahead. However, the views expressed herein are those of the author and do not necessarily reflect the official views of NATO.

<sup>10</sup> “NATO's Current Military Problems,” *N A T O ' s F i f t e e n N a t i o n s*, Vol. 18, No. 6 (Dec 1973-Jan 1974), p. 20 (transcription of speech delivered by General Johannes Steinhoff, DEU Air Force, Chairman North Atlantic Military Committee, at the NATO Defence College on September 26, 1973).

These remarks seem to echo themes from recent newspaper and journal articles, but in fact the remarks were made 40 years ago by the Chairman of NATO's Military Committee during a speech at the NATO Defence College in September 1973. Truly, the more things change, the more they stay the same! NATO always has been, and always will be, afflicted by resource worries and shortfalls. Ours is an enterprise that continuously seeks the bare minimum of military capacity calculated to deal with security risks to Alliance Nations.

In recent decades, NATO has become involved in a variety of difficult missions. The ongoing challenge is to close the gap between the political level of ambition and the military capabilities needed to meet the Alliance's announced commitments. But even if the internal resource dynamics of NATO remain the same, the evolution of the NATO Headquarters at Norfolk is a useful reminder how much the world itself has changed in the last 25 years. Let's flash back to the year 1990, when the Norfolk command was known as ACLANT. The mission of the 'old' ACLANT was to keep the North Atlantic sea-lanes open for the United States to send reinforcements to Europe in case of a Warsaw Pact attack. After the collapse of the Soviet Union in 1989 and the gradual dissolution of the Warsaw Pact, the missions of NATO's ACLANT command also began to disappear during the 1990s, and ultimately NATO planners created a new command out of the ashes of the old ACLANT – standing up Allied Command Transformation in 2003.

The working idea is that preparing for the future cannot just be a collateral duty, but must have a dedicated cadre of people to prepare NATO to meet emerging threats. Our customers were, and are, Allied Command Operations and the (now) 28 Nations of the Alliance. And, our motto became: "*Our business is your success.*" In the end, ACT can only offer recommendations to Alliance and partner nations – and the recommendations have to be practical and achievable. As a former ACT Commander stated, "*We do not intend to be a transformation museum, whose works are admired, but not used.*"

Let me drop back to an even more fundamental question: Why transform NATO at all? By now, you can all answer this question. The global security environment is changing rapidly, and NATO's level of engagement has expanded significantly over the past 25 years.

A little historical perspective is useful to show the before and after. Think back to 1975, when NATO was organized to defend against an attack by massive Warsaw Pact forces. The queen of the battlefield then was the main battle tank, along with strike aircraft, artillery and tactical nuclear weapons. NATO forces were organized in three army groups, and the planning assumption was for a six-week campaign. Now fast forward 35 years: NATO nations are involved in a 10-year conflict, not six weeks – featuring terrorist attacks instead of tank battles on the North German plains; roadside bombs instead of artillery; and with armed drones replacing strike aircraft for certain missions.

This is a massive shift in perspective. I picked 1975 because my father was an air force officer working at SHAPE then. One of his duties was standardization of equipment among the NATO air forces. In practical terms, this meant ensuring that radio frequencies for air communication were coordinated, and that something as simple as refuelling nozzles at any NATO air base would fit into the wing tanks of any aircraft from Alliance nations.

All these little steps were in pursuit of what? Yes, interoperability. Interoperability is still a key pillar of NATO. The range of threats has changed substantially, but the need for interoperability, especially for expeditionary forces, remains essential. Our ultimate customers are the Alliance nations, and at present, the Nations remain somewhat unhappy with NATO's structure and manning. This unhappiness manifests itself in several ways such as calls for reorganizations and changes in NATO structure.

And what about ACT's future as a strategic headquarters? Some call us the "optional" command; others claim that after 2015 SHAPE and ACO will have more need to re-define their mission and engagement processes than will ACT. The truth probably lies somewhere in between. ACT is always on a tether – seeking to steer a middle course between necessary and acceptable innovation. In practical terms, this process generates a tacit need for ongoing review and re-validation of the ACT mission and performance.

The ongoing challenge with a transformation command is to figure out the right balance between work that pays tactical dividends now and work that has a future, perhaps more strategic payoff. The ratio of long-term vs. short-term work is beginning to shift back again to favour long-term projects as ISAF winds down along a determined operational exit plan.

Let me shift gears for a minute and look at some external security challenges.

When I think of changes in the future security environment, what comes to mind are social and technological changes. Accordingly, I am going to step away from current events to look at future possibilities. From a security aspect, the most salient aspect of our era is that events in one part of the world are far more likely than in the past to have repercussions elsewhere. Anarchy in one nation can create an opportunity for terrorists to find a safe haven from which to operate across any border. A nation that evades global norms and gets away with it creates a precedent that others might follow. A cyber-attack that leads to chaos in one city may inspire copy-cat criminals in another. Due to the reach of modern media, even terrorist groups and pirate bands now have public relations specialists. When and wherever NATO acts (or fails to act), it will do so with a global audience.

Overall, NATO must find its place within a less centralized and more complicated international order. Threats may still be directed at the territory of allies or more likely at their citizens, economic lifelines, infrastructures, troops, and even their values. They could come in hybrid variations that combine the stealth of a terrorist group with the power normally associated with a nation-state – including purchased or purloined weapons of mass destruction or mass effect.

Less predictable is the possibility that research breakthroughs will transform the technological battlefield. The Alliance needs to be alert to potentially disruptive developments in such dynamic areas as information and communication technology, cognitive and biological sciences, robotics, artificial intelligence, and nanotechnology. The most destructive periods of history tend to be those when the means of aggression have gained the upper hand in the art of waging war.

Overall, the pace of technological change seems to be accelerating. The key question is whether this rate of external change will exceed NATO's rate of adaptive change inside its organizational structure. The West is looking at a future characterized by continuous competition by non-military, quasi-military and military means. Hi-tech capabilities are flowing to low-tech people, and states are losing their monopolies of knowledge, resources and power. The spread of instant, global communications, combined with proliferation of motivated, non-state actors who are difficult to detect and deter, means that conflict is no longer an "away" game for Western nations but rather increasingly a "home" game.

Our world in the NATO legal community is a traditional world grounded on sovereignty, international law, boundaries, and kinetic warfare. But that world is being eroded by a myriad of forces, forces that are everywhere and nowhere. The operational environments of the future will be the traditional land, sea, air, and space – plus cyber space and an emerging domain of the biosphere, dealing with the body, health, genetic engineering, new forms of life, and far more sophisticated man-machine interfaces. If you think of life as a software program to be decoded and manipulated, then our children will be the first generation to benefit fully from the revolution in bio-engineering – and the last generation to be safe from the destructive potential of such advances. The biological threats emerging in the 21<sup>st</sup> Century will ultimately make the current consternation and concerns over cyber look like a kindergarten exercise.

NATO's core functions are collective defence, crisis management and cooperative security. These will continue to be the guideposts, but as NATO transitions during the next two years from a highly demanding campaign posture to a contingency basis, how will this affect training, doctrine, and NATO's infrastructure? At the strategic level, NATO has evolved over the past 20 years from a static defensive force to an expeditionary force – from a defensive alliance to a security alliance. It is clear that our security interests are no longer tied solely to the territorial integrity of member States. But it is also clear that NATO remains a regional, not a global organization – although with global interests – acknowledging that its resources and authority are limited.

The general principle is that NATO's commitments should never exceed what the Alliance can do. And, the era of specialized military contributions within the Alliance is well under way – driven by unrelenting budget austerity. The way forward also points to permanent pooling of training, logistics and maintenance. Pooling of procurement remains a sensitive subject, and Nations need to work out how to strike a balance between sovereignty and solidarity.

What does all this historical change and flux mean for our legal community? During the Cold War era, the NATO legal community operated mostly in the margins. It was a scary time, but lawyers were not at the centre of the discussion. They dealt mainly with garrison support: SOFA issues, exercise support, discipline, claims, etc. If the Cold War had ever turned hot, the role of lawyers was minimal. Since 1993, the NATO chessboard has grown in complexity and ambiguity. Fortunately, most lawyers thrive in the grey zone. We don't need production work fed into our inboxes in small, daily chunks; we can cope with ambiguity, uncertainty, and complex issues of risk management. It is a lively, interesting time to be a NATO legal advisor. Conversely, operational command is no longer as satisfying as it used to be. There is always a crowd of curious on-lookers when NATO conducts an operation – media, interest groups, and after-action sharpshooters.

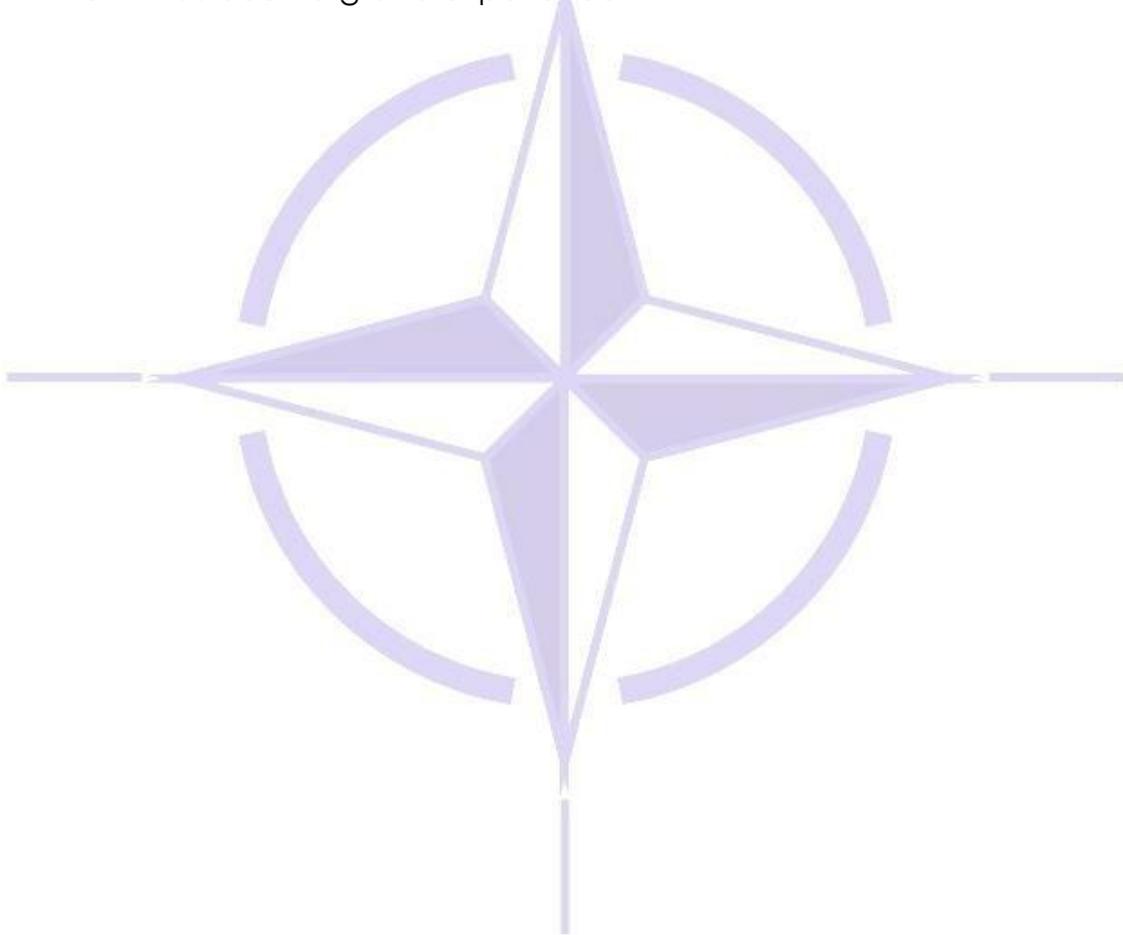
The tools of legal work have also changed in the past 25 years. My predecessor, Ron Howard, did not like computers. He wrote out most everything in longhand on paper, and then it was typed up by a paralegal. This approach is unthinkable in the modern age. But now I too am part of the dinosaur squad, comfortable with computers and e-mail, but not with social media such as Facebook, twitter, and instant messaging.

Most of us are familiar with Mr. Lewis Bumgardner's crusade to bring CLOVIS [Comprehensive Legal Overview Virtual Information System] into our daily lives as a tool to access and share the collective knowledge of our legal community. Mr. Bumgardner is on the right track: we do need to break down the stove-pipes and share more institutionally, rather than just share based on a network of personal or national relationships.

There is too much turnover, especially among uniformed members of our community, to rely on personal affiliations as the primary linchpin of our collective knowledge.

But, in truth, personal contacts do shape our ability to function. With very few exceptions, I have been impressed by the positive attitude and professional abilities of all my colleagues over the past 13 years. Overall, this is a strong community with lots of experience and talent.

At bottom, the NATO legal community remains a confederation of overlapping fiefdoms connected by a common mission, and bound together by network of personal and professional relationships. If we are judged by the company we keep, then I have enjoyed a truly exhilarating 13 years with this family. Thank you all for being my colleagues and sharing the adventure with me. It has been a grand experience.



## UN Effort in Crisis and Conflict Management: Common Threads, Lessons Learned, and Future Applications

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### Introduction

It goes without saying that NATO as well as regional and other intergovernmental organizations are an indispensable partner in the United Nations' efforts to maintain international peace and security. This is reflected, among other places, in the September 2008 Joint Statement establishing a framework for expanded consultation and cooperation.<sup>2</sup> While NATO-UN cooperation includes a broad range of efforts relating to combating piracy and counter-terrorism, promoting arms control and non-proliferation, and ensuring efficient and effective disaster relief, I will focus my remarks on UN-NATO cooperation in the areas of peace enforcement and peacekeeping.<sup>3</sup>

### Legal grounds

Chapter VIII of the Charter provides the constitutional basis for the involvement of regional and other intergovernmental organizations in the maintenance of international peace and security.<sup>4</sup> In accordance with Article 52 of Chapter VIII, the Security Council encourages "*the development of peaceful settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or*

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<sup>1</sup>This article is an adjusted version of a presentation delivered by Mr. Matthias during the 2013 NATO Legal Conference in Tallinn, Estonia. The article is being published with Mr. Matthias' permission. The views expressed herein are those of the author and do not necessarily reflect the official views of NATO.

<sup>2</sup> The Joint Statement. [http://www.nato.int/cps/en/natolive/topics\\_50321.htm](http://www.nato.int/cps/en/natolive/topics_50321.htm)

<sup>3</sup> [http://www.nato.int/cps/en/natolive/topics\\_50321.htm](http://www.nato.int/cps/en/natolive/topics_50321.htm)

<sup>4</sup> A situation in which NATO members would engage in collective self-defense under the UN Charter is not considered in this paper.

*by reference from the Security Council". Pursuant to Article 53, "the Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council..."*

In this connection, I should note that the UN uses the term regional organizations interchangeably with regional arrangements and agencies. These include African Union (AU), Economic Community of West African States (ECOWAS), League of Arab States (LAS), Organization of American States (OAS), and the Organization for Security and Cooperation in Europe (OSCE) among others. The Security Council has generally treated the European Union (EU) as regional arrangement falling within the terms of Chapter VIII. In respect of NATO, the Security Council has sometimes referred to regional and other international organizations including the NATO in the scope of its decisions or other pronouncements; as such, while the Security Council generally does not appear to have treated NATO as a regional organization, it has nonetheless sometimes, and perhaps increasingly, included it in the context of Chapter VIII cooperation.

In this regard, it has to be noted that an exponential increase in the cooperation between the Security Council and regional arrangements and other international organizations in the areas of conflict prevention, crisis management and post-conflict resolution has been observed.

The resolutions and presidential statements adopted by the Security Council since the late 1990's reveal an increased reliance on such organizations and recognition of their capacity and role in the maintenance of international peace and security in both the pacific settlement of disputes under Article 52 including peacekeeping as well as in peace enforcement under Article 53 of the UN Charter.

The UN-NATO cooperation, in particular, has taken several forms:

**1. Traditionally, where the Security Council has authorized enforcement action under Chapter VII of the UN Charter, it has authorized States, individually or collectively, either through ad hoc coalitions or by regional or other organizations (including NATO) to take the necessary action, including through the use of military force.**

This was for example the most recently the case in Libya. In its resolution 1973 (2011), determining that the situation in Libya continued to constitute a threat to international peace and security, and acting under Chapter VII of the UN Charter, in its para 4 the Security Council authorized Member States, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary

measures, “to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory”. The Security Council further authorized Member States, acting nationally or through regional organizations or arrangements, to take all necessary measures to enforce compliance with the no fly zone established in that same resolution in order to help protect civilians.

It is worth mentioning that the first Resolution 1970 (2011) on Libya — tabled in late February, demanding an end to the violence, referring the situation to the International Criminal Court and applying sanctions — had been adopted unanimously. Resolution 1973 (2011), imposing a no-fly zone, and authorizing “all necessary measures” to protect civilians, was adopted with 10 votes.

As you will be aware, there have been questions raised concerning the implementation of the mandate provided in resolution 1973. Several Council members, including Russia and China, who had not voted in favour of the resolution, have taken the position that implementation exceeded the authorization and “veered towards supporting regime change”<sup>5</sup>. Several States, in particular from the African Union, were also critical arguing that “non-coercive measures were not given sufficient time to demonstrate results in Libya”.<sup>6</sup>

As noted by the Secretary-General in his 2012 Report on the Responsibility to Protect (A/66/874-S/2012/578), “whatever the specific merits of these arguments, it is important that the international community learn from these experiences and that concerns expressed by Member States are taken into account in the future.... Regarding the use of force by NATO in Libya, the International Commission of Inquiry on Libya mandated by the Human Rights Council found that NATO had “conducted a highly precise campaign with a demonstrable determination to avoid civilian casualties” (see A/HRC/19/68). NATO has given a detailed account of its targeting decisions and, in particular, its focus on minimizing civilian casualties. Notwithstanding these efforts, civilian lives were lost during the air campaign. The Libyan experience serves to remind us of the importance of military actors taking all possible precautions to avoid situations that place civilians at risk, in accordance with international law governing the conduct of armed hostilities, and investigating possible violations of international law committed in such contexts. The experience also reaffirms the importance of early action aimed at protecting populations so as to prevent the need for the use of force.”<sup>7</sup>

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<sup>5</sup> See DPI Press Release SC/10518 <http://www.un.org/News/Press/docs/2012/sc10518.doc.htm>

<sup>6</sup> See Paragraph 54 of the Report of the Secretary-General “Responsibility to protect: timely and decisive response” (A/66/874-S/2012/578).

<sup>7</sup> Ibid, See paragraphs 54-55.

The experience in Libya appears to have informed the positions of certain Member States on the situation in Syria, at least partially, and in some cases may have provided a basis on which to block their support for UN action to prevent and respond to the crimes being committed against civilians in Syria.

**2. There is another category of cases in which the Security Council has relied on parallel forces, including KFOR in Kosovo and ISAF in Afghanistan. In these cases, the Security Council has separated the mandates of the UN special political missions or peacekeeping operations from the enforcement operations carried out by States or organizations.**

### **2.1. NATO in Kosovo**

Notwithstanding the divide among the five permanent members of the Security Council concerning the legality of the use of force by NATO in respect of Kosovo in the period before the adoption of resolution 1244, the Security Council, in its [Resolution 1244](#) (1999) authorized Member States and relevant international organizations to establish the international security presence in Kosovo “commonly known as KFOR”, as set out in point 4 of Annex 2, with all necessary means to fulfil its responsibilities under that resolution. The principles for agreement addressed in Point 4 explicitly stated that “*the international security presence with substantial NATO participation must be deployed under unified command and control and authorized to establish a safe environment for all people in Kosovo and to facilitate the safe return to their homes of all displaced persons and refugees*”.

In that resolution, the Security Council also authorized the UN Secretary-General to establish an international civil presence in Kosovo – the United Nations Interim Administration Mission in Kosovo (UNMIK) – in order to provide an interim administration for Kosovo under which the people of Kosovo could enjoy substantial autonomy. Its task was unprecedented in complexity and scope; the Security Council vested UNMIK with authority over the territory and people of Kosovo, including all legislative and executive powers and administration of the judiciary.

Following the declaration of independence by the Kosovo authorities on 17 February 2008 and the entry into force of the new constitution on 15 June 2008, the tasks of UNMIK have significantly been modified. Since then, KFOR has remained on the ground to provide necessary security presence in Kosovo and the objective of UNMIK has been the promotion of security, stability and respect for human rights in Kosovo through engagement with all communities in Kosovo, including the leadership in Pristina and Belgrade, and with regional and international actors, including the European Union Rule of Law Mission in Kosovo (EULEX), the Organization for Security and Cooperation in Europe (OSCE) and of course NATO.

## 2.2. NATO in Afghanistan

The NATO-led International Security Assistance Force (ISAF) assists the Afghan authorities in the provision of security and cooperates with the UN Assistance Mission in Afghanistan (UNAMA) in support of the ongoing transition to full Afghan leadership and ownership.

NATO's role in Afghanistan followed the adoption of the Bonn Agreement of 5 December 2001 and Security Council resolution 1386 (2001) under Chapter VII of the UN Charter authorizing the establishment of ISAF as an ad-hoc multinational military coalition of Member States with the mandate to use all necessary means, including the use of force, to assist the Afghan authorities in the maintenance of security in Kabul and the surrounding areas in order to enable the Afghan authorities as well as UN personnel to operate in a secure environment.

On 4 January 2002, ISAF and the Interim Administration of Afghanistan signed a Military Technical Agreement (MTA) which outlined both parties' obligations and, along with the Security Council resolutions, provided additional guidance for ISAF operations. In August 2003, upon request of the UN and the Government of Afghanistan and following the North Atlantic Council decision on 16 April 2003, NATO became responsible for the command, coordination and planning of the force, including the provision of a force commander and headquarters on the ground in Afghanistan. On 13 October 2003, in its resolution 1510 (2003), the Security Council voted unanimously for the "*progressive expansion of ISAF to other urban centres and other areas beyond Kabul*". In 2010, and as a result of bilateral agreement with the Government of Afghanistan and NATO welcomed by the UN Security Council, ISAF began a process of gradual transfer of full security responsibility in Afghanistan to the Afghan National Security Forces (ANSF) country-wide by the end of 2014.

It should be noted that, following the adoption of the Bonn Agreement, the Security Council also established the United Nations Assistance Mission to Afghanistan (UNAMA) as a special political mission in its resolution 1401 (2002), to provide good offices to Afghan political processes and to coordinate international efforts in support of Afghan's reconstruction. In its most recent resolution 2096 (2013), the Security Council further mandated UNAMA to cooperate with ISAF "to optimize civil-military coordination". UNAMA, headed by the Special Representative of the Secretary-General, and ISAF, under NATO command and control, do this through regular meetings and exchanges both at UN Headquarters and in the field.

The international military forces in Afghanistan (represented by ISAF) are scheduled to withdraw in 2014. A gradual transition to Afghan leadership is progressing. As a result of the NATO summit<sup>8</sup> and Tokyo conference<sup>9</sup>, consensus is emerging on post-2014 levels of continuing international support to Afghan security and development needs.

As ISAF prepares to withdraw from Afghanistan, it is appropriate to look back on its successes and challenges. One of the primary concerns from the legal point of view is the issue of civilian casualties. In its most recent resolution on Afghanistan (resolution 2096), the Security Council recognized that “significant progress has been made by ISAF and other international forces in minimizing the risk of civilian casualties, as reaffirmed in the 19 February 2013 UNAMA report on the protection of civilians in armed conflict”.<sup>10</sup> The experience in Afghanistan, like the experience in Libya, serves to remind us of the importance of military actors taking all possible precautions to avoid situations that place civilians at risk, and investigating possible violations of international law when they are alleged to have been committed<sup>11</sup>. Such efforts are not only morally and legally sound but also of great practical necessity in ensuring the credibility and viability of international action in the hearts and minds of the local populations.

### **Analysis and Lessons Learned**

Finally, I would like to touch upon recent developments in UN peacekeeping in order to illustrate the advantages of reliance on and/or cooperation with other organizations, including NATO, in peace enforcement.

In the wake of the tragic failures in Rwanda and Srebrenica, the Security Council has increasingly resorted to Chapter VII authorizations allowing UN peacekeeping forces to use force beyond self-defence albeit at the tactical level primarily but not exclusively to protect civilians under imminent threat of physical violence. Newer mandates requiring the UN peacekeepers to conduct offensive combat operations at the strategic level, however, whether independently or in support of Government forces, have serious repercussions for the UN's perceived impartiality by opposition groups and local populations. More importantly, as observed by the Secretary-General in his recent report to the Security Council on options for Mali, “it is critical that a clear distinction be maintained between the core peacekeeping tasks of [a UN mission] ...and the peace enforcement and counter-terrorism activities of the parallel force .... Any blurring of this distinction would place severe constraints on the ability of United Nations humanitarian, development and human rights personnel to safely do their work”.<sup>12</sup>

<sup>8</sup> In the Chicago Summit Declaration issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Chicago on 20 May 2012.

<sup>9</sup> Tokyo Conference on Afghanistan/The Tokyo Declaration, Partnership for Self-Reliance in Afghanistan From Transition to Transformation adopted on July 8, 2012.

<sup>10</sup> See OP31 of UNSCR 2096 (2013).

<sup>11</sup> See footnote 4 above.

<sup>12</sup> See paragraph 100 of the Report of the Secretary-General on the situation in Mali(S/2013/189).

Moreover, from a legal perspective, the sustained or active engagement of UN forces in armed hostilities raises serious questions under international humanitarian law both in terms of the impact on the protected status of the peacekeepers as well as on the criminal accountability of those who attack them.

As a former senior UN official, once rightly noted, "It is extremely difficult to make war and peace with the same people on the same territory at the same time."<sup>13</sup> We in the UN Secretariat have sought to contribute to the discussion on how much should be done by UN peacekeeping, and what parallel and additional roles will be taken up by other partners including NATO.

The Secretariat has consistently maintained that UN peacekeeping operations are not an enforcement tool. While it is widely understood that they may use force at the tactical level, with the authorization of the Security Council, where enforcement action is necessary, it has traditionally been carried out by ad hoc coalitions of Member States or regional or other organizations acting under United Nations Security Council authorization.

Direct enforcement action by Member States achieves profound and impressive results, whether individually as we saw in Mali with the French Operation Serval, or collectively as we saw with NATO's intervention in Libya. However, it has been noted that the most militarily capable Member States are selective about where and under what conditions they are willing to deploy. They face growing domestic political and financial constraints in this regard. While forces from neighbouring countries or sub-regional organizations may have the political will to deploy for the necessary duration and to sustain heavy casualties, they can lack the necessary capabilities. Both sets of States are easily suspected of or perceived as advancing their own political or security agendas.

On the opposite spectrum, and as observed by the Secretary-General in his recent report on options for Mali to the Security Council, "*the United Nations is not configured to conduct [combat] operations at a strategic level, nor are its peacekeepers typically trained, equipped or experienced in the kind of operations that would be required to implement such a mandate. Moreover, an effort of this nature falls well outside the scope of the United Nations peacekeeping doctrine. It is also doubtful that the Organization would have the ability to absorb the numbers of casualties that could be incurred through such combat operations*".<sup>14</sup>

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<sup>13</sup> Quoted in Prager, K., 'The limits of peacekeeping', *Time*, 23 Oct. 1995, p. 36.

<sup>14</sup> See paragraph 70 of the Report of the Secretary-General on the situation in Mali (S/2013/189).

## Conclusion

The preliminary assessment reveals that ultimately partnerships where peacekeeping mandates are separate but parallel or complementary to peace enforcement activities may be in the best interest of all concerned. Allowing the UN and NATO, and/or other organizations, each to maximize their comparative advantage in their contribution to the maintenance of international peace and security while sharing the burden and bringing the added value and credibility of concerted international action.

Clearly, there are legal and policy challenges, advantages and disadvantages for any of the above options. One thing that is certain, however, is that a genuine consensus among the members of the

Security Council, in particular the five permanent members, is desirable, whenever possible, to ensure legitimacy, clarity of objectives and sustainable political and financial commitment thereto.

