

# NATO Legal Gazette

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## SPECIAL INTEREST ARTICLES

- **The NATO SOFA at SIXTY:  
Heading for Retirement or Has  
Life Just Begun?** By **Dr. Aurel  
Sari**

- **The NATO Agency Reform  
and its Legal Implications** by  
**Ms. Catheline Remy**

- **Generic Guidelines for the  
Use of Force Against Child  
Soldiers in Peace Operations**  
by **LTC Francesco Leandro**

- **Book Review : A History of  
the Laws of War** by **Mr.  
Vincent Roobaert**

- **Democratization through UN  
Peacekeeping Operations?  
Peacekeeping Regimes** by  
**Mr. Andres Munoz-Mosquera**

## **SPOTLIGHT :**

- **LTC John McCabe, FC  
Heidelberg**
- **LTC Frédéric Tuset-Anret,  
ACT**

- **Hail and Farewell**

## GENERAL INTEREST

- **In the News**
- **Calendar of Upcoming  
Events**

## Introduction

Dear Colleagues and persons interested in NATO,

With great pleasure we publish the 27<sup>th</sup> issue of the NATO Legal Gazette. Each issue is sustained by authors who wish to share their knowledge on topics of interest to our extended Alliance legal community. This issue is greatly benefitted by three substantive articles in addition to a book review and shorter updates.

In his first article for the NATO Legal Gazette Dr. Aurel Sari, a Lecturer in Law at the University of Exeter, poses the provocative question of whether the NATO SOFA is losing or gaining utility. This is a scholarly and significant article that merits the attention of all legal personnel who address questions arising from status of forces agreements.

Ms. Catheline Remy is a legal adviser for the Belgian Ministry of Defence who participated in the legal task force who helped direct NATO's effort to reorganize NATO's 14 agencies into, for now, five. Her thoughtful description offers valuable insight into what continues to be a dynamic process of change.

Lieutenant Colonel Francesco Leandro, who is a returning contributor the NATO Legal Gazette, as a result of his own research shares with us his proposal (with charts) for generic guidelines concerning the use of force against child soldiers.

Our most prolific contributor, Vincent Roobaert, reviews the three volume 2011 Hart Publication, *A History of the Rules of War*.

Andres Munoz-Mosquera, who successfully completed his studies at The Fletcher School of Law and Diplomacy, provides a short note describing the book that his thesis became.

As usual, this issue spotlights members of our NATO Legal Community, offers hails and farewells of our always changing colleagues as well as providing general news and information about upcoming events.

Finally, for persons in NATO or national legal posts, the 2012 NATO Legal Conference will be held from 24-28 September in Tirana, Albania. More information about this event will be passed through official channels, but mark your calendars for this event to one of NATO's newest members—and Lonely Planet's #1 travel destination.

Sincerely,

Sherrod Lewis Bumgardner  
Legal Adviser, Allied Command Transformation Staff Element Europe

## The NATO SOFA at SIXTY: Heading for Retirement or Has Life Just Begun?

Dr Aurel Sari (\*)

### Introduction

On 4 March 2005, US troops shot and killed Nicola Calipari, an Italian military intelligence officer, at a roadblock in Iraq. Earlier that day, Calipari and a fellow officer had recovered an Italian hostage from her kidnappers in downtown Baghdad. On their way back to Baghdad International Airport, their car approached a blocking position manned by US forces and came under fire. All three occupants of the car were wounded, while Calipari suffered fatal injuries and died at the scene. A joint US-Italian investigation launched into the incident failed to arrive at shared final conclusions. Whereas the US military determined that the troops involved acted in accordance with the applicable rules of engagement and therefore bore no responsibility for any wrongdoing, the Italian investigators concluded that the shooting occurred as a result of a series of mistakes, including what they considered to be the misguided placement of the blocking position. Proceedings were subsequently instituted against the US soldier responsible for firing the shots, Specialist Mario Lozano, to be tried *in absentia* for murder and attempted murder in Rome.

The facts of this case presented the Italian courts with something of a dilemma, for the proceedings concerned a situation where one sending State, Italy, sought to exercise its criminal jurisdiction over a member of the armed forces belonging to another sending State, the United States, for acts committed by the latter against its personnel and nationals in the territory of a third State, namely Iraq. Considering that the majority of jurisdictional conflicts involving foreign forces arise between sending States and receiving States, the *Lozano* case presented a somewhat unusual set of circumstances which prompted the Italian courts to base their decisions on the applicable rules of customary international law. In its judgment delivered in October 2007, the Court of Assizes of Rome dismissed the case at first instance, holding that the jurisdiction enjoyed by the United States pursuant to the principle of the 'law of the flag' (*principio del diritto di bandiera*) prevailed over the passive jurisdiction claimed by Italy.<sup>1</sup> This ruling was affirmed by the Court of Cassation in July 2008, but on very different grounds.<sup>2</sup> According to the Court of Cassation, the evolution of international practice since the end of the Second World War has led to the progressive limitation of the principle of the law of the flag: current international law consequently gives effect to the territorial jurisdiction of the receiving State alongside the principle of the law of the flag, as evidenced by the arrangements governing the exercise of criminal jurisdiction under Article VII of the NATO SOFA of 1951. While the Court of Cassation therefore rejected the idea that the United States benefited from primary jurisdiction pursuant to the law of the flag, it held that Lozano was nevertheless exempt from the Italian criminal process under the more general principle of functional immunity *ratione materiae*.

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(\*) Lecturer in Law, University of Exeter.

<sup>1</sup> Judgment No 07/21, *Italy v. Mario Luiz Lozano*, 14 October 2007 (Corte di Assise di Roma) (on file with the author).

<sup>2</sup> Judgment No 31171/2008, *Italy v. Mario Luiz Lozano*, 24 July 2008 (Corte Suprema di Cassazione), *Oxford Reports on International Law in Domestic Courts* 1085 (IT 2008).

## The NATO SOFA at SIXTY: Heading for Retirement or Has Life Just Begun?

These judgments raise some fascinating questions, including whether or not the two courts should have recognized the exclusive nature of US jurisdiction on the basis of the combined effect of CPA Order No 17 of 27 June 2004 and Security Council Resolution 1546 of 8 June 2004. The decision of the Court of Cassation also raises a more general question about the evolution of the rules of international law governing the status of foreign military deployments. The picture painted by the Court of Cassation is one of seamless continuity, where the traditional principle of the law of the flag was gradually infused with greater respect for territorial sovereignty during the course of the twentieth century, eventually to be supplanted by the more progressive principle of concurrent jurisdiction as manifested in the NATO SOFA. This story of course closely echoes the evolution of the law of State immunity from an absolute doctrine of immunity to a more restrictive theory. Attractive as it sounds, the storyline is a false one. This short contribution aims to add a bit more colour to the portrait painted by the Court of Cassation and pinpoint the proper place of the NATO SOFA within it.

### No Uniform Regime

It is tempting to search for common principles in order to make sense of the maze of different legal instruments and regimes that govern the status of foreign armed forces under international law. While there can be little doubt that international practice does rest on certain universal principles, such as the principle of functional immunity, a closer reading suggests that despite a high degree of consistency, international practice is not uniform. In particular, as I have argued elsewhere,<sup>3</sup> no universal treaty regime has emerged in international practice. This is so for three main reasons. First, States send members of their armed forces abroad for a wide variety of reasons, for instance to participate in joint exercises, to provide technical assistance or to contribute to peace support operations. Legal arrangements appropriate for one kind of mission may not be suitable for other types of deployments. Second, the operational circumstances of foreign military deployments may differ drastically from one case to another and raise different security considerations. This needs to be reflected in the applicable status arrangements. Finally, status of forces agreements are the product of political bargaining. More influential States are sometimes capable of securing for themselves conditions of stay which are more favourable than those they would be prepared to grant to foreign forces present within their own territory. The combined effect of the diverse objectives pursued by foreign military deployments, their different operational environments as well as the political disparities between sending States and receiving States means that status of forces agreements differ widely in their terms. No single treaty regime has consequently emerged to govern the status of all foreign military deployments in a universal manner.

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<sup>3</sup> [A. Sari, 'Status of Forces and Status of Mission Agreements under the ESDP: The EU's Evolving Practice', \(2008\) 19 EJIL 67, at 69.](#)

## The NATO SOFA at SIXTY: Heading for Retirement or Has Life Just Begun?

Despite this lack of uniformity, there is nonetheless a considerable degree of consistency in international practice. By entering into similar status arrangements under similar circumstances on successive occasions, States and international organizations have built up a substantial body of practice relating to certain types of military deployments. For present purposes, three groups of agreements may be distinguished in this respect. First, status of forces agreements concluded in the context of structured military cooperation between politically equal partners have frequently been based on the NATO SOFA of 1951.<sup>4</sup> The Member States of the EU have thus modelled the EU SOFA of 2003,<sup>5</sup> which governs the legal position of their military and civilian staff deployed within the territory of the EU for the purposes of European security and defence cooperation, on the relevant provisions of the NATO SOFA. Second, the UN and other international actors have developed distinct arrangements regulating the privileges and immunities of peace support operations, which for the most part reflect the terms of the UN Model SOFA of 1990.<sup>6</sup> Finally, the third group includes all other legal arrangements, such as agreements conferring broader rights of exclusive jurisdiction outside the context of peace operations,<sup>7</sup> instruments relying on the provisions of the Vienna Convention on Diplomatic Relations<sup>8</sup> and agreements which for one reason or another are atypical.<sup>9</sup>

Generally speaking, these different types of agreements offer different answers to the same basic question: how to reconcile the divergent legal interests of sending States and receiving States, in particular as regards the exercise of jurisdiction over military personnel present abroad. The fact that different categories of status of forces agreements can be distinguished along these lines suggests two points. International practice relating to status of forces agreements has not followed a linear path of development as the Court of Cassation suggested in the *Lozano* case, but is more nuanced. This in turn implies that the NATO SOFA does not represent the evolutionary pinnacle of the law of visiting forces, but serves as an appropriate precedent in more limited circumstances only.

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<sup>4</sup> *Agreement between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces*, 19 June 1951, 199 UNTS 67.

<sup>5</sup> *EU SOFA*, Brussels, 17 November 2003, [OJ \[2003\] C 321/6](#).

<sup>6</sup> UN doc. A/45/594, *Model status-of-forces agreement for peace-keeping operations: Report of the Secretary-General*, 9 October 1990.

<sup>7</sup> E.g. *Vereinbarung zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Vereinigten Republik Tansania über die Rechtsstellung der an der Übung 'TANZANITE 2002' beteiligten Streitkräfte der Bundeswehr in der Vereinigten Republik Tansania*, 22 January 2002, BGBl (2002) II 621.

<sup>8</sup> E.g. *Agreement regarding the Status of United States Military and Civilian Personnel of the United States Department of Defense Who may be present in Rwanda in Connection with the Military Airlift of Rwandan Military Forces in Support of Operations in Darfur and Future Mutually Agreed Activities*, 11 July 2005, KAV 7344.

<sup>9</sup> Cf. *Convention relating to the Conditions for French Technical Military Assistance in the Training, Organization and Equipment of the Comorian Forces and the Training of Comorian Soldiers at Military Schools and Instruction Centres in France*, 4 August 1979, 1309 UNTS 178.

## The NATO SOFA at SIXTY: Heading for Retirement or Has Life Just Begun?

### What's So Special About the NATO SOFA?

Status of forces agreements are not a recent invention: they have existed as formal instruments of international law for at least two hundred years.<sup>10</sup> Whereas status agreements initially operated on a strictly bilateral level, the onset of the Cold War in the late 1940s created an entirely new set of circumstances calling for the conclusion of the first multilateral agreements: for the first time ever, friendly armed forces were stationed abroad in large numbers on a semi-permanent basis for the purposes of collective security and self-defence in times of peace. The first multilateral agreement drawn up to reflect these novel circumstances was the Brussels Treaty SOFA, adopted on 21 December 1949.<sup>11</sup>

The Brussels Treaty SOFA was designed to define the legal status of forces operating in the context of the Brussels Treaty for collective self-defence concluded between Belgium, France, Luxembourg, the Netherlands and the United Kingdom in 1948,<sup>12</sup> in particular the military personnel stationed at the joint military headquarters in Fontainebleau in France.<sup>13</sup> It was agreed at the very beginning of the drafting process that the aim of the negotiations was to arrive at 'a general agreement between the Five Powers on a basis of complete reciprocity'.<sup>14</sup> Although the final text leaned heavily on earlier bilateral practice, the significance of the Brussels Treaty SOFA lay in the fact that it adapted these bilateral arrangements for a multilateral setting, in particular by laying down rules governing the exercise of jurisdiction over foreign personnel which were designed to balance the competing legal interests of sending States and receiving States in an equitable manner and on the basis of complete reciprocity. The Brussels Treaty SOFA thus set up a system of concurrent jurisdiction under which conflicts of competence in criminal matters were to be resolved primarily by administrative action, while civil claims against foreign forces were to be settled by the receiving State on the basis of its own laws, with the costs of satisfying these claims to be distributed between the States Parties.

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<sup>10</sup> See, for example, the *Convention between Prussia and Russia for the Passage of Troops*, 28 May 1815, 64 CTS 363.

<sup>11</sup> *Agreement Relative to the Status of Members of the Armed Forces of the Brussels Treaty Powers*, 21 December 1949, (1950) Cmd. 7868.

<sup>12</sup> *Treaty for Collaboration in Economic, Social and Cultural Matters and for Collective Self-defence*, 17 March 1948, 19 UNTS 53.

<sup>13</sup> *Minutes of the 47th Meeting of the Permanent Commission*, 7 January 1949, DG/1/13/65, at 3. On file with the author.

<sup>14</sup> *Report from the Military Committee*, 15 June 1949, DG/1/13/65, at 19 (emphasis added). On file with the author.

## The NATO SOFA at SIXTY: Heading for Retirement or Has Life Just Begun?

Although the Brussels Treaty SOFA lost its political significance following the conclusion of the North Atlantic Treaty and never entered into force, it shaped modern legal practice by serving as a basis for the NATO SOFA.<sup>15</sup> Indeed, the *travaux préparatoires* of the NATO SOFA suggests that the existence of the Brussels Treaty SOFA played a rather important role in facilitating early agreement on its jurisdictional provisions. In particular, by upholding the principle of concurrent jurisdiction underlying the Brussels Treaty SOFA, but at the same time enabling sending States to exercise their jurisdiction in those types of cases where their interests were most directly affected,<sup>16</sup> the drafters of the NATO SOFA were able to devise a more flexible system for the allocation of the right to exercise jurisdiction 'which each side could accept as being equitable' and which subsequently became Article VII of the NATO SOFA.<sup>17</sup> Whereas the transition from bilateral to multilateral status of forces agreements thus began with the Brussels Treaty SOFA, it was the conclusion of the NATO SOFA in June 1951 which put the principle of complete reciprocity into practice and thereby laid the foundations for the multilateral period of foreign military deployments.

### But is it Custom?

Unlike the Brussels Treaty SOFA, the NATO SOFA has not only generated a vast amount of practice among its signatories, but it has also served as a model for a large number of other bilateral and multilateral status of forces agreements. Two factors played a key role in this regard. The fact that the United States, by far the most prolific sending State within the Alliance, became a Contracting Party ensured that the NATO SOFA had a much broader impact than the Brussels Treaty SOFA was ever likely to achieve. Even more importantly, the jurisdictional provisions of the NATO SOFA were widely perceived to have struck a fair balance between the interests of sending States and receiving States, and for this reason have attained a high degree of legitimacy even among States not parties to the Agreement.

The NATO SOFA's substantial impact on international cooperation raises the question of whether or not it reflects customary international law. While there can be little doubt that its individual terms did not codify pre-existing rules of customary international law at the time of their adoption in 1951, it is equally obvious that they gave effect to certain general principles of international law, such as the principle of State sovereignty and State responsibility, and of course continue to do so. The more relevant question, therefore, is whether since 1951 any specific provisions of the NATO SOFA have attained the status of rules of customary international law as a result of subsequent practice. Considering the very large number of agreements which replicate or otherwise reproduce the jurisdictional arrangements laid down in the NATO SOFA, there exists a considerable body of State practice to support the argument that at least certain provisions of the NATO SOFA may have passed into custom. Nevertheless, this argument encounters some practical and conceptual difficulties.<sup>18</sup>

<sup>16</sup> MS(J)-R(51) 2, 8 February 1951, in *ibid.*, at paras. 14-17.

<sup>17</sup> D-R(51) 15, 2 March 1951, in *ibid.*

<sup>18</sup> See also M. S. Johnson, 'NATO SOFA: Enunciating Customary International Law or Just a Model, and What Does the Future Portend?', in H. Fischer et al. (eds), *Krisensicherung und Humanitärer Schutz - Crisis Management and Humanitarian Protection: Festschrift für Dieter Fleck* (2004) 287, esp. at 290-292.

## The NATO SOFA at SIXTY: Heading for Retirement or Has Life Just Begun?

First, whilst the volume and consistency of pertinent State practice may be sufficient to count towards the development of rules of customary international law, proving the existence of corresponding *opinio juris* is rather more difficult, at least if one takes their *opinio juris* seriously. Second, the existence of several distinct legal regimes governing the status of different types of foreign forces demonstrates that, contrary to the Court of Cassation's pronouncement in *Lozano*, the provisions of the NATO SOFA could not have evolved into rules of customary international law applicable to all foreign military deployments.<sup>19</sup> If certain parts of the NATO SOFA have passed into custom, they did so only with respect to deployments comparable to those for which the NATO SOFA was designed, namely the deployment of armed forces in the territory of politically equal partners in the context of structured military cooperation. The necessarily imprecise nature of this caveat means that the field of application of any rules of customary international law arising from the NATO SOFA cannot be stated with absolute precision. Third, the NATO SOFA has stood as a beacon of legal reciprocity in relations between sending States and receiving States since 1951.<sup>20</sup>

In the case of the NATO SOFA, legal reciprocity came about as a consequence of the political equality among its signatories. However, States finding themselves in fundamentally different political circumstances may still demand to benefit from the principle of complete reciprocity and insist on the application of rules derived from the NATO SOFA in an attempt to achieve political parity. Here, legal reciprocity becomes a means to political equality. As a matter of strict law, nothing precludes States from pursuing such a policy, since as *jus dispositivum*, any rules of customary international law which may have arisen from the NATO SOFA may be displaced between the parties of an international agreement to this effect. In other words, even if under customary international law the principle of complete reciprocity only ought to be applied in operational conditions comparable to those of the NATO SOFA, the existence of such customary rules could not prevent the interim government of a post-conflict country from seeking to subject a multinational peace operation present within its territory to the terms of the NATO SOFA, using a random example.

None of this is to say that the question of whether the NATO SOFA forms part of customary international law admits no answer or is of no significance. On the contrary: understanding the NATO SOFA's contribution to the development of customary international law is not only critical to a better understanding of the general principles that govern the legal status of foreign military deployments under all circumstances, but it also provides a basis for questioning the legitimacy of attempts to extend the principle of complete reciprocity to entirely different operational circumstances.

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<sup>19</sup> To similar effect, see D. Fleck, 'Introduction', in D. Fleck (ed.) *The Handbook of the Law of Visiting Forces* (2001) 3, at 5–7.

<sup>20</sup> This sometimes lead to agreements based on different principles to be revised and brought in line with the NATO SOFA, e.g. R. A. Porrata-Doria, 'The Philippine Bases and Status of Forces Agreement: Lessons for the Future', (1992) 137 *Military Law Review* 67, at 70–81.

## The NATO SOFA at SIXTY: Heading for Retirement or Has Life Just Begun?

### Conclusion

For over six decades now, the NATO SOFA has served as an effective legal framework for the deployment of large numbers of military forces and associated personnel without a single amendment to its terms. Even cautious observers would describe this as a major achievement. What, then, accounts for this success? The recipe seems to be simple enough: focus on getting the basic principles right and leave most of the details to be worked out later in supplementing agreements. While the continued health of the NATO SOFA depends on the vitality of the North Atlantic Treaty, its impact and legacy extends far beyond the Alliance. Whether or not the NATO SOFA is headed for retirement or remains in force for another sixty years, it has attained a degree of international recognition and legitimacy which would seem to guarantee its continued influence on international practice for the foreseeable future.

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# The NATO Agency Reform and its Legal Implications

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## 1. Introduction

At the Prague Summit in November 2002, Heads of States and Governments commissioned the Deputy Secretary General to lead a review of the roles of NATO's Agencies, to establish a more efficient and effective NATO Command Structure, more rapidly deployable forces and to adopt across the Alliance, increasingly flexible, innovative and pragmatic approaches to today's security needs.

The Deputy Secretary General's report was approved by the North Atlantic Council (NAC) in December 2004 and the bulk of its recommendations were implemented during 2005. The ongoing NATO Agencies review was accelerated and broadened with the specific aim of reviewing costs, financial programmes and processes of all common-funded agencies.

NATO currently has 14 Agencies located in 7 member states which provide essential capabilities and services to NATO Armed Forces. NATO Agencies are the executive bodies of their respective NATO Procurement, Logistics or Service Organisations (NPLSOs) responsible for tasks such as the development and/or acquisition of major defence systems and in-service support of NATO and national assets. They are established by the NAC to meet collective requirements of some or all members of NATO in the field of procurement, logistics and any other form of services and support.

The goal of the Agencies Reform is to enhance efficiency and effectiveness in the delivery of capabilities and services, to achieve greater synergy between similar functions and to increase transparency and accountability. The Agencies Reform should ultimately bring savings, in particular, with regard to overhead costs and sharing of support services.

## 2. The Development of the New Agencies Structure

The NATO Agencies Reform Team (NART) was created in order to prepare a proposal for consolidation, including a clear outline of the new Agencies structure, with the goal of seeking approval of this new structure and its governance at the Lisbon Summit in November 2010. The NART was composed of International Staff, International Military Staff and Voluntary National Contributions.

The level of ambition of the Agencies Reform had grown due to the financial crisis and the operational challenges. At the Lisbon Summit, Heads of States and Governments approved the consolidation and rationalisation of the functions and programmes of NATO Agencies into three Agencies, following three major programmatic themes: Procurement, Support and Communications and Information, as well as the consolidation of general support services under a Shared Services initiative.

The NART developed business cases supported by resource analyses for each of the new Agencies and the Shared Services initiative, working closely with Agencies Staff and Nations. On this basis, an implementation plan was noted by the Defence Ministers in June 2010 and the proposed way ahead was approved with the business cases serving as supporting documentation for the implementation phase of Agencies Reform, which will lead to a new Agency structure by 1st July 2012.

## The NATO Agency Reform and its Legal Implications

### 3. The Agencies Reform

The new NATO Procurement Organisation will act as a holding body including an Agency with a small staff in Brussels, into which the current multinational Agencies (NETMA (NATO Eurofighter and Tornado Management Agency), NAHEMA (NATO Helicopter Design and Development Production and Logistics Management Agency) and part of NAGSMA (NATO Alliance Ground Surveillance Management Agency) and NAPMA (NATO Airborne Early Warning & Control Programme Management Agency) ) could be progressively integrated with the agreement of the participating nations.

The new NATO Support Organisation, including an Agency with its Headquarters in Capellen (Luxembourg) would be responsible for functions currently executed by CEPMA (Central Europe Pipeline Management Agency), NAMA (NATO Airlift Management Agency), NAMSA (NATO Maintenance and Supply Agency) and part of NAPMA.

The new NATO Communication and Information (C&I) Organisation, including an Agency based in Brussels, will take over the functions currently performed by NCSA (NATO CIS Services Agency), NC3A (NATO Consultation, Command & Control Agency), NACMA (NATO Air Command and Control System (ACCS) Management Agency), the ALTBMD (Active Layered Theatre Ballistic Missile Defence) Programme Office and Information Technology support functions at NATO HQ and the NATO Agencies to the maximum extent feasible.

Additionally, an Office of the Shared Services will be established and initially located at NATO HQ, in order to create a Shared Services environment between NATO Agencies, NATO HQ and other NATO bodies.

A new Science and Technology Organisation will incorporate functions of the NATO Research and Technology Agency (RTA) and the NATO Undersea Research Center (NURC) and will be led by a Chief Scientist located at NATO HQ.

The NATO Standardisation Agency will continue to function but will be evaluated in 2014 to determine if it can be re-organised or absorbed by another Organisation.

### 4. The NART, the CMST and the LTF

In April 2011, the NART established a Legal Task Force (LTF), composed of national legal experts, members of the NART and legal advisers from the NATO HQ Office of the Legal Adviser<sup>1</sup>. The NART LTF was also well supported by the Legal Advisers or other experts from NATO Agencies.

The NART LTF first identified the legal aspects of the Agencies Reform which are related to the business cases for the new Agencies. The initial focus was on how the current Charters may relate to the new Charters and to what extent the current Programme Memoranda of Understanding (PMOUs) may need to be reviewed as a result.

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<sup>1</sup> Composition of the NART LTF: Christian VON BUTTLAR (IS), Eddy GROENEN (IS – OLA), Laura MAGLIA DEAVIN (IS – OLA), Albert KLEIN (VNC – US), Keith ANDERSON (VNC – US), Walid BENALI (VNC – FR), Rolf LIEUWEN (VNC – NE), Catheline REMY (VNC – BE), Barbara GREGORI (IS).

## The NATO Agency Reform and its Legal Implications

Human Resources issues, agreements with third parties such as contracts with industry and host nation agreements were addressed, taking into consideration the legal issues raised by Nations and current Agencies.

The NART LTF issued an initial report in May 2010 addressing several of the legal issues to the details possible. The means and capabilities available to the LTF made it impossible to make a detailed examination of all agreements, contracts or other legal documents concerning all Agencies affected by the Reform. The findings of the initial report were based on sample texts and examples taken from various Agencies.

The Change Management Support Team (CMST) inherited the role of the disbanded NART in June 2011. The CMST's main role and responsibilities were to prepare the constitutive documents of the new Organisations (the Charters), to support the recruiting process of the General Managers, to prepare a roadmap, to provide information on transition costs, to present estimates for funding and to elaborate a communication plan.

Within the CMST, the LTF<sup>2</sup> has been established to study legal issues that might have an impact on the Reform process, including those associated with the transition phase. Some areas highlighted in the initial report required further analysis and attention. In addition, the LTF supported the drafting process of the Charters.

### 5. The Legal Personality of NATO

First the LTF addressed the NATO legal personality issue that helps to comprehend the Agencies Reform from a legal point of view and then solve the subsequent legal issues. But beforehand, we have summarized some applicable provisions in order to understand what a NATO Agency is.

Article 9 of the North Atlantic Treaty provides to the NAC the authority to establish subsidiary bodies. NPLSOs are subsidiary bodies created within the framework of NATO by the NAC pursuant to Article 9 of the North Atlantic Treaty and within the meaning of the Agreement on the Status of the North Atlantic Treaty Organization, National Representatives and International Staff, done in Ottawa on 20 September 1951 (the Ottawa Agreement).

The NPLSOs are established with a clearly defined organisational, administrative and financial independence and are established with a view to meeting to the best advantage the collective requirements of some or all member states of the Alliance in the fields of procurement, logistics and any other form of services, support, or cooperation in any other related field as the NAC may decide. NPLSOs comprise a Board of Directors, composed of representatives of NATO nations, and an Executive Body, called the "Agency", composed of a General Manager and his staff.

Each NPLSO constitutes an integral part of NATO. It shares the international personality of NATO, as well as the juridical personality possessed by NATO by virtue of Article IV of the Ottawa Agreement. The juridical personality of every NPLSO is an intrinsic part of that of NATO and cannot be distinguished from it.

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<sup>2</sup> Composition of the CMST LTF: Christian VON BUTTLAR (IS), Albert KLEIN (VNC – US), Catheline REMY (VNC – BE), in collaboration with Eddy GROENEN (IS – OLA).

## The NATO Agency Reform and its Legal Implications

### 6. The Charters Drafting Process

The new Organisations will be created under the Ottawa Agreement by the NAC, through the approval of a Charter. The CMST drafted the Charters taking into consideration the guidelines approved by Nations in C-M(2009)0079 entitled "Regulations for NATO Procurement, Logistics or Service Organisations." Those Charters address, among other things, the legal status, the authority to conclude contracts and agreements, the ownership of assets, responsibility and liabilities, the governance structures, as well as the delegation of authority, financial management and the participation of non-NATO Nations. With regard to the existing Organisations, the CMST addressed these matters to the satisfaction of Nations in the Charters.

The old Charters will be revoked thereby dissolving the existing Organisations, with the new Charters then creating the new Organisations. Since these Organisations will share in the juridical personality of NATO, all rights and obligations of the old Organisations will be transferred to, and assumed by, the new Organisations under the same terms and conditions.

Following the NAC decisions, NATO or the existing Organisations will have to inform NATO Nations and Partner Nations that the arrangements or agreements they have with NATO or an Organisation will continue to be applied and honoured, within NATO, by the newly established Organisations under the same terms and conditions. The transfer can also be confirmed in a more formal document between the Nation concerned and NATO or the new Organisation.

All contracts entered into with industry by the existing Organisations will automatically be transferred to the new Organisations. The existing Organisations will have to inform their contractors that following the internal changes/reorganisation within NATO, their contracts will be further executed under the same terms and conditions as was done by the previous Organisations.

The Agencies Reform is considered to be an internal reorganisation of the Agencies structure. The transfer of functions, programmes, personnel and assets will be prepared and executed in order to fully preserve all services and capabilities of the existing Agencies. Considering that the new Organisations participate in the same single legal personality of NATO, all the existing agreements and contracts will automatically be transferred and assumed by the new Organisations.

### 7. The CMST's Work

The CMST participates in the Provisional Agency Supervisory Boards (PASBs), the provisional Boards of Directors of the future Organisations who work on the development of the Charters. The Conference of National Armaments Directors (CNAD) is the PASB of the NATO Procurement Organisation. The PASBs report to the Defence Policy and Planning Committee (reinforced) (DPPC(R)), the Committee at the policy level that also discusses the governance of the future Organisations.

## The NATO Agency Reform and its Legal Implications

The LTF advises the CMST on legal issues and answers questions coming from Nations. The LTF tries to harmonize the respective Charters in order to clarify the comprehension of the documents and facilitates its interpretation. The different services, capabilities and structure of the future Organisations complicate the work of the LTF that has to take these differences into account. But the LTF did not identify any unsolvable issues during its work.

The LTF will continue to work on the further development of Agencies Reform by supporting the CMST until the Charters are approved. The LTF will also help to facilitate the transition from the existing Organisations to the new ones by proposing some transitional arrangements that could be approved by the NAC in order to formalize the transfer of the rights and obligations into the new Organisations.

### 8. Way Ahead

The Charters drafting process is still ongoing. The DPPC(R) will submit the finalised Charters to the NAC for approval. The Nations are discussing the last details of the future structure of the new Organisations and their respective Charters. The CMST puts all its efforts into this drafting process and tries to accommodate Nations in order to provide finalised Charters that satisfy all Member Nations and can be approved by the NAC.

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Structure of current Agencies can be found at the following link: <http://www.nato.int/cps/en/SID-4296A040-692D82B6/natolive/structure.htm>

# Generic Guidelines for the Use of Force Against Child Soldiers in Peace Operations

LTC Francisco Leandro(\*)

## 1- Looking behind

Who is a child soldier? <sup>1</sup>

The starting question for this essay is: who is a child soldier? Often we have seen answers to this question based on an erroneous perspective, bringing peculiar questions, especially from the military viewpoint. Frequently, the only angle used is to choose between shooting to kill or shooting to scare. For the legal purpose of this paper, the accurate answer conveys a short but steady message: a child soldier is always a victim to be looked after and is never to be held accountable. Child soldiering is dangerous, irrational, destructive, hopeless, disturbing, traumatizing, cruel, violent, and unleashes a horrendous magnitude of evil. Child soldiering is probably one of the cruelest monstrosities and together with sexual violence represents a token of the moral standards breakdown in modern armed conflicts. The dark hours of the night consist of a particularly easy field for sexual and gender based violence, namely against hopeless girls and boys, committed by perpetrators and their aids and abettors. Silence is the black veil of their shame.

To fire back without considering other options or to walk away are the easiest options, but certainly not always the best ones. Personal commitment, leadership and preparedness are driving factors to succeed in protecting children associated to armed groups, which is a standard duty of all peacekeepers. None of these keystones lay a hand on the fundamental right of self-defense or prevent the use of armed force to stop the imminent attack or a direct armed attack. Nevertheless, complex problems call for comprehensive solutions. The challenges placed by children associated with armed groups, especially in the context of sexual gender based violence are to be seen through the glasses of the biding principle of the "best interest of the minor."

The adoption of the use of force guidelines (ROE<sup>2</sup>) against child soldiers in peace operations must begin by learning what leads children to become soldiers. In fact, understanding what a child soldier is gives the information we need to guide our military on how to act when confronted with minors posing an imminent or direct threat to them. It has been said many times that there are children forced to join armed groups. It has also been reported that the large majority joins the armed groups without being forced to do so. Foremost, a child soldier is a product of five main combined factors: politics, economics, social/physiological, technological and tactical. Let's briefly review each one of them:

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(\*) LTC Francisco Leandro has written this essay as individual research, not for official attribution.

<sup>1</sup> Cape Town Principles and best practices (1997) - 'Child soldier' in this document is any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers and anyone accompanying such groups, other than family members. The definition includes girls recruited for sexual purposes and for forced marriage. It does not, therefore, only refer to a child who is carrying or has carried arms – Source: [http://www.unicef.org/emerg/files/Cape\\_Town\\_Principles\(1\).pdf](http://www.unicef.org/emerg/files/Cape_Town_Principles(1).pdf)

<sup>2</sup> Rules of Engagement (ROE)

## Generic Guidelines for the Use of Force Against Child Soldiers in Peace Operations

- **Politics** – *The general lack of public authority that characterizes failed States generates the likelihood to have children enlisted in armed activities. Forced recruiting activities, despite being an international serious crime, are frequently a product of the criminal enterprises, which include individuals holding de facto power positions exercised over civilian populations, based either on an ongoing threat against people’s lives or on family constraints. This type of power tends to be exercised even after the termination of the armed conflict;*
- **Economics** – *The expression “abject poverty” says almost everything. Hopeless poverty is indeed the starting point to understand that being a child soldier is not an option, but the only course in the context of manipulation, starvation, lack of access to food, absence of hope and is, consequently, a matter of survival. Sometimes, it represents more than the struggle of an individual to stay alive, and it is indeed a family or a community decision based on the lack of basic needs that imperils the entire community. Likewise, their labor, especially when used to collect minerals such as coltan<sup>3</sup> or diamonds, might represent an important source of financial support for armed groups, allowing them to be self-sufficient in ammunitions and other military supplies;*
- **Social/physiological** – *Children are at an age when they obey and emulate elders. To bear a weapon is equivalent to holding a superior status of power of indiscriminate use. Carrying a gun is frequently a way of “publicity”, demonstrating a real “manhood” to gain status and respect”<sup>4</sup>. Uniforms, hats, weapons, drugs, alcohol, media and propaganda, the possibility of exercising power over peers, the opportunity to belong to a group, the idea of seeking protection in a male-dominated society which rewards mistreatment of women, sometimes voodoo or other sorcery practices, constant beatings, the deliberate family killings, absurd humiliations, and finally the absence of hope, are among the many reasons why a child is forced to join armed groups;*
- **Technological** – *It might appear odd but technology applied to small weapons transformed them into “war toys-tools,” if we consider their light weight, their dimensions and operation procedures. New weapons are handy, small and made of steel and plastic. In short, small arms with soft recoil. Consequently, they are easily operated by small hands, tiny bodies, and well washed-out brains. Arms control failures, together with illegal trade and consequently the impunity of the dealers, provide good support to the armed activities of children. There are, indeed, small arms of large human destruction;*

<sup>3</sup> Coltan is the industrial name for columbite-tantalit, which is a dull black metallic mineral used to manufacture electronics such as cell phones, DVD players, video games and computers.

<sup>4</sup> UNITAR/GCDCAF - Security Sector Reform Foundation Course, Lesson 2, 2011, (gender issues) pg. 8.

## Generic Guidelines for the Use of Force Against Child Soldiers in Peace Operations

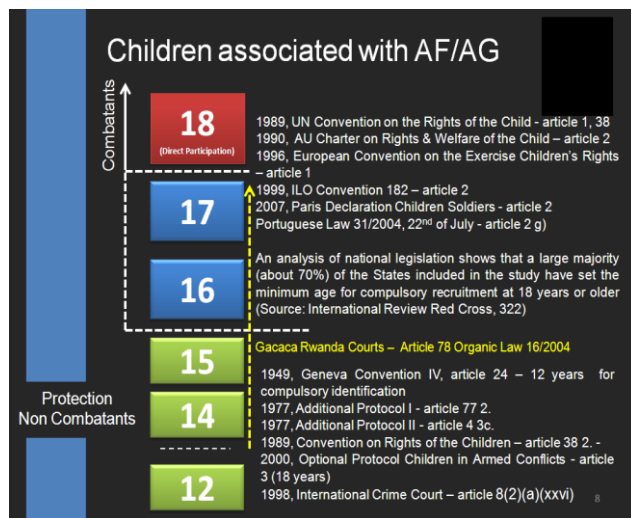
- **Tactical** (military tactics) – From the military point of view, children offer valuable features in non-international conflicts worldwide: training, logistics, intelligence, and operational engagement:
  - ✓ *Training* – Departing from possessing nothing and having everything to lose, children are easy to train as they require minimal resources. They tend to be quick learners because their lives depend on it, they require short-term training mostly using the «on the job training» formula, and violence is used as a method to produce good and fast results. Seen as instruments they are toughened by other children under senior juveniles' supervision and the results are immediately measured in action. They often pay for their mistakes with their lives.
  - ✓ *Logistics* – Children eat less, drink less, are not paid, serve as pack animals, are able to cook, can collect wood without drawing attention, they normally have no next of kin to worry about them and consequently are replaceable and disposable. They do not need uniforms, and they are able to carry out logistic activities without leaving a military trace and because of that they are considered perfect couriers. Moreover, girl soldiers are also great fighters, the best logisticians, and serve as instruments of sexual satisfaction for regular troops.
  - ✓ *Intelligence* – Children are children. They might be playing and collecting information. They might be moving from one place to another to visit their communities and collecting information. Forced enlisted children know how to count tracks and personnel. Children have a good visual memory and can easily identify weapons, numbers, types of vehicles, colors, locations, faces, inscriptions, and marks. Children seemed to be harmless: they move, they stay, they play, they ask, they beg... and in the end they almost always report to get compensation.
  - ✓ *Operational engagement* – Children are remarkable frontline fighters. They have a particular notion of danger. They like games, they are small, move fast, shoot accurately, and are merciless. They hide easily, they pay attention to mines, and they bring new ethical issues to the foreign contingents each time they directly engage with peace forces and there is a self-defense reaction.

In summary, the roots of child soldiering are many and the exploitation of those roots is an unlawful individual conduct. Becoming an enlisted child is not an option based on free will, nor is it a conscious act of engaging in conduct of a given nature. The criminal responsibility of an act carried out by a child soldier lies with the indirect perpetrator who acts by means of executing criminal acts through minors: the recruiter or the conscripting agent and the adult exercising effective control over the child.



## Generic Guidelines for the Use of Force Against Child Soldiers in Peace Operations

Enlisting and recruiting children amounts to a crime committed against children<sup>5</sup> in situations of armed conflict<sup>6</sup> even though the adulthood concept has not yet reached universal consensus;<sup>7</sup> international treaty law (article 7, 1)<sup>8</sup> and customary law consider child soldiers victims, not offenders.<sup>9</sup> For the purpose of this essay we tend to assume that generally speaking a child is a human being who is under 18 years of age, acknowledging that other solutions are to be taken into consideration. They are victims who sometimes bear weapons and directly participate in the use of armed force. In this context, *direct participation* is understood "by covering both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage, and the use of children as decoys, couriers or placed at military checkpoints. It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer's "married" accommodation. However, the use of children in direct support functions such as carrying supplies to the front line, or activities at the front line itself, would be included within the terminology.<sup>10</sup>



Charter 1 – Children Associated with Armed Forces

<sup>5</sup> For reference it might be useful to see the Statement by the President of the Security Council, 17<sup>th</sup> of July 2008.

<sup>6</sup> Security Council Resolution 1612 (2005) on Children and Armed Conflicts, §1.

<sup>7</sup> Article 1° of the Convention on the Rights of the Child specifies that, for the purposes of that Convention, a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier. International Crime Court Statute articles 8 2. b) xxvi and 8 2. e) vii – Conscripting or enlisting children under the age of fifteen years...

<sup>8</sup> Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, adopted and opened for signature, ratification and accession by General Assembly Resolution A/RES/54/263 of 25<sup>th</sup> of May 2000 and entered into force on 12<sup>th</sup> of February 2002 – Source: <http://www2.ohchr.org/english/law/crc-conflict.html>

<sup>9</sup> It is largely accepted that the use of child soldiers in armed conflicts amounts to a violation of their rights and should be considered a war crime (OAU Council of Ministers, Resolution 1659 (1996), ICC Statute, SCSL Statute, and national legislation without known official practice). But besides that, it is necessary to consider that in case of direct participation in armed conflicts, children continue to benefit from a special protection to which they are entitled, whether they are prisoners of war or not (Additional Protocol I, article 77 3), adopted by consensus).

<sup>10</sup> Draft Statute of ICC quoted by Jean-Marie Henckaerts and Louise Doswald-Beck in Customary International Humanitarian Law, ICRC, 2009, pg. 478.

## Generic Guidelines for the Use of Force Against Child Soldiers in Peace Operations

Children in combat are victims who enjoy special protection (article 77 Additional Protocol I), even if engaged in the direct use of armed force (article 77 3. Additional Protocol I and article 4 3. Additional Protocol II), and consequently raise moral dilemmas every time that peace forces exercise the legitimate right of self-defense. Therefore, this essay will consider them unaccountable victims in any circumstance, adhering to the International Labor Organization Convention 182 (1999), which considers child soldiering the worst form of child labor.

### 2- *The Best Prepared Never Works Alone*

*We are looking for comprehensive solutions,  
and not for the easy ones.*

“The United Nations and regional peacekeeping forces have had to confront situations involving child victims or participants in hostilities and have, at times, demonstrated an inadequate ability to react in accordance with international standards. Tense circumstances, vague mandates, and a lack of training and operating guidelines have produced lamentable encounters between peacekeepers and youth”<sup>11</sup>. The responsibility to create the instruments to control and to hold to account peacekeeping forces lies with the United Nations Security Council<sup>12</sup>. But each field commander bears the responsibility to enforce those instruments and they also should be held accountable.

To make the linkage between the legal instruments and the field commanders' action work, we must develop the following areas as shown on the diagram 2, bearing in mind that we are looking for comprehensive solutions, and not for the easy ones: we need to prepare the battlefield, we ought to prepare the engagement, we have to learn how to exercise targeting & self-defense, and how to “help break” the recruitment chain. Let's shortly review each of them:

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<sup>11</sup> Harvard Human Rights Journal - The Protection of Children in Peacemaking and Peacekeeping Processes, pg. 148. Source: <http://www.law.harvard.edu/students/orgs/hrj/iss12/cohn.shtml>

<sup>12</sup> The Council has condemned the use and recruitment of child soldiers in several Security Council Resolutions, namely 1261 (1999), 1308 (2000), 1314 (2000), 1325 (2000), 1379 (2001), 1460 (2003), 1539 (2004), and 1612 (2005). Children and armed conflict 1. strongly condemns the recruitment and use of child soldiers by parties to armed conflict in violation of international obligations applicable to them and all other violations and abuses committed against children in situations of armed conflict.

## Generic Guidelines for the Use of Force Against Child Soldiers in Peace Operations



Diagram 2 – The Steps

- Preparing the battlefield** – To prepare the battlefield in peace operations we must start by understanding the individual role and the context of peacekeeping forces in terms of the balance between their operational missions and the respect of Human Rights and International Humanitarian Law. This balance is particularly important, as mentioned by the Capstone Doctrine,<sup>13</sup> regarding the protection of women, children and civilians. Children remain children even if they are carrying out intelligence activities or aiming a loaded weapon at a peacekeeper. In addition, enlisted children are victims to be protected from their recruiters and are to be returned to their youth as soon as possible. In this field, peacekeepers bear special responsibilities. Likewise, it is important to learn about the situation of women and girl soldiers who seek protection from a sexual relation with a man with a gun, to avoid becoming a collective sex object. These «husbands» often play the role of protector from physical hardship, food scarcity, dangerous activities, and random rapes. A girl soldier is indeed a victim among the victims, especially in traditional and conservative societies at war. Both girls and young boys “are outside or at the periphery of the system soldiers use to classify enemies (or adversaries). The confrontation with child soldiers disrupts our paradigms of professional soldiering and cultural values and beliefs we share on children”<sup>14</sup>, but is a fact of modern armed conflicts.

<sup>13</sup> Chapter 1, *The Normative Framework for United Nations Peacekeeping Operations*, pg. 16 – Source: [http://pbpu.unlb.org/pbps/Library/Capstone\\_Doctrine\\_ENG.pdf](http://pbpu.unlb.org/pbps/Library/Capstone_Doctrine_ENG.pdf)

<sup>14</sup> RTO-TM-HFM-159, pg 6-1.

## Generic Guidelines for the Use of Force Against Child Soldiers in Peace Operations

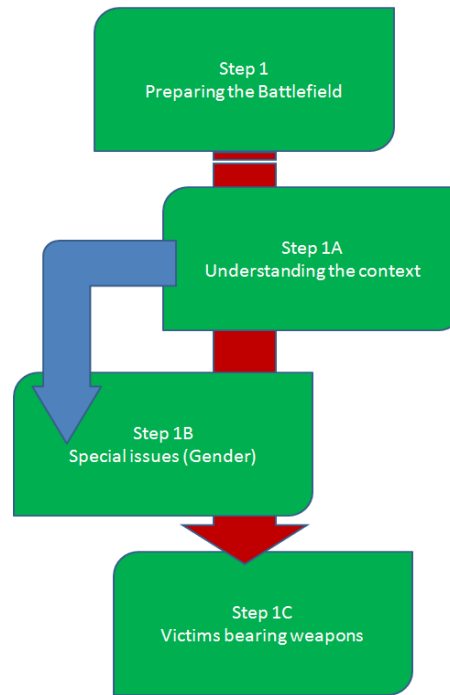


Diagram 3 – Step 1

- Preparing the engagement** – Preparing an engagement is a common activity involving the entire chain of command. As early as possible, a peacekeeping force must direct its headquarters staff to collect intelligence on the situation of the child soldiers, which will be used to prepare operational tools to deal with the situation, and as evidence to bring the recruiters before a court of law. The human intelligence plays a significant role in the collection and information analysis through the production of operational tools. These joint endeavors are to be brought together in a coordinated matter Information Operations (INFOPS), Psychological Operations (PSYOPS), Media and Civil-Military Cooperation (CIMIC) with two main objectives: to reduce the likelihood of direct armed confrontation with armed child soldiers and to support their return to local communities. Furthermore, the master message should be that “everything possible is done to avoid and limit child soldiers from becoming casualties, but that lethal force may be the only option; that juvenile detainees and escapees are being treated in accordance with international law and great care; that the guilt and blame lie with the people who recruit children as soldiers”<sup>15</sup>. At the same time mission legal reference documents are to be studied and clarified in order to establish confidence among the military deployed. The following simple and easy rules adopted by the large majority of the regular armies (TTP<sup>16</sup> or Soldier’s Card style), written in the native language of those peacekeepers are a must.

<sup>15</sup> RTO-TM-HFM-159, pg 6-3

<sup>16</sup> Tactical, Techniques and Procedures

## Generic Guidelines for the Use of Force Against Child Soldiers in Peace Operations

Proportional responses are also available to deal with different levels of threat: Warnings;

- ✓ Detention and interrogation;
- ✓ Self-defense procedures;
- ✓ Use of non-lethal force;
- ✓ Use of lethal force.

Finally, live rehearsal training situations should provide each individual the procedures and the confidence to act correctly. New equipment needs might be identified, namely those related to the application of non-lethal force.

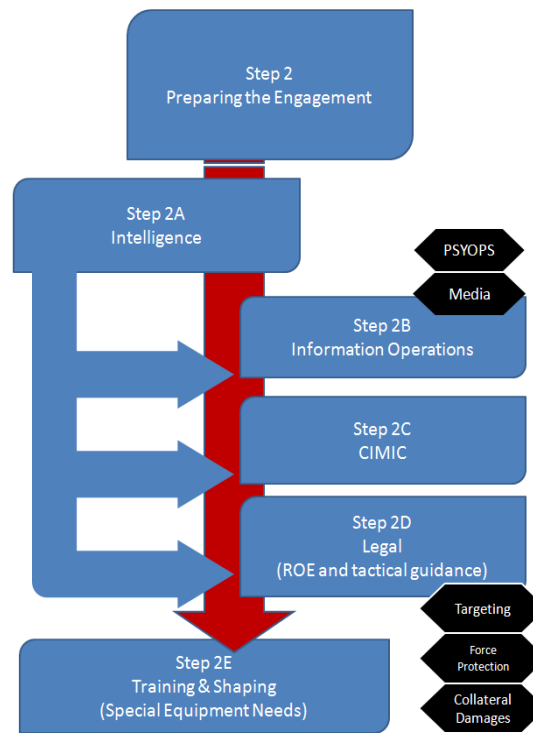


Diagram 4 – Step 2

- **Targeting & Self-Defense** – Targeting and self-defense require an extensive application of the International Humanitarian Law principles. Consequently, the discrimination principle, in addition to its regular legal application, should also be used to discriminate inside the military target, between regular soldiers and child soldiers, or at least to avoid/reduce collateral damages on child soldiers. The minimum use of force and the proportionality principle are to be used together and combined with non-lethal options in case of direct engagement. The diagram 5 illustrates several options depending upon positive child soldier identification and non-positive child soldier identification. In the first case (child soldier positive identification) option 1 and 2 are designed to stop a current armed threat, a hostile act or a hostile intent, without the use of deadly force. In the second (non-positive identification of a child soldier but having information or having witnessed that they are engaged on the current use of armed force), option 1 and 2 are typical engagement options in self-defense.

## Generic Guidelines for the Use of Force Against Child Soldiers in Peace Operations

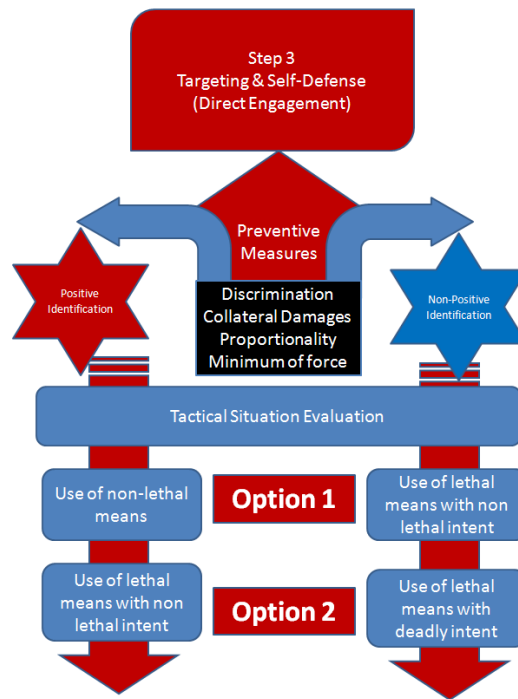


Diagram 5 – Step 3

- Supporting the recruitment chain breaking** – An essential aspect of dealing with child soldiering is indeed breaking the recruitment chain. We understand that this is not a typical military function in terms of peacekeeping units. Nevertheless, after being detained by peacekeepers, a child soldier needs immediate medical and psychological care. Being well looked after represents the first opportunity to act together with specialized agents and to involve directly other specialized actors. The first step to breaking this chain is to provide a minimum of psychological comfort to these minors. After that, military should assist their disarmament, and reintegration, working side by side with technical teams on the ground. Strictly speaking, it is difficult to talk about demobilization, if we do not consider them as regular combatants. Education, society, gender and labor are among the issues to be dealt with in close coordination with the other United Nations agents, in a medium/long-term process, which aims at providing former combatants with sustainable livelihoods. At the same time, the security sector reform procedures will help to put in place a conflict exit strategy to restore the effective functioning of the State institutions.

## Generic Guidelines for the Use of Force Against Child Soldiers in Peace Operations

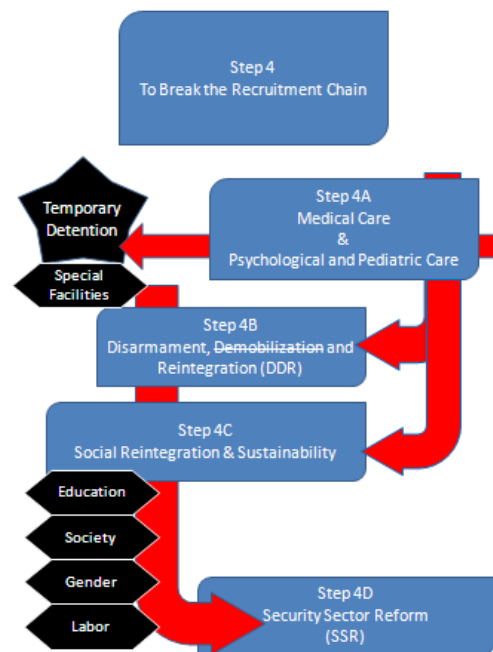


Diagram 6 – Step 4

### 3- Girls Associated with Armed Forces or Armed Groups (GAAFAG)

... Girls are recruited, or abducted as extensively as boys...  
Some girls have joined armed groups by choice<sup>17</sup>.

Dutch Major General Patrick Cammeant mentioned in an address to the UNSC<sup>18</sup> in 2008 that it is probably more dangerous to be a woman than a soldier in armed conflicts. Thus, it is even more dangerous to be a nice young good looking girl. The UNSCR 1820 (2008) Women and Peace and Security (§3) demands that all parties to armed conflict immediately take appropriate measures to protect civilians, including women and girls, from all forms of sexual violence, which could include, *inter alia*, enforcing appropriate military disciplinary measures and upholding the principle of command responsibility, training troops on the categorical prohibition of all forms of sexual violence against civilians, debunking myths that fuel sexual violence, vetting armed and security forces to take into account past actions of rape and other forms of sexual violence, and evacuation of women and children under imminent threat of sexual violence to safety. Thus, peacekeeping forces are also called to enforce these measures.

<sup>17</sup> Beth Verhey *Reaching the Girls, Study on Girls Associated with Armed Forces and Groups in the Democratic Republic of Congo*, Save the Children UK and the NGO Group: CARE, IFESH and IRC, November 2004, pg. 6 and 10.

<sup>18</sup> European Security Defence College, *Comprehensive Gender Approach to Operations Course*, December 2011.

## Generic Guidelines for the Use of Force Against Child Soldiers in Peace Operations

The common and well-accepted definition of child soldiers also includes girls recruited for sexual purposes and forced marriage – the so-called “bush wives”. This phenomenon creates a completely different problem when compared to the use of rape as a weapon of war by the same armed groups. The latter emphasizes the extensive abuse of women not belonging to the armed group with a humiliating intent in order to destroy the morale of the enemy and to stop the regular pace of the reproduction process by harming the heart of factory of life: the families. The immediate impact might be the psychological trauma and in the long term affects the reduction of labor force in dysfunctional communities. The goal is clearly to cause indiscriminate losses and moral breakdown in the enemy ground.

The former refers to process (forced or not) to bring girls into armed groups with the purpose of using them to the “benefit” of the members of the armed group and the performance of the armed group as such. The purpose is to gain a situational advantage (mainly tactical) by enforcing the combatants' skills, to increase the numbers of bodies in arms, and to contribute to the “sexual satisfaction” of the regular soldiers. Therefore, both crimes have a tremendous impact on non-combatant population, and in both cases heavily harm the burden of building sustainable peace. Dealing with children associated with armed groups requires an extensive approach, with particular attention to the role of military gender advisers, working closely with other international and national actors. However, girls or young female juveniles associated with armed groups, especially in the African context, are probably one of the most demanding gender situations, once peacekeepers commanders are legally bound to protect all minors in peril. In this context, it is important to understand why girls are associated with armed groups.

- **Voluntary grounds**

- To seek power (status) in a male-dominated environment;
- For revenge after being abused;
- To escape from domestic violence or sexual gender-based violence (SGBV);
- To seek physical protection - better to have a “husband” soldier than to be abused by many – changing protection by sex and food, in a relationship closer to the one known as “transitional sex”;
- For ideological reasons;
- To gain access to fashionable items<sup>19</sup>;
- To gain access to a group;
- Due to lack of alternatives after being rejected by their communities;
- Offered by the small communities as a “tax” of war.

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<sup>19</sup> As mentioned by the famous red shoes stories - Mrs Irma Specht, Transition International addressing at Comprehensive Approach to Gender in Operation Course organized by the European Security and Defense College in Delft (The Netherlands) (November, 2011).



## Generic Guidelines for the Use of Force Against Child Soldiers in Peace Operations

- **Non-voluntary grounds (forced enlistment):**

- To stand as a model of permanent need to exercise the best skills;
- To train other girls and young kids;
- To become a "wife" (to provide food and sex to a senior soldier);
- As a weapon of war depriving a child to be educated by an ethnic group;
- To perform logistics and intelligence;
- To wage acts of war between armed groups or State regular forces;
- To wage in the use of weapons against international forces;
- To wage acts of war to save the strength of senior soldiers.

In both situations their rights are violated and in both situations there is physical and psychological harm. In fact, girls associated with armed groups require additional layers of protection: as a minor associated with armed groups and as a female individual. To look after girls associated with armed groups requires much more than individual will, legitimacy or material items. It is vital to be equipped with military, legal, human, technical, team attitude, and moral skills to cope with that titanic task.

#### 4- **Military Peacekeeping Gender Advisers**

*Gender skills are not soft skills and should not be perceived as such.*

Bearing in mind the Cape Town principles and the best practices on the prevention of recruitment of children into armed forces and on demobilization and social integration in Africa (Cape Town principles, 1997), military peacekeepers need gender advisers. The UNSCR 1888 (2009) went even further establishing in paragraph 12 the following: "Decides to include specific provisions, as appropriate, for the protection of women and children from rape and other sexual violence in the mandates of United Nations peacekeeping operations, including, on a case-by-case basis, the identification of women's protection advisers (WPAs) among gender advisers and human rights protection units, and requests the Secretary-General to ensure that the need for, and the number and roles of WPAs are systematically assessed during the preparation of each United Nations peacekeeping operation...".

Due to the extremely difficult role of a gender adviser, working gender issues coming from the harsh external environment and inside one's unit might be useful to refer to their main activities. In fact it has to happen within their military structure, closely to the humanitarian and legal actors, the civil society, the development actors, and should carry out the following main activities:

## Generic Guidelines for the Use of Force Against Child Soldiers in Peace Operations

- a) To support the force build up gender sensitivity;
- b) To include gender in the military planning instruments;
- c) To train key leaders in gender issues;
- d) To ensure that the soldiers' card is gender sensitive;
- e) To ensure that reports are gender sensitive;
- f) To ensure that the flow of information is gender sensitive;
- g) To ensure regular legal and military training on handling situations involving children;
- h) To contribute to promote gender sensitive public information;
- i) To participate on the ROE design and the implementation process;
- j) To seek immediate release with the best interest of the children in mind, in particular the girls, and to bring them to the appropriate reintegration program;
- k) To prevent further recruitment actions by direct and indirect action on field commanders, by supporting the enhancement of formal State accountability mechanisms and all available informal/oversight mechanisms, namely the media; working closely with civilian actors to minimize the ultimate causes of the recruitment, and involving the educational system and community level;
- l) To advise on alternatives to judicial proceedings in case of violations of the LOAC by children (with particular regard to International Covenant on Civil and Political Rights (1967), the United Nations Standard Minimum Rules for Administration of Justice for Juvenile Delinquency – the Beijing Rules – and the United Nations Guidelines for Prevention of Juvenile Delinquency – the Riyadh Guidelines – UN Doc A/45/49 1990);
- m) To contribute to women's and girls' protection from public exposition, namely from harmful media coverage, particularly non-constructive in case of girls;
- n) To support the fight against the "girls invisibility", after being released from armed groups dominance;
- o) To work closely with interpreters to prepare them to act in the context of violence against children;
- p) To exchange information with the key military, non-military partners, and other children protection bodies<sup>20</sup>.

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<sup>20</sup> 1925 (2010) - Recalling its resolutions 1325 (2000) and 1888 (2009) on women and peace and security, its resolution 1894 (2009) on the protection of civilians in armed conflicts, and its resolution 1882 (2009) on children and armed conflict, and recalling the conclusions of the Security Council Working Group on Children and Armed Conflict pertaining to parties in the armed conflict of the Democratic Republic of the Congo... 12 f) Implement the United Nations system-wide protection strategy in the Democratic Republic of the Congo, operationalizing it with MONUSCO's protection strategy built on best practices and extend useful protection measures, such as the Joint Protection Teams, Community Liaison Interpreters, Joint Investigation Teams, Surveillance Centers and Women's Protection Advisers.

## Generic Guidelines for the Use of Force Against Child Soldiers in Peace Operations

Diagram 7 represents a matrix attempting to summarize the direct involvement of gender advisers in child soldiering related issues. Gender issues tend to be perceived as soft security issues and left aside by less informed commanders. They tend to be left to the gender adviser to be dealt with. Gender issues should be taken as regular operational problems and dealt with by all staff, supported by the gender adviser. The low level staff also bears a tendency to look at gender as another complex "policy issue."

Thus, the role of a gender adviser demands a high level of conflict sensitivity and context awareness; it requires a long term approach in the field of trauma and its impacts on the following generation; it involves vision to approach the mission to reduce unforeseen side order effects; it demands a deep understanding that girls associated with armed groups phenomenon is a symptom and not the cause of the problem; it fosters all to understand that accountability measures should not be dependent of the goodwill, and finally he or she is to set his/her mind in order to understand that the value of an action is measured by the effects produced and not by the amount of money allocated. Being a gender adviser is an extremely important role which is not well perceived by few and which is hopefully strongly supported by many.

| Gender military adviser |        |       |         |          |          |
|-------------------------|--------|-------|---------|----------|----------|
| Tasks                   | Before | Early | Regular | Children | Children |
| a)                      |        |       |         |          |          |
| b)                      |        |       |         |          |          |
| c)                      |        |       |         |          |          |
| d)                      |        |       |         |          |          |
| e)                      |        |       |         |          |          |
| f)                      |        |       |         |          |          |
| g)                      |        |       |         |          |          |
| h)                      |        |       |         |          |          |
| i)                      |        |       |         |          |          |
| j)                      |        |       |         |          |          |
| l)                      |        |       |         |          |          |
| m)                      |        |       |         |          |          |
| n)                      |        |       |         |          |          |
| o)                      |        |       |         |          |          |
| p)                      |        |       |         |          |          |

Diagram 7 – Generic Engagement Matrix

## Generic Guidelines for the Use of Force Against Child Soldiers in Peace Operations

### 7- The Horrible Option is Never the Solution

*Child soldiers tend to protract armed violence.*

Nowadays, peacemaking intends to deliver more than ending the war; it lays the normative ground for transition and sets the agenda for a long standing peacetime.<sup>21</sup> Child soldiering tends to protract armed violence, since after the termination of the conflict former child soldiers hold the only power recognized by them: the power of weapons. It is indeed hard to change that idea with the hope of a better life in the long run. However, that fact does not support treating child soldiers as regular combatants because it raises the scale of predatory brutality to the absurd and increases the threat to regional stability in the post-conflict to unacceptable levels. Furthermore, "using violent means against children by armies from developed, industrial countries contravenes not only codes of human conduct against enemies, but touches upon some basic understandings about us as human beings".<sup>22</sup> As a result, the horrible option (as General Roméo Dallaire named it<sup>23</sup>) to fight back employing lethal fire even in self-defense without considering other options, is never a solution.

In fact, it creates many legal problems, it might generate individual criminal accountability, it poses new ethical problems, and it turns the transitional process towards peace longer and harder. Children soldiers showing a threatening posture towards peacekeeping forces are a legitimate target to detain, to keep in custody<sup>24</sup>, to disarm, to neutralize, to separate from adult dominance, and as a last resort to use lethal fire with non lethal intent. The centre of gravity to disrupt the use of children in armed conflicts is the leadership of senior juveniles or adult leaders who exercise complete power over those innocent victims, together with those who effectively control the recruitment activities. Since the very beginning of their basic training, our military should replace the idea of "child soldiering" by the new concept of "children associated with armed groups or armed forces". Child soldiering places children on the other side and directly links them to an armed answer. Instead, children associated with armed groups leverage the idea of being victims, and recalls immediate protection. In this way it will be easy to make them understand the complex nature of a child bearing arms or working for the military. As mentioned by David Crane,<sup>25</sup> justice is to be served against those who mistreat children by committing against them a brutal crime of stealing their childhood. Military commanders of peacekeeping forces play a fundamental role dealing with children associated with armed groups, especially through their leadership, discipline and their will to enforce accountability and support integration. Individual peacekeepers must understand that they are there to protect youth, not to destroy it in self-defense. That would, indeed, amount to the grossest human indecency.

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<sup>22</sup>RTO-TM-HFM-159, pg 6-1

<sup>23</sup> General Roméo Dallaire, "They fight like soldiers, they die like children", 2010, pg 225.

<sup>24</sup> The European Convention on Human Rights imposes European Union States the duty not to transfer detainees, unless there is a guarantee that their fundamental rights will be respected. This provision is reaffirmed by the article 37 of the Convention on the Rights of Children (1989). Source: <http://www2.ohchr.org/english/law/crc.htm#art37>

<sup>25</sup> General Roméo Dallaire, "They fight like soldiers, they die like children", 2010, pg 180.

## Book Review : A History of the Laws of War by Alexander Gillespie<sup>1</sup>

Mr. Vincent Roobaert, NC3A Asst Legal Adviser<sup>2</sup>

With the end of the Cold War came some hope that mankind would enjoy the dividends of peace. Some authors even considered that humanity had reached the end of history and that liberal democracies would quickly spread throughout the world. With hindsight, one must now realise that the road to peace remains paved with many obstacles, as the conflicts in the ex-Yugoslavia, Rwanda, Iraq and Afghanistan have shown. One could even argue that the violence committed in most recent conflicts, which had their origins in ethnic or religious differences or a clash of civilizations, reached a level not seen since the atrocities of World War II. Disappointed, the optimists of the 1990's could wonder whether or not humanity had learned anything.

The progress of mankind is a topic that Alexander Gillespie discussed with his mother on a Sunday afternoon. The result of these debates is a three volume set on the history of the laws of war in which the author assesses the progresses, if any, made in the area of the laws of war and their enforcement.

The author has divided his work into three volumes, which are also available separately. The first volume covers the customs and laws of war with regard to combatants and captives. The second volume reviews the customs and laws of war with regard to civilians in times of conflict. The third and final volume examines the customs and laws with regard to arms control.

The first volume reviews two main themes, combatant and captives. The first theme examines who can legally fight war and addresses issues such as conscription and mercenaries. The second looks at the situation of captives, wounded and remains. The second volume addresses four themes. The first section deals with targets and aims at defining what could legally be attacked. This topic is closely linked to the type of weapons used but also requires an examination of the concepts of safe zones and open cities. The second section reviews in great detail a topic that is usually not extensively covered, namely the use of starvation and scorched earth policy as a method of war. The third section covers occupation. The last covers property, namely whether there are places or objects, such as cultural property, that had to be spared. It does not therefore address the destruction of goods and equipment indispensable for the survival of the population which is included in the section on starvation.

The third and final volume contains two chapters: one on conventional weapons and another on weapons of mass destruction. The emphasis on the third volume is not so much on the use of such weapons (e.g., need for discrimination) but on the efforts to regulate and ban some weapons. The book provides some rationale behind some of the prohibitions that have been agreed in the past. While some of these can be said to be justified on humanitarian grounds, others reflected the interests of the ruling elite. For example, the ban of longbows was seen as an attempt to prevent too many casualties among the nobility.

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<sup>1</sup> Alexander Gillespie, *A History of the Laws of War*, Hart Publishing, 2011.

<sup>2</sup> This review does not represent the views of NATO, NC3A and/or the NATO Member nations.

## Book Review : A History of the Laws of War by Alexander Gillespie

In each volume, the author reviews the situation prevailing in the past, going as far back in history as possible but usually starting with the Greek and Roman civilizations. He then writes chronologically to the present. The chronological approach allows the reader to identify trends and triggers for new regulations. It also shows that progress is not linear but that there are detours on the way. Finally, it underlines how gaps and loopholes were identified in certain area that were once considered to be appropriately regulated when these regulations were tested in war.

The wealth of materials compiled and reviewed by Alexander Gillespie for the purpose of this book is breath-taking and one can suspect that Alexander Gillespie's books will become the mandatory starting point for anyone wishing to study the history of the laws of war in the future.

At the end of each volume, the author offers his views on whether or not humanity has progressed in a particular area. These views are off course relative and one may or may not agree with each of the author's conclusion. What is essential to take away from Alexander Gillespie's work, however, is the notion that progress is not a given and that additional efforts will continuously need to be made to limit the horrors of wars.

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## Democratization through UN Peacekeeping Operations? Peacekeeping Regimes

*Mr. Andrés Muñoz-Mosquera, SHAPE Asst Legal Adviser*

The book titled: "UN Peacekeeping Operations, Quo Vadis? Kosovo and East Timor: The fourth wave of democratization and/or a new way of democratization" is a summary of a Thesis written by the author of this article. The thesis was presented to the Faculty of The Fletcher School of Law and Diplomacy on March 22, 2010; the thesis advisor is Professor Ian Johnstone, one of the former U.N. Legal Advisors and principal advisor to Kofi Annan.

The text intends to provide an analysis of U.N. peacekeeping operations and sets off for a short journey to identify the impact of them on global politics. The first stop (Section II) is the study of peacekeeping operations under the regime theory to demonstrate that theoretically, and in practice, peacekeeping operations create certain arrangements intended to modify actors' behavior, with an ultimate goal of solving the conflict, and, therefore, each peacekeeping operation is a temporary regime, although for the purpose of repercussions on further developments on political science, only those peacekeeping operations with an interim or transitional administration should be considered as actual peacekeeping regimes.

In the 1990s there were peacekeeping operations that looked like the obsolete U.N. Charter trusteeships system, but, in this case, compromising the sovereignty of the territories where the peacekeeping regime was implanted, "violating" the once sacrosanct principle of Article 2(7) of the UN Charter of refraining from intervening in the internal affairs of states. This situation gave a major role to the search for legitimacy (Section III) in intrusive peacekeeping operations. Be that as it may, the principle that required the consent of the receiving state for the deployment of UN peacekeeping forces on its territory lost importance in favor of the need to promote human rights and democracy as a means to enable the fulfillment of the UN Charter principles cited in its preamble and Article 1.1. The UN peacekeeping operation in Namibia and those in Cambodia, Kosovo and East Timor brought a new dimension to the creation of democracy, especially UNMIK and UNTAET; and this to the point of wondering if we are not being witnesses to the fourth wave of democratization (Section IV).

This text further develops (Section V) this hypothesis and recognizes that although it is too soon to qualify this phenomenon as a new wave of democratization or a simple way of democratization, we should not refrain from collecting the characteristics observed in the case studies to use them to craft those of the proto-paradigm for candidate members of what might be the fourth wave of democratization.

Democratization through UN peacekeeping operations? Peacekeeping regimes  
by Andrés B. Muñoz Mosquera. ISBN 978-90-5850-673-3.  
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## Spotlight



**Lieutenant**

**Colonel John**

**McCabe, Legal**

**Adviser**

**Force Command**

**Heidelberg**



Name: John M. McCabe

Rank/Service/Nationality: LTC, OF-4/Army/United States

Job title: LEGAD, Force Command Heidelberg

Primary legal focus of effort: Support the Commander and the Staff in all legal matters.

Likes: Baseball and traveling with family.

Dislikes: Bad military and civilian crime television shows.

When in Heidelberg, everyone should: Obvious is to visit the Heidelberg walking street and castle, but also take a side trip and see the Schwetzingen castle and gardens.

Best NATO experience: Learning about NATO and meeting the diverse international staff

My one recommendation for the NATO Legal Community: Learn how other nation's legal systems work and enjoy your time as it will go fast.

[John.Mccabe@fchd.nato.int](mailto:John.Mccabe@fchd.nato.int)



## Spotlight



**Lieutenant Colonel**

**Frédéric Tuset-**

**Anres, Staff Legal**

**Adviser**

**Allied Command**

**Transformation**



Name: TUSET-ANRES Frédéric

Rank/Service/Nationality: LTC / Army / French

Job title: Staff Legal Adviser

Primary legal focus of effort: Operational Law, Centres of Excellence.

Likes: team work.

Dislikes: partitioning.

When in Norfolk, everyone should: speak French ?

Best NATO experience: NATO operations in the Balkans (SFOR, KFOR).

My one recommendation for the NATO Legal Community: share your knowledge with your colleagues !

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**HAIL**

**&**

**FAREWELL**

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## Hail

**FC Heidelberg:** LTC John McCabe (USA A) joined in February 2012.

**NATO Headquarters :** Ms. Lone Kjelgaard (DNK CIV) joined in March 2012.

**NATO Headquarters :** Ms. Antoaneta Boeva (BGR CIV) joined in April 2012.

**JFC Naples :** CDR Henriette Broekhuizen (NDL N) joined in April 2012.

## Farewell

**NATO Headquarters :** Ms. Christine Taylor left in March 2012.

**JFC Naples :** LTCDR Martin Fink (NLD N) left in April 2012.

## GENERAL INTEREST/NATO IN THE NEWS

- Financial and Economic data relating to NATO Defence (Defence Expenditures of NATO countries from 1990 to 2011) have been published:

[http://www.nato.int/cps/en/SID-EC1EA0E6-7F43FAD8/natolive/news\\_85966.htm?mode=pressrelease](http://www.nato.int/cps/en/SID-EC1EA0E6-7F43FAD8/natolive/news_85966.htm?mode=pressrelease)

- "Smart Enough? NATO's response to the fiscal crisis" – keynote remarks made by NATO Deputy Secretary General Alexander Vershbow at GLOBSEC Conference in Bratislava, Slovakia on 13 April 2012

[http://www.nato.int/cps/en/natolive/opinions\\_85984.htm](http://www.nato.int/cps/en/natolive/opinions_85984.htm)

- Articles on Gender Balance and Diversity in NATO can be found at:

[http://www.nato.int/cps/en/natolive/topics\\_64099.htm](http://www.nato.int/cps/en/natolive/topics_64099.htm)

- Report on the "Left-to-Die boat" can be read at:

<http://www.guardian.co.uk/science/interactive/2012/apr/11/left-to-die-report>

- An Article on Cyber Attacks by Matthew C. Waxman (Columbia Law School) can be found at:

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1674565](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1674565)

## GENERAL INTEREST/NATO IN THE NEWS

- On 3 April 2012, by IMSM-00171-2012 (Children Affected by Armed Conflict), the Director of the International Military Staff has requested the Strategic Commands to provide their initial comments on the working draft regarding military guidelines to properly integrate UNSCR 1612 and related resolutions on Children Affected by Armed Conflict into Alliance military doctrine, training and operational planning and conduct. The draft is in the early stages of development.

The focus on Children Affected by Armed Conflict is not new and has been included in operational planning and execution for several years. SHAPE, as well as ACT, is already actively reviewing policies and procedures to deal with this challenging issue, together with the UB and relevant agencies.

In Afghanistan ISAF and UNAMA have jointly undertaken several practical steps, in particular supporting Afghan institutions in implementing an Action Plan, to stop and prevent grave child rights violations, including actions to prevent underage recruitment in the ANSF, sexual abuse, sexual violence and killing and maiming of children.

## UPCOMING EVENTS

*"It is hard enough to  
remember my  
opinions, without also  
remembering my  
reasons for them"*

Friedrich Nietzsche

- The next NATO Legal Conference will take place in Tirana, Albania from September 24 to 28, 2012. Host is the Ministry of Defence of Albania. For more information, please contact Mr. Lewis Bumgardner at [sherrod.bumgardner@shape.nato.int](mailto:sherrod.bumgardner@shape.nato.int), Mrs. Anne Boulengier at [Anne.Boulengier@shape.nato.int](mailto:Anne.Boulengier@shape.nato.int) or PO Jessye Leforestier at [Jessye.leforestier@shape.nato.int](mailto:Jessye.leforestier@shape.nato.int)

- The next Legal Advisors Course will be held at the NATO School from May 21 to 25, 2012.

For more information on courses and workshops, please visit

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

- The 4<sup>th</sup> Annual Senior Officers' Security and Law Conference is designed for One-Star officers and above and civilian equivalents together with specialist staff officers to discuss current issues relating to the legal dimension of security operations. It is organized by the Geneva Centre for Security Policy and deadline to apply is June 1<sup>st</sup>, 2012. More details can be found at:

<http://www.gcsp.ch/Sidebar/Events/Upcoming/4th-Senior-Officers-Security-and-Law-Conference>

- The annual US European Command / George C. Marshall Center International Legal Conference will be held in Riga, Latvia from 4 to 7 September, 2012. The conference will be held at the Radisson Daugava hotel and will bring together military and civilian legal advisors from over thirty European nations and more than a hundred foreign and US attorneys are expected to attend. Please mark the dates in your calendar and for more information, contact Mr. Kirk Samson at [Kirk.Samson@eucom.mil](mailto:Kirk.Samson@eucom.mil)

- The CCD CoE Conference on Cyber Conflict will be held June 5-8, 2012 in Tallinn, Estonia. The conference will focus on military and paramilitary activities in cyberspace. For more information, please go to:

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

## UPCOMING EVENTS

- The National Defence Institute of Portugal, the University of Coimbra and the Catholic University of Portugal will organize an international seminar on Gender based violence in armed conflicts in Lisbon or Coimbra on December 4, 2012. For additional information, please contact LTC Leandro at [francisco.leandro@defesa.pt](mailto:francisco.leandro@defesa.pt)
- The Anti-Piracy and Maritime Security Seminar which aims at providing a holistic overview of the topic of piracy from the historical, commercial and NATO's point of view will take place from 10 to 12 September, 2012 at the NATO School.
- The NATO School in cooperation with the International Institute of Higher Studies in Criminal Sciences will organize a seminar on Shar'ia Law and Military Operations from 19 to 23 November, 2012 in Siracuse, Italy.
- The NATO Cooperative Cyber Defence Centre of Excellence, the NATO School and the US Naval War College announce their joint International Law of Cyber Operations Course which will be held 10-14 December, 2012 at the NATO School.

<https://www.natoschool.nato.int/conferences.asp>

- The Round Table on Private Military and Security Companies and International Humanitarian Law will take place at the International Institute of Humanitarian Law on 6 and 8 September 2012. For more information, please go to:

<http://www.ihl.org/Default.aspx?pageid=page1>

*"It is often for an  
excuse that we say  
things are  
impossible."*

François de la  
Rochefoucauld

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Articles/Inserts for next newsletter can be addressed to Lewis Bumgardner ([Sherrod.Bumgardner@shape.nato.int](mailto:Sherrod.Bumgardner@shape.nato.int)) with a copy to Dominique Palmer-De Greve ([Dominique.Degreve@shape.nato.int](mailto:Dominique.Degreve@shape.nato.int)) and Kathy Bair ([Kathy.Bair@act.nato.int](mailto:Kathy.Bair@act.nato.int)).

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