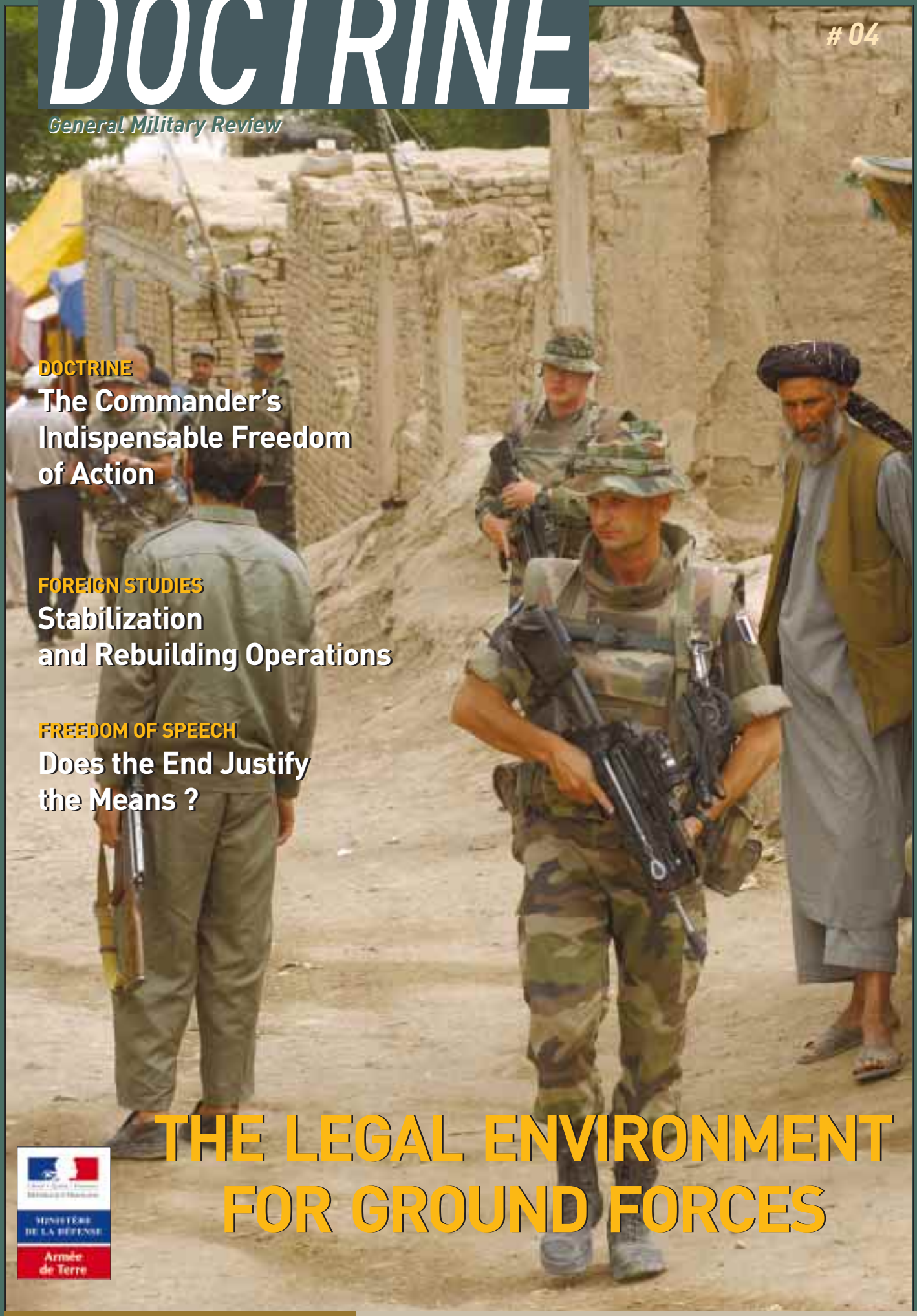
DOCTRINE
General Military Review
04



DOCTRINE
The Commander's Indispensable Freedom of Action

FOREIGN STUDIES
Stabilization and Rebuilding Operations

FREEDOM OF SPEECH
Does the End Justify the Means ?

THE LEGAL ENVIRONMENT FOR GROUND FORCES

MINISTÈRE DE LA DÉFENSE
Armée de Terre

>> Lessons Learned
The Meanders of International Criminal Justice




Summary # 04

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editorial

C.D.E.F

The relevance of this edition, DOCTRINE No. 4, is of particular significance today because it is fully dedicated to the legal issues surrounding the commitment of our forces.

Our soldiers are increasingly confronted by complex situations, where war is not war, where there are multiple actors, with various statuses, men, civilians or not, women, and even at time children, youngsters always.

On top of additional laws, compounded by their interm ingling, and, at times, their contradictions, this century's conflicts take place in a foggy environment – a new " fog of war ".

This fog thickens as our opponents frequently dismiss the rules and laws that regulate war conventions.

Therefore, we should do everything possible not to let " the voice of law being so loud as to paralyze even a moderate use of our forces ". Within the well defined framework of the six employment principles of our professional Army – freedom and legitimacy of action ; concentration of forces and gradation of the effects of our weapons ; economy of force and damage control (either human, cultural...) – the most rigorous observance of the law is a must for our forces.
Of course, all of the above, in strict compliance with the universal values that are the foundation of our democracies. But, also while ensuring, as an essential concern, the success of our forces, and therefore the consolidation of the peace we always intend to make.

On this line of thought I would like to thank Mrs. BERGEAL and her staff of the Legal Services Directorate, for so willingly participating in the edition of this "Doctrine" which, de facto, is a doctrine document.

Major General Gérard BEZACIER

FOREWORD

In his famous book, Law in Wartime and Peacetime, Grotius wrote "a famous Roman general pretended that the clamor of the battlefield kept him from hearing the voice of the law." In 1625, Grotius added that "nothing is more common than putting law and weapons at odds" - this is a serious error.

Would any of our soldiers question that today ? The soldier is at odds with many issues : the expansion of international laws ; the multiplicity and swelling of international regulations ; the confrontation of heterogeneous national laws within complex multinational consultations ; the diversity and types of new missions foreign to accepted norms of the Law of Land Warfare ; the permanent obligation to justify his actions in front of the public opinion. All parties, on a permanent basis, scrutinize the daily actions of soldiers against the law.

Law can sometimes be used as a flag. It can also be used as an instrument to serve a party. On the other hand, without it, no action can be legitimated.

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As a matter of fact, what law gives a soldier the extraordinary permission to use violence ?

Further, what law allows him to intervene outside of his own borders ?

Lastly, what law allows him to silence the guns in foreign lands ?

It is vital that the officers leading an army that deploys 10,000 to 15,000 soldiers in out-of-area operations on a constant basis become aware of the legal framework surrounding their actions. Recent studies carried out by the commission on the general status of the military have demonstrated the magnitude of these issues.

I am pleased to take notice that "Doctrine" has dedicated this edition to this problem. It is also important to observe that this deliberation is not limited to the personnel of the legal directorate. I trust that this study will be fruitful.

Because without law, there is neither State of legitimacy nor democracy, and as Pascal wrote : "force and justice coexist to ensure peace, the overarching wealth."

Catherine BERGEAL,
Senior Legal Counsel, Council of State
Director, Juridical Affairs

The Commander's Indispensable Freedom of Action

Because of the increasing number of overseas deployments, French soldiers are often confronted to a new problem : the frequent lack of a clearly defined legal framework. Sometimes, as a corollary to that issue, some (fortunately very few) soldiers fall into legal problems. This has caused the legal protection of the soldier in overseas (out-of-area) operations to be a particularly sensitive topic in the course of the last few years. Members of the Armed Forces (particularly of the Army) have developed a mounting feeling of distrust and sometimes fear of national and international judiciary institutions because of the increasing role of the legal issues within western societies, growingly prominent in France. As such, they rightly refuse to receive the attention of the justice for having used force while obeying a national order.

Somehow, the reality of this possibility causes a " feeling of legal insecurity "[1]. The resulting psychological effects can cause some subordinates to become faint-hearted or even turn some leaders into inaction, or even to decline responsibility.
However, this aversion to risk-taking (the fear of the possible consequences of the decisions taken at the time of events - especially when they are highly publicized in the media) can inhibit certain leaders' action at all levels of command and thus limit their necessary freedom of action. This freedom is essential for the proper execution of the missions that they were entrusted with by the Nation - within the framework, or not, of an international or local organization.

By General (Ret) Jean-Marie VEYRAT, Editor of " Doctrine " magazine

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Hence, this premise establishes that the legal framework of their action should be clearly defined by the authorities in charge, in particular by the political authorities that have set the operational objective. First and foremost, the formulation of the desired end-state and the rules of engagement (ROE) must be specified. The description of the legal framework should go well beyond the chiefly technical opinions rendered by legal specialists who are not always well aware of the realities on the ground. With the necessary freedom of action and the associated confidence which will have been granted to them, the military commanders will then be able, at all levels of the hierarchy, and within the joint and generally multinational framework of an operation, to detail the directives received, and to give orders and guidance. All this in accordance with the doctrine of employment of the French forces, which remains, for our units and staffs, the best protection because they are the synthesis of international and national rules that are to be applied by the armed forces of a democratic country.

Armed Forces Conducting Overseas (Out-of-Area) Operations are Confronted to Legal Issues Linked to their Actions, Including Potential Penal Consequences.

The often speedy initiation of operations generally prevents from assigning for each a specific and precise legal framework, well adapted to the theatre and the types of actions to be carried out. On the contrary, there is usually a superposition of international, national, and local laws, which does not facilitate the task of those who are to ensure that those regulations are respected. They are magistrates, police officers, provosts, and they often choose to apply the law that they know best, in general the national law, which, in any event, remains applicable to the French nationals. This national law, designed to be internal, is often badly adapted to our units' framework of action, which is neither peace nor war, but rather some sort of undeclared conflict or a crisis. These situations are

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not, or only poorly defined. In addition, the variety of the roles that the gendarmes endorse while deployed with our forces (sworn law officer within MP units, member of the anti-riot police in charge of keeping law and order[2], or member of international police task forces) do not always contribute to understanding the context in which land forces are engaged. This is all about a military context, implying the use of force and weapons. This hodgepodge of tasks can lead some subordinates of the Provost Marshal to misconstrue their mission, in turn encourage them to rely too heavily on procedures that are unsuited to the situation of the units on the ground.

In some cases, a sweeping inconsistency in the stance of the forces, caused by a misunderstanding of the spirit of the mission, or simply sometimes due to problems of human relations, can lead to incidents resulting in penal procedures - especially if these incidents have been widely covered by the media, or if one of the warring factions wants to exploit them politically. It is not a matter of disputing legal procedures applicable in cases of proven crimes, exactions or patent violations of the Law of Land Warfare, that are, alas, always possible, even in old democracies' armed forces; but to consider those procedures that could be initiated as a result of events that have occurred during combat or serious incidents.[3]

It is thus essential to have a legal framework clearly established for each operation. Above all, to align the laws in perfect coherence with the political directives and the rules of engagement (ROE) that (it must be reminded) have been approved by the political national authorities, and with the orders and instructions given by the various levels of command.

Beyond the sometimes complex technical debates about ROE statute in the domain of national or international law and about the possibility of developing, or not, a legal framework adapted to each operation and approved by the Parliament[4], lawyers must propose to the civilian and military authorities simple solutions to the problems which their soldiers will be confronted with in the field. However, an initial solution to the soldiers' questions or concerns already exists.

The First Answer Remains Within the Realm of the Application of the Forces Employment Doctrine that Establishes Clear Rules of Action for our Units and Preserves the Commanders' Necessary Freedom of Action.

The conditions of the application of the law in overseas theatres of operations can sometimes worry commanders as well as subordinates. However, there are still very few French soldiers brought to court for an action they would have ordered or carried out.

The reservations experienced by a few often result from their ignorance of the texts that should guide their action. Namely it is the French Forces employment doctrine[5] and its specific application within each of the services. Specifically, TTA 901

for Land Forces in operations, including the associated employment manuals for the subordinate levels of unit of employment or of action, and all the operational procedures.

The doctrine documents, which cannot be called regulations[6], thoroughly describe the " How " of the action that has to be carried out, including potential courses of action and possible command and forces organizations. However, these documents should, of course, not replace directives, orders, and instructions that each commander at his own level must formulate and issue to subordinates. Additionally, these documents describe the decision-making process, at strategic, operative and tactical levels including the NATO and national procedures to be used.

For all commanders, from the commander in chief to the squad leader level, the fact of relying on a sound knowledge of force employment regulations[7], rather than the often obscure legal rules, remains the best insurance of carrying out a judicious action within the framework of the received orders. This guarantees acting in conformity with the principles adhered to by our democratic Nations.

Besides possessing a good knowledge of his framework of action, as well as the decision-making process which led to it, as modest as the action might be, the commander or the subordinates must trust their chain of command and carry out their mission with all the freedom of action they have been entrusted with.

Freedom of action is, within French armed forces, one of the major principles of war[8], as stated by Marshal Foch, and undoubtedly the most significant of the three. In fact, this freedom of action consists in preserving the freedom of choice in order to be able to fulfill the assigned mission while taking into account the friendly constraints (among which legal...), as well as the constraints caused by the environment and the opponent.

The exercise of this freedom of action and choice, presents a significant intellectual, and psychological aspect. In order to be able to exercise it, the commander must demonstrate freedom of mind. This can be acquired only thanks to a good knowledge of his job, self-confidence and confidence in others, including in the legal advisors of his own country.

1 Documented by a group of civilian lawyezrs in "l'environnement juridique des forces terrestres dans les operations exterieures" (The legal environment for ground forces during operations) a study conducted for the center de recherche et de documentation du CDES (The CDES research center) page 16 (Cahier # 1 des Etudes du CRD November 2003.)

2 Army units, even when reinforced by the Gendarmerie and equipped with non-lethal weapons, are not qualified for crowd control (maintien de l'ordre). Thus they prefer the term control of the masses (controles des foules).

3 The recent (as of mid-May 2004) events that occurred in Iraq, i.e. the exactions committed by some US MPs in charge of guarding war prisoners (among which proven terrorists and accomplices), should not lead our public opinion to put the blame on all the forces that are present in the theatre of operations to fulfill a mission given by their country. And as a consequence, this should not in the future be the cause for too restrictive limitations to be imposed on the freedom of action of the commanders during the course of French overseas operations.

4 See the already quoted study

5 Instruction 1000- Joint forces employment in operations - updated each year.

6 These are not "regulations" per se but rather manuals, notes, memos... Contrary, for instance, to security regulations, these documents have no legal binding basis.

7 Which also describe the legal and most of all ethical framework within which we have to act (among which rules of engagement, rules of behavior, and specific rules of employment).

8 We'd rather say principles of forces employment.

As a conclusion,

in order to retain his indispensable freedom of action, the commander must know especially well his units' doctrine of employment, the long decision-making process which brought him into the theater, the orders as well as the rules of engagement and of conduct which limit his sphere of action, but that can be modified on his request. He must also be prepared to grant equal freedom to his subordinates, since like himself, they are members of an ancient army within which initiative, participation, respect of values and permanent control of the force are not mere intellectual concepts. On the other hand, he must be ready to discipline any infraction to the rules and to initiate legal procedures if and when needed.

The Statutory Recognition of Service Members Involved in Overseas Operations

The national law is the legal basis for the action of the service member in overseas (out-of-area) operations. Even in a foreign country, " in all times and places " (article 12 of the statutes), the soldier exclusively falls within the scope of national law. This legal recognition results from a set of provisions mainly articulated around the general statutes of the service member ; criminal law and the military justice code (article 27 of the statutes) ; the 6 of August 1955 law pertaining to the advantages granted to military personnel involved in maintenance of law and order operations under certain circumstances; and the pension code (article 20 of the statutes).

This legal recognition does not however particularly distinguish overseas operations as an action departing from common law : on the contrary, soldiers are " subject to common criminal law as well as to the provisions of the military justice code " (article 27 of the statutes). As professional soldiers, they benefit from a risk cover and a compensation right (articles 20, 58, 59 et 60 of the statutes) for recorded disabilities " resulting from or occurring during service " (articles L2 et L3 of the disability military pension code).

BY COLONEL GUILLAUME DE CHERGÉ, LEGAL ADVISER OF THE SOUTH-WEST ARMY REGION

Legal Recognition Vs. the Reality of OverSeas Operations

So, the legal recognition given by the statutes is not adapted to the ambiguous reality of overseas operations. In fact, overseas operations are not necessarily war operations but, most frequently, the way to bring to an end an armed conflict that does not have an international nature, and without the projected force having to take an active part in the conflict. Therefore, the service member is exposed to exceptional risks.

The legal misapprehension of these risks can affect and turn the responsibility system in overseas operations into an ordinary, especially in the following areas :

- the assimilation of the recourse to force to the case of action in self-defense for oneself or for others ;

- the professional misconduct made imprudently or following non-action, especially in cases of emergency or failure to assist a person in danger ;

- the evaluation of damages encountered or made in connection with its link to service ;

- the always possible opening of a preliminary investigation against a military based on a denunciation.

Thus, the personal nature of the action of the soldier determines the level of responsibility : military personnel benefit from State protection as soon as he " is subject to criminal prosecutions resulting from facts which do not have a nature of personal misconduct " (article 24 of the statutes). This personal nature also appears in the judicial proceedings when the soldier is summoned as witness of incriminated facts. These proceedings disregard the statutory link to retain one criminal offense nature concerning the carried out action.

Widening of the Self-Defense Concept to the Framework of the Mission

The revision of the military general statutes, as it appears in the draft[1], sticks to the principle of the individuality of the service member in overseas operations. However, it is aimed at enhancing the statutory warranties (article 1 of the statutes) in accordance with the general legal principles. If the soldier cannot claim immunity resulting from the fact that he is acting in operations and following orders, he can benefit now from a positive judicial qualification of his action, in a follow-on criminal proceedings connecting his actions to service.

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The criminal justification of the use of force by the soldier follows the principle of necessity : " is not legally responsible the military who, in compliance with international law regulations and within the framework of a military operation taking place outside the French territory, exercises coercion measures or makes use of armed force when this is deemed to be necessary for the fulfillment of the mission"[2]. This principle of necessity is logically based on a threefold criteria :

- the proportionality of engaged assets in relation with the reality of danger ;

- the impossibility to decide and act differently and, if the case arises, without being able or knowing how to take normal precautions ;

- the usefulness of the use of force during the course of the mission.

Thus, the criminal justification widens the self-defense concept of properties and persons to the framework of the mission, giving priority to the commander's judgement on the ground.

The imputation to service " of any injury resulting from an event occurring between the start and the end of an operational mission "[3] is recognized without any restriction : the only limit to the guaranteed imputation to service connection of a wound is "the misconduct which can be disconnected from service "[4].

This notion of misconduct which can be disconnected from service, emerging from the administrative jurisprudence, keeps an irreversible effect which deprives the soldier responsible and victim of the incident from the statutory advantages : the misconduct which can be disconnected from service is characterized by an action carried out for personal reasons, which is not subject to usual professional rules, in contradiction with good sense. The misconduct which can be disconnected from service would be particularly scrutinized at disciplinary or even criminal levels within the framework of overseas operations.

On the contrary, the connection to service of the incident is acknowledged under the sole condition of its obviousness.
The distinction service - outside service (article 1 of the general discipline regulations[5]) is therefore not advisable in operations. Consequently, the military is permanently subject to hierarchical control and to discipline regulations.

A Hierarchical Responsibility

In conclusion, the precise definition of the statutory warranties entails a reinforcement of the control a posteriori of the conditions of recourse to force and exposure to risks. The future " specific criminal provisions pertaining to the use of force by the military outside the national territory stated forth in the military justice code "[6] will undoubtedly define the indispensable procedural precautions.
The implication of the personal responsibility of a service member needs, as a prerequisite, the opinion of the hierarchy who is the only one able to bring a professional appreciation of the event. It cannot jeopardize classified national defense matters (providing this information can be denied to the national judge as well as to the international one[7]), to which the soldier would have had to adhere under obviously complex circumstances.
As an instrument, in overseas operations, of a constraining international law context, the service member truly possesses rights according to the statutes.

1 Report of the revision commission of the military general statutes, under the presidency of M. Renaud DENOIX de SAINT MARC dated October 29, 2003.
2 id
3 id
4 id
5 Article 3 of the military general statutes.
6 Report of the revision commission of the military general statutes dated October 29, 2003.
7 article 72 of the convention creating the International Criminal Court dated July 17, 1998.

The Legal Framework of Overseas Operations

One of the noblest ambitions of law is to restrict the recourse to force. Force must be submitted to law. Even better, it must be at the service of the law. This very old ambition is especially applicable in the face of wars, and more generally to any type of international armed action. Today, the legal regulations applicable to such interventions are numerous, particularly in order to regulate the unfolding of conflicts, the fate of combatants and non-combatants. It is not the purpose here to go through all these legal regulations but to analyze the legal conditions of the recourse to force. These are determined both by internal law and by international law.

BY MAJOR (AIRBORNE) PITHOIS, (CGSC GRADUATE)

The Internal (National) Legal Framework of Overseas Operations

The Constitution of October 4, 1958 precisely states the prerogatives of the executive and legislative powers as far as military matters are concerned. It provides specific regulations for the declaration of war that must be authorized by Parliament, and refers, for all other overseas operations, to the competence of common law of the executive.
On the one hand, in accordance with article 35 of the Constitution, *"the declaration of war is authorized by Parliament"*. Here can be found the revival of an old republican tradition that was already to be found during the IIIrd and IVth Republics. As such, article 9 of the July 16, 1875 law stated *"the President of the Republic cannot declare war without previous agreement from the two houses"*. Similarly, article 7 of the Constitution of October 27, 1946 stated, *"war cannot be declared without a vote of the National Assembly and the previous advice from the Republic Council"*. Such a power given to the Parliament is the translation of the democratic principle according to which, in a Republic, the power of declaring war is a matter for the national representation. It is the same in other democracies.
Thus, in the United States, it is the Congress who has the power to *"declare war"* (first article, section VIII of the American Constitution).

This provision, concerning the declaration of war, was not exactly implemented during the first two world conflicts, even if, in every case, the Parliament was closely associated with the break out of the conflict. In 1914, after a mobilization decree had been passed in France, Germany considered itself in a state of war with France. France being attacked, a vote declaring war to Germany was of not use, but the Parliament was immediately gathered and supported the government. In 1939, after the invasion of Poland by the German troops, the French Parliament increased military budgets and the Government notified Germany that it had to enforce the French-Polish bilateral agreement. Thus, in 1914 as well as in 1939, the Parliament was closely associated to the break out of hostilities even if the wars, taking into account the international circumstances, were not formally declared.

Of course, under the Vth Republic, the Parliament did not have to use the powers stated forth in article 35. In such a case, the authorization of the Parliament would come before the declaration of war, which is the responsibility of the executive. With the exception of this case of declaration of war, the constitutional provisions do not give any competence to the Parliament in the outbreak, the conduct and the end of armed forces overseas operations. These fall under the responsibility of the President of the Republic *"Commander- in-chief of the armed forces"* (article 5 of the Constitution) and of the Prime Minister *"responsible for the national defense"* (article 21).

These dispositions have often been implemented under the Vth Republic, when France implemented the provisions stated forth in bilateral defense agreements, especially with African States, or when it acted in accordance with resolutions of the United Nations Security Council. Thus, the Parliament did not have to intervene to authorize operations in Zaire (19 May 1978) or in Chad (9 August 1983). However, the National Assembly had the opportunity to be informed, during a foreign policy statement of the Government and the follow-on debates on this statement (respectively on June 8, 1978 and October 6, 1983). These debates were never followed by a vote.

On the contrary, in 1991, the operations in the Persian Gulf led to a vote in Parliament on the basis of article 49, line 1 (engagement of the responsibility of the Government) intended for the National Assembly and article 49, line 4 (without engaging its responsibility)

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for the Senate. As then stressed by Professor Guy Carcassonne : *" Indeed and as, everybody knows, this vote was not legally indispensable. It was not an authorization ; it was the case of a confidence motion on a precise issue. It was not at all indispensable for the Commander-in-Chief of the Armies to legally be able to commit France in this conflict. "*

Such a power given to the Parliament would require a constitutional change. During the debate, without vote, on Kosovo, which took place on April 1999 in the national Assembly, the President of the Defense Commission, in this sense, expressed the wish that the Government would ask for the authorization of Parliament before committing troops overseas. The Prime Minister then judged that article 35 of the Constitution was not to be applied but stated, *"the case of a military engagement on the ground could not be envisaged, unless the question is submitted to you. You would be formally consulted to authorize, or not, thanks to a vote, such an intervention ".*

All in all, the internal framework of overseas operations seemed to be well established. According to the Constitution, it is for the Parliament to authorize the declaration of war. Other overseas operations fall under executive prerogatives. In the later, the information modalities of the Parliament have however been reinforced. Thus, Defense Minister Alain Richard, announced four measures on February 4, 1999 :

- the preparation of a yearly report from the defense ministry for the Parliament on overseas operations ;
- a debate on this report and these operations during sub-appropriation discussions ;
- a presentation, to the defense commissions of the National Assembly and the Senate, of the objectives of overseas operations within the month following their start ;
- a visit trip, once every six months, of MPs belonging to defense commissions to armed forces in overseas operations.

The International Legal Framework of Overseas Operations

While the October 4, 1958 Constitution provides for the hypothesis of a declaration of war, it also refers to the Preamble of the October 27, 1946 Constitution which states that *"the French Republic will not embark upon any war in view of conquest and will never use its forces against the liberty of any people "*. This provision is contemporary to that of the United Nations Charta, signed on June 26, 1945 and implemented on the following October 24. The Charta dispositions build up the international legal framework of recourse to force.

Article 2, paragraph 4 of the Charta states that *"in their international relations the members of the Organization (of the United Nations) refrain from resorting to the threat or use of force, either against the territorial integrity or the political independence of any State, or in any other way incompatible with the aims of the United Nations "*. In this way, the Charta sets out a general principle of prohibition of recourse to force, still keeping the legality of such recourse under certain circumstances or in view of certain objectives.

The first exception to this prohibition is well known : it is the one stated in article 51 of the Charta concerning the *"national self-defense right, individual or collective, should a member of the United Nations have to face an armed aggression, up till the Security Council has taken the necessary measures in order to maintain international peace and security "*. At first sight, this disposition seems simple by setting out the principle of self-defense. However, in legal terms one knows that the absence of a general definition of *"aggression "* doesn't solve all the difficulties raised by article 51 of the Charta. In face of the sole 3314 resolution of the United Nations General Assembly passed in 1974, aggression can, today, only be defined as the intervention of the Security Council. Failing such an intervention, which since 1945 has only occurred once at the time of the *"war in Korea "*, states are authorized to use their legitimate self-defense right up till it has reached its objectives. The conduct of military operations beyond what is necessary to repel aggression is not authorized by this defense.

The United Nations Charta, to which article 2, paragraph 4 refers to, sets out a second exception to the prohibition of the recourse to force. It is the one contained in articles 42 and 53 pertaining to collective action taken in view of facing a threat against peace, a break of peace or an act of aggression. Article 42, and more generally chapter VII of the Charta to which it belongs, are legitimately seen as one of the corner stones of the UN structure. These dispositions have encountered a sharp revival in their employment with the end of the cold war. The concerned resolutions did not however contain explicit dispositions on recourse to force, as in most cases, the Security Counsel prefers to

use a formulation enabling the States participating in a force to take all necessary measures in order to fulfill their mandate. Such a wording should be understood in an extensive way and include recourse to force.

Several examples emphasize the restraint in words of the Security Council resolutions, in which the *"recourse to force"* is only mentioned in resolution 169 dated February 21, 1961 for the UNAPROC in Congo. After that, for Somalia, resolution n° 794 dated December 5, 1992 authorized, in accordance with chapter VII of the Charta, the United Task Force Somalia to use *"all necessary means to impose security conditions for humanitarian operations as soon as possible"*.
In Rwanda, France was authorized by resolution n° 929 dated June 22, 1994 to use *"all necessary means to reach the humanitarian objectives"*. In Haiti, the multinational force was authorized based on chapter VII, thanks to resolution n° 940 dated July 31, 1994 to *"use all necessary means to facilitate the departure of the military leaders"*.

As far as East Timor is concerned, the Intal Force in East Timor is authorized to *"take all necessary measures to fulfill its mandate"*.
Irrespective of self-defense and of collective action under the United Nations umbrella, these last fifteen years have seen the development of a trend advocating another basis for the use of force, that of the *"right of humanitarian interference"*. Beyond the moral requirement of facing distress situations, one should question the integration of this current in affirmative law.
On one hand, the classic international law has acknowledged since long ago the right for a State to ensure the protection of its citizens overseas in certain circumstances. This is the meaning of Max Huber's sentence, President of the IJPC, in 1924 concerning British holdings in Morocco. However, law precisely restricts this state prerogative, as it directly jeopardizes the sovereignty of another State.
The intervention for the benefit of one's citizens must notably be strictly necessary and proportionate.

"The right of humanitarian interference" aims at going further than to this state right of saving its citizens. However, it fits into an international law based on the sovereignty of States.
In this way, in 1946 the International Court of Justice in the Straits of Corfu affair ruled that *"the alleged intervention right can only be envisaged ... as the demonstration of a force policy, policy which in the past, has given place to the worst possible abuses that, whatever the present deficiencies of the international society, may be, should find no place in international law"*.

Humanitarian law faithfully reflects this orientation. Thus, article 3 of protocol II of 1977, added to the Geneva Conventions on non-international armed conflicts further explains that *"no disposition of the present protocol should be invoked as a justification for a direct or indirect intervention, whatever the reason may be, in the armed conflict or in home or foreign affairs of the other signing party on the territory of which the conflict occurs"*.

Today, some voices are rising to criticize this affirmative right, essentially in European democracies. Their claim for a humanitarian interference right is notably rejected by a great deal of Southern States. Hubert Védrine, French Foreign Minister, analyzes this situation in answering Dominique Moïsi : *"The right of interference you are speaking about is of concern for numerous countries, as who interferes ? Always the same countries ! I believe it is advisable to preserve the sovereignty of States... We have difficulties in assessing what it still represents, for a great majority of UN Member States, in terms of dignity, national identity, and protection against a worrying internationalization. I would like to add that, contrarily to an accepted idea, more problems emerge due to the weakness of a certain number of the 189 UN Member States and not from their excessive strength."*

This structuring of the international society doesn't jeopardize for States, in affirmative right, the means of action in order to face humanitarian distress situations. While article 2, paragraph 7 of the Charta states that *"no disposition of the said Charta authorizes the United Nations to intervene in matters which essentially fall under the national competence of a State"*, it further states, in fact that *"this principle doesn't jeopardize the implementation of coercion measures stated forth in chapter VII"*. It is on this basis that operation *"Render Hope"* in Somalia had been decided in 1992. Of course, it has been the same for Former Yugoslavia and the United Nations Protection Force from 1992 onwards. Examples are now numerous : Cambodia, Angola, Haiti, Rwanda, and Timor...

The legal framework of overseas operations is both national and international. As far as national law is concerned, it refers to the prerogatives of the legislative and executive powers. The first one authorizes the declaration of war ; the second one has wide prerogatives necessary for overseas armed actions. As far as international law is concerned, the United Nations Charta defines a precise framework that prohibits recourse to armed force but may authorize it in case of self-defense or collective action.

Such collective actions, under the United Nations umbrella, are the necessary answer to dramatic humanitarian situations in various countries of the world. However, after their development in the early 90's, such operations are nowadays less numerous. Undoubtedly, the cause for this is notably to be sought in the critics that are immediately aroused by inactive countries. This apparent paradox goes far beyond the analysis of the legal framework of overseas actions, but also underlines that it is not incomplete. Within the United Nations and when they want it, States have the means to act in order to face violence and distress.

The Protection of Service Members During Operations Abroad

Overseas operations are an essential activity of our forces. The purpose of the proposed reflection is to look into the juridical environment of French service members during operations conducted abroad (or out-of-area).
In this regard, it is not considered to be adequate both with respect to the successful conduct of missions and the medical and social coverage. However, room for improvements exist.

It is acknowledged that an overseas operation is an operation of a humanitarian nature that can only be conducted after re-establishment (or imposition) of a minimum public order enabling acceptable living conditions for the population. All this being often complicated by the obligation to separate - or impose joint-living - of populations whose liking or respect for others is not the primary concern.

The action of the soldiers lies within a crisis framework, of a variable intensity (intensity levels are likely to change very rapidly). The recourse to armed force cannot be excluded; if this happens, is the French service member sufficiently legally protected ? Protected, yes; sufficiently, no. Let's be quite clear about this : we are not talking about making him impune. The present situation can nevertheless be improved, whilst leaving the completeness of his attributions to the criminal judge.

BY COLONEL GILLES BERNARD (ADMINISTRATION), LEGAL AFFAIRS CELL, FRENCH JOINT STAFF

The Service Member and the Use of Armed Force on Overseas Operations

Basic Principle : it is the French Law that is Applicable.

But in fact, in many cases, an overseas operation has a multinational nature ; the commander of this operation issues ROEs (*Rules of Engagement*). It will be admitted that these ROEs do not raise any legal issues vis-à-vis the armed conflicts legitimacy and law.

The problem is that these ROEs are not a legislative or regulatory disposition in French law that are imposed to the criminal judge.
In case of possible criminal proceedings, the use of weapons will be scrutinized in accordance with the criminal code provisions, in the light of " self-defense " and the level of " necessity " ; that's quite usual, although these notions have been developed taking into account a democratic and " civilized " society, a situation which is scarcely encountered during overseas operations.

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However, article 16-1 of the general statutes of the soldiers imposes to check " whether the normal conscientiousness, taking into account the responsibilities, powers and assets they are endowed with, as well as the very specific difficulties pertaining to the missions they are entrusted by law ", have been correctly implemented. The fact of not acknowledging the existence of the ROEs does not enable a complete adherence to the provisions of this article. In order to be able to reconcile the possible action of the criminal judge with article 16-1 of the military general statutes it is therefore necessary to make room within our legal system for the ROEs.

On one hand, the French State acknowledges that service members can comply with the ROEs legitimately issued by a supranational authority and, on the other, that its criminal justice does not recognize them.
The review commission of the soldier general statutes has proposed that the

following provision be added to the military justice code : " the service member is not criminally liable , when, in accordance with international law provisions and within the framework of a military operation taking place outside the French territory, he exercises coercion measures or uses armed force when it is necessary in order to fulfill the mission ".

Although this proposal is a real step forward, it should however go further and specifically quote the ROEs.
This is not an insurmountable legal difficulty and would likely enhance a more serene climate for action without jeopardizing in any way criminal justice prerogatives.

The Medical and Social Coverage

This development will only deal with the acknowledgment of incapacitating consequences in relation with their possible link to service. Although the 1955 law provisions (imputability presumption, reduction of the disability limit down to 10%) are systematically extended to overseas operations, this has not avoided problems pertaining to the imputability acknowledgement in connection with the execution of service.

In fact, certain cases connected to this issue have created a strong emotion in the military community. Although the outcome of these cases was in favor of the plaintiffs, the closing stages needed lengthy and fastidious proceedings for situations rather commonly faced by personnel during overseas operations.

It is not the case of reviewing these litigations ; it is just a matter of stressing the difficulty to appreciate the connection of certain activities with " service ".

Two Situations Should be Carefully Scrutinized.

The first one encompasses what we call " day to day activities ". Although the service member is led " to serve anywhere ", he does not have the legal protection recognized by the Court of Cassation recognized to employees carrying out a mission (appeal n°285 dated July 19, 2001 ; appeal n° 133 dated April 2, 2003 ; Social Chamber ; " but considering that the employee carrying out a mission benefits from the protection stated forth in article L.411-1 of the Social Security Code during the duration of the mission he carries out for the benefit of his employer, it does not matter whether the accident occurs during a service connected mission, or not, with the exception for the employer or the Social Security to bring evidence that the employee had interrupted his mission for a private reason ").

The second one covers recreational activities, essentially tourism trips. This situation may undoubtedly change from one theater of operation to another ; it cannot however be ignored.

It is considered that taking into account the Court of Cassation jurisprudence in statutory texts and the disability military pension code would enable to clarify the medical and social coverage for personnel on overseas operations without, at the same time, increasing cost to the government. The review commission of the Military General Statutes suggests to take into account the imputability presumption from the start till the end of the mission ; it's an improvement which however does not go as far as the Court of Cassation jurisprudence.

This contribution only aimed at evoking the legal situation of personnel during overseas operations ; although the principle of commitment to such operations seems to be well established, the consequences vis-à-vis personnel seem more blurred. Let's hope that the proposals of the review commission of the Military General Statutes will find a favorable echo. Maybe we could go further - allocate a specific legal statute to overseas operations.

Is there a Law of Warfare ?

If war confronts us with a specific problem, it comes from its disproportionate, and barbarian nature. Just as a fight between two men has a violent aspect without any rule, and any constraint..., when no police forces intervene, in the same way, a declared war sets forces in motion, which consequently overstep the mark of the wrong undergone or of the incurred threat. It is a "savage all or nothing". This disproportion is certain, it wounds our innate sense of reason - and we claim that war is "absurd" ; it wounds our will for universal good - we claim it is a "scandal". But, when you think about it, disproportion is not so much the sign of madness or of collective injustice as much as it is the proof of a lack of any institution, of higher wisdom, able to provide measured solutions and to be able to impose them on on the belligerents. *"War is not a rightful necessity - it is neither metaphysical nor divine -. Nevertheless, the defense of a nation against an aggression infringing on its rights, on its dignity, and on its safety, can legitimize this statement. The law of war acquires obvious nobility, insofar as it enables to safeguard international balance and universal peace from the tantrums and oscillations of nations."*[1]

Peace is a work of justice but it is also a work of force.

Therefore, we must initially deal with the concept of law within war ; then, we will deal with the fundamental principles of this law.

BY LIEUTENANT-COLONEL JÉRÔME CARIO, CENTER FOR FORCE EMPLOYMENT DOCTRINE (CDEF) LESSONS LEARNED DIVISION (DREX)

ADC F. CHESNEAU/SIRPA Terre

What is Law Within War ?

Is there not a contradiction in the very terms when we deal with " law within war or the law of armed conflicts[2] " ? Can we associate to the term of law a behaviour which seems to be its denial ?[3] The paradox is only apparent. Indeed, war, like trade, like the movement of people, - following the example of any human activity - is an opportune chance to regulate it. *"After all, it should not be more childish to codify the conduct of hostilities between two armed groups than it is for road traffic".* Thus, there is no inconsistency in dealing with the *"Law of armed conflicts".*[4]

Law within war is thus a set of principles and rules of public international law applicable during conflicts and whose purposes are :

- to protect and affirm that non-combatants, civilians in particular, and out-of-action soldiers are treated with humanity (Geneva Law),
- to limit, even to prohibit, some warfare methods and means, in order to prevent undistinguished violence and excessive sufferings (The Hague Law).

Sources for this law lie in customs and international conventions. If these customs go up rather far in time5, ..., conventions that codified them, as what was then called " war law and customs ", originate at the time of the creation of the International Red Cross. This is when it produced this legal corpus commonly referred to as humanitarian international law or law of armed conflicts.[6]

Today, it is thus a set of numerous and sophisticated international treaties, which make up the main part of law within war. For this reason, their scope must be evaluated with the criteria and methodology suitable for international

law. Thus, before affirming that such a rule applies to a particular conflict, it is advisable to check if the Nations taking part in this conflict are bound by the treaty which states the rule and, in the event of an affirmative answer, if they did not make any reservations. For example, if the 1949 GENEVA Conventions were ratified by almost all the Nations, it is neither true for their additional 1977 agreements - which bind only two thirds of them to date - nor for the 1980 convention - which binds less than one third of them.[7]

"For us, French soldiers, the law of armed conflicts is a mandatory law, which prevails over the rules of national law."[8]

This flexible law applies to international wars only, namely mainly interstate wars, such as the Iraq - Iran (1980-1988), Iraq - Kuwait (1990-1991), Ivory Coast (2002-2003) or Iraq - Anglo-American coalition (2003 - ...) conflicts ; national liberation wars, which oppose a Nation to a foreign occupation power or regime, such as the Western Sahara (1975 -...) conflict ; internal conflicts with an intervention characterized by the commitment of foreign armed forces, such as the Vietnamese (1958 - 1975) or Afghan (1979 - 1989/2002) conflicts.

In internal conflicts, much more frequent nowadays, such as the Yugoslav conflict, in its early phase (1990 - 1991), the conflict in Chechnya (1994 -...) or in Liberia (1989 -...), the law of armed conflicts involves nothing more than a trifle share, - a provision in the four Geneva Conventions, (article 3, common to the four conventions), - in the 1954 The Hague Convention (article 19), - as well as a treaty that includes less than 20 articles, the 1977 2nd additional agreement. These texts state the minimal protection standards for the victims. Still it is necessary that an internal armed conflict reach a certain scale for these provisions to apply, which is not the case if the rebellious party does not control a part of territory or does not have, at least, an organized armed force. These texts do not apply *a fortiori,* either to situations of internal disorders.

Main Principles in Law Within War

Law within war relies on the primacy of the victims' interests. In case of doubt, it means that it is necessary that - between two behaviors - the behavior that is most favorable to the victims prevails.[9]

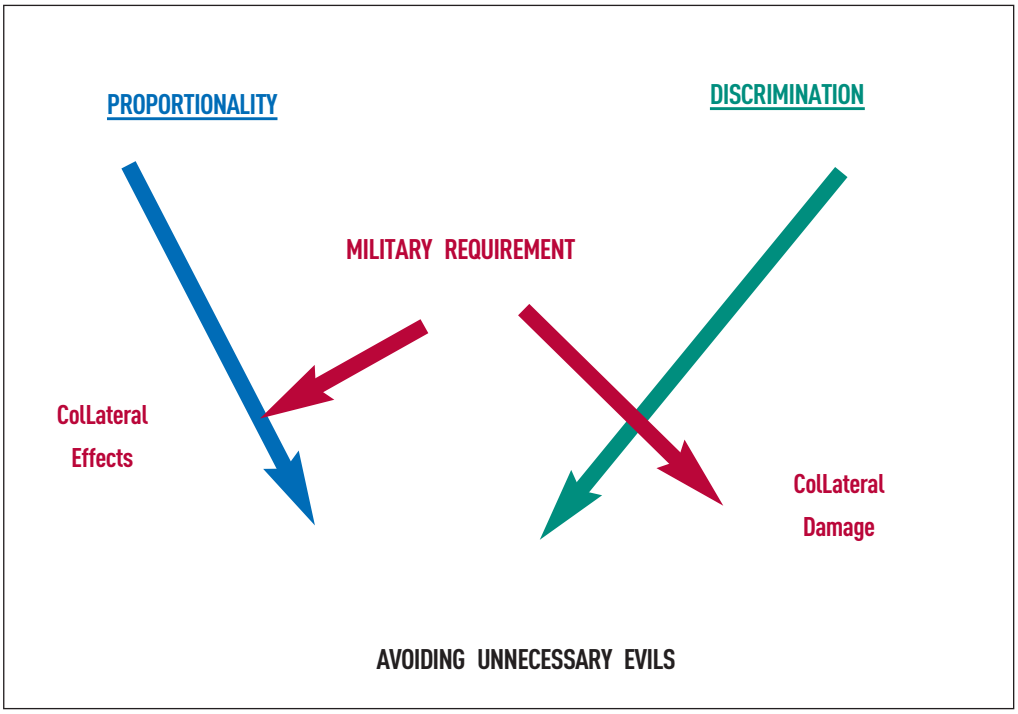
This principle of priority to the protection of the victims lies in the fact that this law relies less on the interstate reciprocity than on the unilateral obligation towards the victims.[10]
In other words it is not because a warring faction violates the " jus in bello " that the other party can give up applying it ; reprisals are generally prohibited.[11]

Thus, on the one hand, there is law within war that regulates the conduct of hostilities by relying on the conservation of Nations : *it is the military requirement*[12] ; on the other hand, there is a law of assistance, which tends to protect the victims : it is *the humanitarian principle*.[13]

Apart from *these general principles*, there are principles more specific to the various phases of a conflict.

Indeed the law of armed conflicts governs two types of situations :
- situations of confrontation where individuals are exposed to the direct effects of hostilities ;
- situations following a confrontation where individuals find themselves in the enemy's power.

Thus, the specific principles of proportionality[14] and of discrimination[15] are set down as a requirement for a military commander when planning and conducting an operation. They have but one goal, to avoid unnecessary evils while enabling a military commander to achieve the tasked mission, which thus results into a military requirement. This military requirement may produce collateral damage or effects that are likely to be but accidents.
When understood and applied in this way, the law of armed conflicts is surely not a "weapon against soldiers". "Contrary to what some people wish or even imagine, the law of armed conflicts should not be considered as a constraint on the conduct of the mission; on the contrary, it controls it."[16]



Conclusion

The implementation of law within war does not elude the weaknesses of the current international system, whose process still largely relies on the willingness of Nations and thus unfortunately on the law of the strongest. Consequently, we can wonder why a Nation that deliberately violates international law by engaging in a war - unambiguously banished since the enforcement of the United Nations Charter, (*purpose of the jus ad bellum*) - would comply with the rules of the law of armed conflicts *(purpose of the jus in bello) ?*

Actually, in spite of many serious violations, we cannot ignore that it also contributes to spare innumerable lives, either because the standards that it defends have been understood and accepted, or still by mutual interest, or finally out of fear of international sanctions or disgrace.

But for the law of armed conflicts to be complied with, the Nations must first of all commit themselves to become parties to existing treaties and to carry out prescribed obligations.

Then, for the law of armed conflicts to be known by all those that will have to enforce it and to become part of national legislative systems, it is necessary that Nations take a range of measures or provisions.

Two kinds of national measures are particularly important :
- national legislations that Nations must pass to enforce these treaties; "the higher contracting parties and parties to conflict must repress serious offences and take the necessary measures to put an end to all other infringements to conventions or to the present agreement which result from an oversight contrary to a duty to act."[17]

- measures about the dissemination of Law of Armed Conflicts (DCA) and soldier training. *" The higher contracting parties commit themselves to disseminate conventions and the present agreement in their respective countries and in particular to incorporate its study in military training syllabuses as much as possible, in peacetime as in periods of war. "*[18]

Thus, if force is necessary, *" it is necessarily controlled, i.e. anxious to save civilian populations and respectful of the adversary... Numerous are those that could think that law within war might be at the level of speech whereas action takes place in the concrete realities of a quite different inspiration. It is a dangerous and criminal concept ".*[19]

Law within war or the principle of controlled force is thus necessarily essential to us ; for this reason, it must feed our thinking, our training, our operational planning and our commitments.

1 G. de Nantes. *War and death penalty. In the CRC in the 20th century. March 1976.*

2 *In a deliberate way, we will consider that the concepts of law within war, humanitarian international law or law of armed conflicts form the same legal corpus.*

3 *For CLAUSEWITZ : " One could not introduce a moderating principle into the philosophy of war without making nonsense ".*

4 *Eric DAVID. Principles of Law of armed conflicts. Bruylant Edition. Brussels. 1999 republication.*

5 *Jerome CARIO. Law of armed conflicts or limitations to harm, in its regulations and means. Doctorate thesis in history - humanitarian international law. Nantes University, November 2001.*

6 *In 1864, following the work issued by Henri DUNANT - A memory of SOLFERINO, that Nations adopt the first major multilateral convention on law within war : the GENEVA Convention dated August 22, 1864 for the improvement of the fate of wounded soldiers.*

7 *Lieutenant-Colonel Jérôme Cario. Law of armed conflicts. Editions Lavauzelle/CREC. July 2002.*

8 *Article 55 of the 1958 - Constitution : " The treaties or agreements regularly ratified or approved have, as of their publication, a higher authority than that of laws, on the condition that, for each agreement or treaty, it is applied by the other party. " See : (The principle of reciprocity).*

9 *In war, " it is preferable to wound rather than to kill and it is preferable to take somebody prisoner rather than to wound ". ICRC (International Committee of the Red Cross) principle of humanity.*

10 *" The higher contracting parties commit themselves to abide by this convention and this agreement and to enforce them, in all circumstances. " Article 1 common to the four Geneva Conventions and article 1/1 of the 1st agreement.*

11 *Vienna Convention on the law of treaties, art. 60, paragraph 5.*

12 *Military requirement : It is the principle which authorizes a belligerent to take all the necessary measures that would be required to complete an operation and that would not be prohibited by the laws of war.*

13 *The humanitarian principle : It is the protection of non-combatants in all circumstances.*

14 *The principle of proportionality*
- *It is a principle of limitation for military operations :*
  - *It is not an unlimited right as for selecting the means to harm the enemy ;*
  - *It is the prohibition to inflict useless sufferings ;*
  - *It is the prohibition to cause extended, durable and serious damage to the natural environment.*
- *It is also a principle of prohibition or limitation of certain combat means or methods :*
  - *Perfidy ;*
  - *The prohibition to exterminate survivors ;*
  - *The prohibition or the regulation of some weapons.*

15 *The principle of discrimination*
- *It is the distinction made between combatants and civilian people:*
- *It is the distinction made between military objectives and civilian assets;*
- *It is a reinforced protection for some civilian assets;*
- *Protected areas.*

16 *Major General Bruno CUCHE. Symposium on Humanitarian international law and armed forces. May 2000. Research center of Saint-Cyr Academy. Editions PIR, Saint-Cyr Academy.*

17 *" G P I -86; G I-49 ; G II-50 ; G III-129 ; G IV-146 "*

18 *" GI -47 ; G II-48 ; G III-127 ; G IV-144 ; GPI-83/1 ; H.CP-25. "*

19 *General Jean-René BACHELET. Short speech delivered at the SIGEM. March 2001.*

The Rules of Engagement in Ten Questions

The notion of rules of engagement (ROE) remains for many people an object of questions. What does this expresion include, what is the use of these rules of engagement ? Where are they coming from ? What is their legal value ? This article has no other ambition than to provide some short elements of answers to these questions.

By Colonel (Quarter Master) François MARTINEAU*, Legal Affairs Directorate

What are the Rules of Engagement

The joint glossary for the words and expressions related to the operationnal use of forces defines them as " Guidances released by a competent military authority and specifying the circumstances and the limits in which forces will be allowed **to open fire or keep fighting**. " However, another text often implemented by the French armed forces, NATO[1] MC 362, defines them in a slightly different way : " The ROE's are guidances released to military forces (including service members) which define the circumstances, the conditions, the degree and the manner in which one has to respect, to be allowed, or not to use force, or to engage in behaviour which might be considered as provocations. "

So, we are in the presence of two definitions : the use of firearms in one case and the use of force, understood in a larger sense, in another. These definitions reflect their time. The present French definition is taken from the AAP-6 (NATO glossary), adopted in 1973, itself inspired by the 1967 American definition, all these definitions dating from the Cold War era. The MC 362 definition as well as recently adopted[2] others, show a larger concept : the use of force includes the use of weapons but also encompasses any measure leading to restrict individual liberties as well as actions or measures that can be seen as aggressive or provocative by a potential adversary. These definitions have in common the fact that they have been adopted for less than five years. They reflect the evolution of the missions assigned to the military in the framework of peace keeping missions. Soldiers are increasingly requested to substitute themselves to police forces. This leads them, for example, to carry out identity controls, to detain individuals or arrest war criminals. This is the reason why the Armed forces staff deemed necessary, to come closer to the recently adopted definitions, to give thoughts to the definition of the ROE that will soon appear in the *Joint doctrine for the use of force in expeditionary operations* - the result of a common work between the Armed forces staff and the Legal affairs Directorate. France will then have at its disposal a catalog of rules of engagement comparable with those of NATO and the EU, and interoperable with them.

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Where are they Coming From ?

The notion stemmed from the US Navy in the mid fifties[3]. Why this naval origin ? During the Cold War, the US Navy ships, out at sea, might find themselves facing harassment actions by Warsaw Pact ships[4]. It was therefore necessary to give the commanders directions permitting them to control the escalation risks during possible clashes with adverse fleets. The notion was later used, in the early sixties, by the US Air Force elements stationed in South Korea and then by the US Army.

Of What Use are they ?

The object of the rules of engagement is to enable the civilian or military authority to master the use of force at the different echelons of command ; and this, depending on the limitations imposed by the political, military and legal requirements. By determining the conditions for the use of force, they permit the commanders of deployed forces to manage crisis situations in peace

time and in war time to master or control the level of the hostilities. The philosophy of the rules of engagement is therefore to limit the escalation of violence towards the adversary. They also have another " hidden " function : To avoid friendly fires by fixing the criteria of identification of the adversary[5]. These two aspects make them a vital tool for the operation of international coalitions.

What Links do they have With Self-Defence ?

In the absence of rules of engagement, service members have, as any citizens, the right of self-defence. The rules of engagement have not therefore a vocation to allow the recourse to self-defence but to manage the recourse to force beside the cases of self-defence when it is allowed according to other foundations for example a resolution of the United Nations Security Council taken under the Chapter VII of the Chart and allowing " the use of any necessary means ". The drafting of the rules of engagement may be an opportunity to remind, as a preamble to the rules of engagement themselves, the conditions which rule the implementation of self-defence.

Who Uses them ?

The majority of the Western armed forces.
NATO, the UN and, from now on, the European Union have their own catalog of rules of engagement that the French armed forces may have to implement.

How to Draft them ?

A rule of engagement must present itself as a sentence, as simple and clear as possible, allowing or forbidding such action in such circumstances, for example : " It is forbidden to enter the territorial waters of such State ".

The basic principles of the rules of engagement :
ROE's are based on the idea of a gradation of violence implementing the principle of proportionality[6] of the law of the armed conflicts. Only the minimal and necessary force to reach the goal must be used. Second principle : the " descending accountability " : subordinate echelons are free to establish further restrictions to the authorized rules of engagement but never to " enlarge " them on their own. Third principle, adaptability - ROE's must not remain " frozen " once and for all, they must evolve depending on the situation in the field or on any modification of the mandate given to the force - the agreement procedure must be reactive. Finally, ROE's are generally classified[7].

What the rules of engagement are not :
the rules of engagement are not tactical instructions and must not contain orders pertaining to procedures in the use of weapons nor restate the rules of the law of the armed conflicts. The law of the armed conflicts must be known by the service members prior to their departure in operations and cannot be summarized in a few lines[8]. Equally, they must not be used for the management of the air space.

Some points to keep in mind
- Ban ambiguous terms. The use of a catalog of rules of engagement permits to use standardized terms which decrease the risk of ambiguity. This is particularly important in the framework of a coalition ;
- Accompany the rules of engagement with explaining comments ;
- The rules of engagement are meant to be implemented in the field by a private. One must then avoid drifting in " legal pathos ". The fact that the legal framework has been taken into account must be " transparent " to the final user ;
- Drafting a " soldier's card " summarizing the rules of engagement in a few essential rules is of a certain interest. But one must guard against the existence of different versions that might contradict themselves.

Who Drafts them ?

Though the legal framework of the operation must be taken into account, and therefore the legal advisor closely associated, the drafting of the rules of engagement must remain a responsibility of the operational cell (J3 and J5). It is therefore necessary to avoid the temptation, sometimes apparent, consisting in abandonning their drafting to the legal advisor.

When to Draft them ?

The drafting of the rules of engagement is intimately linked to the process of planning of the operation. It is a three steps procedure, the main guiding lines of which can be summarized as follows : after analysing the concept of operation, taking into account the legal framework of the operation as well as the expected political goals, the strategic commander (in a NATO framework) after consulting the force commanders (for example : army, navy, air force), drafts a project of rules of engagement for which he is requesting the approval by the political level through a message called ROE Request.
The political authority, for example in a NATO framework the Committee for the Defence Plans of the North Atlantic Council, gives its approval through a ROE Authorization[9] message.
The strategic commander (for example : SACEUR) will then implement the rules of engagement by forwarding the authorization to the subordinate commanders after adding his comments (ROE Implementation messages). This operation is reproduced all along the hierarchical chain down to the elementary units.
As a general rule, the draft work must be done as early as possible to enable the troops to familiarize themselves with their rules of engagement prior to departure for the theater of operations.

Which Law Must be Taken into Account for the Drafting of the Rules of Engagement ?

The rules of engagement must respect at the same time international law and the internal law of the states taking part in the force. Alongside the mandate of the force, generally defined by a resolution of the Security Council, the international standards are in keeping with the two parts of the international

law which are the law of the armed conflicts[10] and the law on human rights. The standards to be applied may vary depending on the nature of the crisis and its level of violence. Therefore they are specified for each operation. Besides, the national law continues to apply to the military composing the force. So, under the article 113-6 of the Criminal Code and , moreover, for the military personnel, because of the articles 59 and 68 of the Code of Military Justice, the French criminal law applies to all the French citizens outside the territory of the Republic. The laws of foreign states may, regarding the use of force, differ from the French law. In the hypothesis of a multinational operation one must ensure that the implementation of the rules of engagement does not contravene the French law which prevails. The reference documents of the different organizations (NATO, European Union) envision the possibility that the states taking part in an operation release comments or restrictions permitting each state to respect its own law.

What is their Legal Value ?

The combination of the rules of engagement between political, military and legal factors is a source of confusion about the value of these rules. It would be wrong to believe that the respect of the rules of engagement of the international and national laws make them automatically acquire their value. The rules of engagement must be considered as orders from the command or, in terms of the Criminal Code, orders from the " legitimate authority ". The force in overseas operation is, in fact, employed under the order of a legitimate authority i.e. a competent public authority[11].

Concretely, can the rules of engagement exonerate soldiers who apply them from criminal responsibility ? Article 122-4 of the Criminal Code foresees, as a cause for exoneration of criminal responsibility, the obedience to an indistinguishable illegal order from the legitimate authority.[12] Insofar as the act prescribed by the rules of engagement is not obviously illegal, the executor will see himself exonerated of his criminal responsability. The responsibility then weights on the drafter of the rules of engagement. Respect of the rules of engagement by subordinates contributes therefore to their legal protection.

It is precisely to reinforce the latter that the Direction of the legal affairs proposed, in the framework of the works of revision of the general status of the military, that be inserted in this text a disposition establishing the principle that " particular criminal dispositions pertaining to the use of force by service members outside the national territory are foreseen by the Military Code of Justice ". These special dispositions might, in substance, establish that " is not criminally responsible the soldier who, in the respect of the rules of the international law and in the framework of a military operation taking place outside the French territory, applies coercion measures or uses armed force when it is necessary for the performance of the mission "[13].

CCH J.J. CHATARD/SIRPA Terre

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1 On Novembre 9th 1999, the military Committee ratified the document MC 362, " NATO Rules of engagement " which states the procedure to adopt rules of engagement and provides a catalog of these rules.

2 Like the UN guidance " Rules of engagement for the UN peace keeping operations (April 2002) (MD/FGS/020.0001) or the concept " Use of force for EU-led Military Crisis Management Operations" of the European Union (ESDP/PESD/COSDP 342 dated November 20th 2002).

3 The first informal use of the expression dates in November 1954 with the release of the " Intercept Engagement Instructions for the U.S. Navy ".

4 This explains why the French Navy, accustomed to operations and exercices in conjunction with NATO Navies has been, historically, the first to be confronted with that notion.

5 In 1982, a US Army study demonstrated that out of 269 cases of friendly fires against ground forces, 99, or 37 % resulted from fires from Air Force planes supposed to support them.

6 Proportionality is the requirement that the use of force will be limited in intensity, duration and scope, to what is necessary to stop and repel the attack or the threat. Except as otherwise stated, minimal force includes lethal force when it is necessary. In war time, the rules are more flexible than the rules established for peace support operations.

7 There are however exceptions. So, with a deterrent goal, France declared during the Iran-Irak war, that " the French war ships will open fire at the forces which will refuse to stop their attack on a neutral merchant ship when French ships have received distress signals. "

8 However rules of engagement have been seen with guidances such as : " looting is forbidden ", " treat with humanity all captured persons ", " denial of quarter is forbidden ". Mixing these permanent principles within the rules of engagement with technical rules pertaining to the operation may be confusing for the unit members who may give them an identical value and " forget " the principles of the law of the armed conflicts that would not have been reminded by the rules of engagement.

9 For the procedure adopted by the European Union, see LCL Joram's article devoted to operation " Artemis ".

10 The law of the armed conflicts rules the use of the military force in situations of armed international or non international conflicts. It limits the means and methods of combat that may be employed by the belligerent parties. The use of force cannot go beyond what is authorized by this law.

11 See Article 21 of the Constitution of the Fifth Republic about the assignment of the military authorities. - law n°72-662 dated July 13th 1972 general status the military of - Decree n°82-138, dtd 8 Feb 1982 Attributions of the Chiefs of Staff.

12 Article 122-4 para 2 of theCriminal Code : " Is not criminally responsible the person who performs an act ordered by the legitimate authority except if this orders are obviously illegal. "

13 Report of the Commission in charge of the revision of the general status of the military, chaired by M. Denoix de Saint Marc, dated October 29th 2003, pp. 15-17.

The Indispensable Cooperation Between the Military Authority and the Military Police in Criminal Matters

In French law, the notion of crisis, defined as an intermediate situation between peace and war, has no legal existence. So France's engagement outside the national territory occurs in the absence of a specific legal framework. Crisis management is therefore kept in the French common law to which must be added dispositions of international significance such as :

1) the agreement about the status of the forces which establishes, at least, a privilege of juridiction,
2) the rules of engagement which, schematically, constitute the framework of the military action defined by the political authority.

That way, any member of the French forces operating or deployed in a foreign country, notably in a multinational operation, remains under the influence of these texts and of the French law. Since 1999, the Armed forces tribunal in Paris is the sole competent to take cognizance of these criminally litigious actions or omissions under the article 59 of the Military Justice Code (CJM). The district attorney of this tribunal is assisted by criminal police officers of the Armed forces (OPJFA), professional soldiers from the Gendarmerie who serve with the military police and who have as one of their missions to carry out criminal police duties within the armed forces. As such, they ascertain the violations of all nature and report them to the competent magistrate.

But the particular situation of the overseas operations imposes the cooperation of the military authority who has some prerogatives in criminal matters and of the OPJFAs who must take into account the legitimacy of the action.

By lieutenant-colonel (Quarter Master) P. JABOT, Legal Advisor of the Commander, Land Command

The Role of the Military Authority in Criminal Matters

As a general rule, the military authority has the ability to take up the attorney's summary. In this framework, he has a certain competence for judgement.

The Military Authority Informs the Attorney

The article 40 para 2 of the Criminal Procedure Code (CPP) specifies that " any constituted authority (...) who, in the exercise of his function has the knowledge of a crime or an offence is obliged to report it without any notice to the attorney and to forward to this magistrate all the informations pertaining to it ". It is under this article that the military authority is obliged to inform the Prosecutor's Office of all crimes or offences in his knowledge[1]. Therefore the military authority informs the attorney either directly or through an OPJFA. That information is subject to no regulation about the form. This duty to inform must not be confused with the indictment or the opinion of the minister and of the entitled authorities as established by the article 698-1 of the CCP which enable the military authorities to directly request the intervention of the Gendarmerie for an investigation, for example in the framework of a robbery committed in a military facility.

Therefore the military authority is obliged to inform the attorney of the crimes, notably those which might have occurred during an engagement by the Force. Consequently, the presence of OPJFAs in this type of action is not mandatory but may favor, through the drafting of hearing and observation reports, the protection of the interests of the military who would be unduly summoned by a victim. The military authority must also evaluate the act.

SIRPA Gendarmerie

The Reviewing Authority of the Military Commander

On October 27th 1999[2], the Council of State considered that the administrative authority is only responsible to report to the attorney "concerning the facts that it comes to know in the course of its attributions, if these facts seem plausible and if it estimates that they constitute a sufficient basis to be in breach of the law, the implementation of which it has for mission to ensure." The military authority is therefore not obliged to immediately, automatically, and without judgement forward the information concerning an adverse incident. It must exert its competence by investigating the case. The facts must be sufficiently established, be linked to its competence area and present a punishable or criminal nature. So it has some power of evaluation and can decide that a violent act conducted in accordance with the received orders does not present a punishable or criminal nature. Of course, if need be, the legal authority which would have had knowledge of the facts through another channel, can always estimate that there is, in the circumstance, a violation of the obligation to inform.

What would then be the sanction ? There are a few specific dispositions which constitute offences such as, for example, hiding or modifying any evidence of a crime or of an offence[3], the threat or intimidation to deny the filing of a complaint[4], or yet witness bribing[5]. Nevertheless these cases are few in numbers and strictly defined. It appears therefore that the military authority is totally able to judge the existence or not of a characterized offence. Evidently, it is not about hiding a criminal offence, but it can have no fear to err on the wrong side as soon as it estimates that the action was not unlawful.

Taking into Account of the Legitimacy of the Action by the OPJFAs

The intervention of the OPJFAs, legitimate according to the texts, must allow to verify the legitimacy of the military action.

An Intervention Justified by the Texts

Military Police personnel, as well as the officers, NCOs and gendarmes under their command, practice military criminal police duties under the dispositions of articles 81 to 88 of the CJM and notably article 84 para 4 of the CJM which specifies that the OPJFAs "are bound , towards the attorney, by the obligations established by article 19 of the CPP" which itself stresses that "they are obliged to inform the attorney without any notice about the crimes, offences and infringements they know about".

Therefore, the application of this article imposes upon them to inform about any characterized infringement without notice. If they are not party to the military action, they will be able to collect the informations likely to help them to evaluate the act thanks to the cooperation with the military authority. In this context, the kind of relations maintained with the command will, of course, be determining.

If an investigation is decided, the relations between the District Attorney and the OPJFA will

be direct. Which will then be the elements of evaluation ?

- Is the act covered by self-defence[6] ?
- Has the act been perpetrated because of necessity in order to safeguard a seriously threatened person or property[7] which includes notably the persons or properties having a special status quoted in the rules of engagement ?
- Is there a cause for irresponsibility, the act having been "ordered or authorized by legal or regular dispositions" or "commanded by the legitimate authority, except if this act is obviously illegal[8]", in other words, have orders been given ?

The legitimate action must find its justification in the answer given to these questions.

The Legitimate Action Covered by Law

Let us immediately discard the action which might be considered as illegal ; it is the case, for example, when an operation would be beyond the framework of the mandate of the Force. Here, the indicted soldier could try to justify his act by weighing his unavoidable error against the law[9].
In the case of a legitimate action which unwillingly caused inappropriate behaviors, (for example : injury because of rashness), a precedent by the Supreme Court of Appeal dated January 5th 2 000 recognized a clause of criminal irresponsibility to the faults unvoluntarily committed during the execution of an act commanded and authorized by the law or the regulation. So, the French law offers, depending on the circumstances, means to address a legitimate action.

Other rules of the law can also be legitimately invoked. The local criminal law, if it exists, is certainly an example that must be taken into account in operations (searching or frisking) which are, in principle, conducted in accordance with guidance from the Force commander. In this type of situation, a OPJFA, who has an indisputable know-how, can nevertheless find himself taken aback with regards to the details, and of which rule to apply.

Similarly, in the framework of a peace keeping operation, relatively intense combat phases may occur, imposing the respect of the rules and principles of the humanitarian law.
The rules of the international law and the law of the armed conflicts should therefore be applied depending on the events.

Finally, the rules of engagement will be invoked every time orders have been given for the execution of a legitimate action ; though not constituting a legal standard, they are derived from the international mandate given to the Force and are validated by the French political power. They determine the conditions of execution of the mission and, even if they are not released, they must be able to "cover" the military actions conducted in the framework of the mandate.

The cooperation of the OPJFA and of the military authority or of its legal advisor is therefore necessary to establish the legitimacy of the act. It is indeed commonly recognized that in the law, legitimacy is often synonymous of legality. Besides, it must be stressed that until now no member of a French force in operation has been the object of a criminal sentence following the execution of a military action. The centralization of the affairs by the TAP since 1999 should perpetuate this situation insofar as the magistrates of this tribunal have today a good knowledge of the difficulties which the military are confronted with when in overseas operations.

1 Instruction n°21420/DEF/SGA/DAJ/APM/EO dated October 23th 2001.
2 The Solana Case.
3 Article 434-4 of the Criminal Code.
4 Article 434-5 of the Criminal Code.
5 Article 434-15 of the Criminal Code.
6 Article 122-5 and 122-6 of the Criminal Code.
7 Article 122-7 of the Criminal Code.
8 Article 122-7 of the Criminal Code.
9 " The person who justifies to have believed he could legally perform an action, and that his act against law was unavoidable, is not legally held responsible. " Article 122-3 of the Criminal Code.

Conclusion

The OPJFA on the theater has therefore no reason to be systematically involved in the military actions conducted by the forces in the execution of their mission ; the military authority must play its role in criminal matters.

But there is no reason either to try to systematically keep the OPJFA aside. The establishment of a confident relationship between the military and legal authorities is required ; there should be no suspicion of hidden violations which the legal authority is responsible for investigating.

For that, it certainly belongs to the legal advisor of the commander on the theater, in liaison with the military police commander to dissipate all the misunderstandings and to see to it that the written reports be marked with some caution not to stir up inextricable disputes on the principles when no serious incident occured.

Overseas Operations of the Bundeswehr

in the Light of International Law and Constitutional Law

Soldiers committed in overseas operations want to know the justification for a military intervention in which they take part. They ask why they must part from their families during a protracted period, even be put at risk of dying, being wounded, displaced or tortured. Thus they claim a credible legitimating of a military mission together with a legal cover for overseas operations. A lack of a legitimate status would result into a loss of motivation. Thus it is in the interest of the employer-state to avoid it.

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In the past, a German soldier considered himself first as a military combatant who had to show his abilities within the armed forces to enable the State to assert itself. The legitimate aspect of his mission was obvious. Today, he has to consider himself as an instrument of the current policy. In a new security context, he contributes in implementing political decisions abroad. It is difficult for him to understand the meaning of his mission if he does not receive any explanation. Consequently, he must be informed of the political goals sought after by the military intervention in which he takes part.

Moreover, he must know the legal legitimate characteristic that justifies the pursuit of the objectives through a military commitment. This legitimating gives him the certainty to act on solid legal bases, in particular when he is not completely convinced by the official political arguments.

This legitimating procedure relies on the "citizen in uniform" principle. We ask our soldiers to obey orders while keeping a critical mind. However, to have a critical mind, soldiers need to know the main reasons for their commitment as well as the principles of international law and constitutional law underlying their mission. For military commanders who have to answer questions from their subordinates, this requirement is an enormous challenge.

In addition, the commanders of soldiers committed in operations must face other questions with legal implications. Indeed, it is necessary to explain to soldiers in which conditions and how they have the right to resort to force. The use of force within the framework of an operation, including overseas operations, permit one to impose a political mission with military means. It is absolutely necessary to avoid that a counter-productive use of force by some soldiers or a military commander when they carry out their missions jeopardizes the success of the operation.

Consequently, only duly authorized coercive measures can be applied. Contrary to traditional warfare, not resorting to force is the rule and resorting to force is exceptional. Applicable law in operation is thus organized around the questions arising in this context.

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Both aspects, the "right to carry out operations" on the one hand and "applicable law in operation" on the other hand, constitute the primary elements of any legal training within the framework of operational planning.

Legal Bases for Military Operations

The Importance of Legitimating Overseas Operations with International Law

The framework set up by international law for committing armed forces overseas is defined through proscription standards. The most important of which is the universal ban to resort to force in international relations. States are compelled to settle their disagreements through peaceful means. To meet this requirement of the United Nations Charter, Member States have transferred their prerogative to resort to force to the system of collective security of the United Nations. They have entrusted the Security Council with the safeguard of international security. Only the Council is authorized to inflict sanctions, should peace be threatened or broken or should an aggression occur. Coercive measures that the Council imposes in accordance with chapter VII of the United Nations Charter are not regarded as war, but as international police operations carried out with military assets.

The task of the Security Council which consists in authorizing independent States to resort to force, is carried out through the adoption of resolutions by which Member States are entrusted with a military intervention into foreign States. Overseas operations of the Bundeswehr currently in progress rely also on such resolutions. Within the framework of international law they legitimate the use of force by independent States. By principle, Germany takes part only in multinational military interventions justified by a mandate of the United Nations. Exceptions, such as those we faced during the air war in Kosovo, require a specific legitimating by international law.

Considering the problems more closely, we realize that some elements are still missing for a comprehensive explanation for the Bundeswehr operations to be entirely covered by international law. In fact, the operations of the Bundeswehr are also based on conventional international law. As an example, let us consider the SFOR commitment in Bosnia-Herzegovina.

The SFOR - and previously the IFOR - mission results first of all from the provisions of the Dayton peace agreements. They describe the obligations of former civil war belligerents and the mission for the peace supporting force whose implementation was entrusted to NATO. The Nations represented within the Security Council which signed the peace agreements confirmed the implementation of the treaty's provisions, negotiated with the concerned belligerents and the Balkan States ; it followed that any non-compliance with these agreements would result into coercive measures in accordance with chapter VII of the United Nations Charter. To this end, resolution 1088 dated 12/12/1995 was adopted. As far as its legitimate standing regarding international law, the commitment of the Bundeswehr within the SFOR framework relies thus

on two elements : common international law and conventional international law.

As the Bundeswehr takes part in a NATO multinational military operation, it is sometimes suggested that the SFOR commitment should also be related to a NATO mandate under the terms of conventional international law. This is not correct. The mandate of the Security Council obtained for the SFOR commitment by the States which signed the Dayton peace agreements was not addressed to NATO, but to the Member States of the United Nations. Thanks to their troops, they had to achieve the implementation of the Dayton peace agreements. They were tasked to take suitable measures to carry out the tasks arising from the peace agreements with the assistance and within the framework of the organization mentioned in appendix 1-A.

If the Security Council considered NATO - expressly mentioned in the Dayton agreements - when it drafted its resolution, it dealt however at first with some nations which combined their forces, capacities and resources on the account of the Dayton agreements and which were also NATO members. They decided to carry out the U.N. mandate together and to OPCON their available troops to a NATO command. However this procedure did not transform the decisions made by the NATO Council into a NATO mandate. Indeed, it was a common decision made by independent States in compliance with the rules and procedures provided for in the NATO treaty. Thus the military operations of NATO forces do not rely on a NATO Council decision as a legal base, but on agreements settled within Alliance qualified organizations binding NATO-member sovereign States under the terms of international law.

It was requested from the States not belonging to NATO to also take part in the NATO operation. To this end, NATO Member States authorized the NATO Council to conclude relevant agreements with the Nations that did not belong to the Alliance and were ready to commit themselves to the NATO operation.

The Legitimating of Overseas Operations of the Bundeswehr by Constitutional Law

Contrary to other nations, whereas the military operations of all the Nations supplying troops for peace support missions rely on identical principles of international law, Germany has some specific characteristics as regards the coverage of operations by constitutional law. At the end of the East-West blocks confrontation and after Germany's reunification, the federal government of that time took a cautious turn towards a policy of participation in multinational military operations. This policy caused a strong dispute within German public opinion. It particularly concerned the commitment in Somalia in the early 90s. Parliamentary opposition of that time regarded military operations out of the framework of national and collective defense pertaining to the Alliance as anti-constitutional. It referred to the text of paragraph 2 of article 87a of the fundamental Law : *Apart from defense, armed forces should be committed only insofar as the present fundamental Law authorizes it expressly*. As the very authorization required by this constitution article is not included in the fundamental Law, overseas operations of the Bundeswehr - according to what was said at the time - would not have complied with the fundamental Law.

A political controversy followed, arousing a keen interest, and was carried out with legal arguments. This intense public debate was concluded by a decision of the federal constitutional Court dated 07/12/1994. It objected to the reservations as presented. It justified its decision by referring to paragraph 2 of article 24 of the fundamental Law, which authorizes Germany to adhere to a system of collective mutual security to safeguard peace. According to the interpretation proposed by the Court, this constitutional provision also legitimates peace support operations within the framework of the United Nations.

With this decision, the federal constitutional Court made another determining decision, which appreciably influenced political practices : Any armed operation requires the preliminary parliamentary authorization of the Bundestag - whatever it is : a pure peace support mission or a mandate of the United Nations allowing coercive measures in compliance with chapter VII of the U.N. Charter. This interpretation of the federal constitutional Court does not come directly from the wording of the fundamental Law. It comes from the constitutional tradition which attaches a great importance to Parliament - a tradition that could be observed since 1918, only excluding the state practice of the IIIrd Reich.

However, the parliamentary prerogative of approval does not confer any right to the Bundestag to take initiatives. This means that the Bundestag does not have the right to compel the federal government to launch an overseas operation. It can only grant or refuse its assent to any overseas operation requested by the federal government.

Applicable law in operation

Rights and obligations for troops in countries of deployment result from the mission of the forces committed overseas, defined under the terms of international law and constitutional law. Rules of engagement, stipulated at international level and called " Rules of Engagement " (ROEs), are the command and control tool that enables political authorities to have an influence on the armed forces to achieve the political goals. These are OPORDs (Operation Orders) and intervention orders thanks to which political intentions can be implemented in compliance with the legal provisions in force. ROEs are used as a legal basis for orders governing troop operations, should we

resort to force with or without the use of firearms. As ROEs enable to control troops committed overseas with political tools, they underline the primacy of politics.

Nothing that is prohibited by national or international law can be authorized by ROEs. The humanitarian international law must also be complied with within the framework of peace support operations. ROEs authors must take this into account. On the other hand, it is necessary to authorize measures that imply the use of force and that are guaranteed by international law such as a soldier's individual self-defense.

Each commitment is the purpose of specific ROEs, even if there are standard ROEs within NATO. It is necessary because the contents of the United Nations mandates are not identical either. SFOR troops do not have necessarily the same rights as KFOR ones. ROEs include a list of decisions authorizing to resort to force within the framework of the options granted by the very mandate, according to the provisions of international and constitutional laws. Thus a military commander who orders a measure implying the use of force should not only check if it is suitable, but he must also check its conformity with ROEs.

ROEs are negotiated within NATO organizations. During negotiations, nations can voice reserves that will be taken into account. As an example : the non-utilization of irritating products such as teargas or pepper spray when facing gatherings of people prone to violence, the non-utilization of landmines or similar reserves such as formulated in the past by the German part.

ROEs - in their capacity of agreed-upon orders at an international level - do not have an immediate effect as such. According to German law, orders sent to German soldiers can come but from a German commander. Consequently, ROEs are formally to be enforced by the German SOD (Secretary of Defense).

Beforehand, ROEs are not compelling. First of all, ROEs are intended to military commanders. A condensed version of ROEs is given to soldiers in the shape of a pocket card. This pocket card should enable each soldier to control the application of the provisions concerning the use of weapons.

Conclusion

The German soldier must be informed of the goal of his overseas commitment. He does not need to know each legal detail of its mission. However, he must be aware of the essential legal provisions in order to have confidence in the legitimacy of the operations he is about to carry out. Only when he has become confident, he will realize that he will also have to comply with the limits which are imposed to him by law.

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The Public Security Gap in Modern Peacekeeping Missions and its Implications for Military-Police Interfaces

Although recent conflicts such as those in Afghanistan and Iraq indicate that high intensity warfare will remain a potential role for modern armies for the foreseeable future, peacekeeping or peace enforcement missions appear likely to remain the most common type of deployment. However, even in Iraq it has become clear that winning the high intensity combat phase of an operation is not enough. The real challenge is addressing the stabilization phase and "winning" the subsequent peace. There is a growing realisation within the International Community (IC) that the sort of peacekeeping missions we find ourselves contributing towards -whether peacekeeping, peace enforcement or post-conflict stabilization- require a multifunctional approach within which the military, police or any other contribution is but one part. This axiom implies the need to achieve a convergence of various functional capabilities - political, economic development, humanitarian, military and law and order towards a desired end-state.

BY THE LIEUTENANT-COLONEL (GB) ROLLINS, BRITISH LIAISON OFFICER, CENTER FOR FORCE EMPLOYMENT DOCTRINE (CDEF)

There is nothing original here. The issue is at the core of the UN's Brahimi Report, is recognised implicitly in NATO's Strategic Concept and has been confirmed in the five major Lessons Learned that have come out of the NATO experience in the Balkans, namely the need to :

- Assign responsibilities early and clearly.
- Ensure tight linkage between mission, mandate and capabilities.
- Harmonise civil and military planning and co-ordinate civil and military action.
- Close the "enforcement gap" between civil police advisors and military forces.
- Focus on "end-state" rather than "end-date".

However, even in making these observations, there may be misplaced assumptions about the IC's ability to draw up mandates and generate capabilities that, given adequate co-operation, planning and co-ordination, will meet needs on the ground. In particular, can the IC cover all requirements from a sufficiently early stage in a crisis ? This conundrum applies particularly to the area of public security and the interface between military and police forces.

THE REQUIREMENT

The very fabric of any society is underpinned by an effective system of law and order. This requires, firstly, addressing the whole spectrum of law and order at the same time. For a regime of public security to work, there must be :

- A more general level of security within which a public security regime can be applied.

- A legal system that is applicable to the society in question.

- The ability to investigate, arrest, prosecute and sanction criminals. This must be based upon a recognised legal process and independent police forces and judiciary who work to accepted norms and who are perceived to do so.

More than this, however, the above needs to be put in place from the early stages of a crisis before an unmanageable public security vacuum arises, one in which the wrong elements might flourish and undermine progress towards a stable society. But do such standing capabilities exist and, if not, how can the situation be addressed until they are in place ?

There is considerable empirical evidence that there is likely to continue to be a policing capability gap in the early stages of an IC response to a complex political emergency. This is in spite of initiatives by the OSCE, EU and UN to address such issues as the setting up of standby capabilities, improving mobilization procedures and legal frameworks. The gap must be addressed as what happens in this area in the early days is one of several key issues critical to the longer-term stability of the area. There is also, evidence, however, that the use of military forces can, potentially, contribute towards a wider solution. Within the Balkans and in East Timor, for example, forces have done much to support the policing function and uphold public security.

IMPLICATIONS FOR MILITARY FORCES

The issue, however, goes beyond premeditated consideration of using military forces in such a way. The fact is that military forces continue to be drawn into a direct public security role, often without proper mandates or appropriate rules of engagement. This happens because the requirement has not been properly addressed by the IC beforehand and there is no other way of filling an immediate vacuum. This leaves military forces facing questions as to where responsibilities for a more general level of security end and those for public security/law and order begin. What if a public security regime is not in place and unlikely to be for some time ? How far does that military force go in protecting civil society from crime ? What is its mandate to do so ? If it has one, what is the legal basis ? Are the soldiers concerned trained and equipped for such a role ? There have been many examples - the early days in Kosovo is one- in which military forces have found themselves in such a position, effectively acting as a proxy police force without the proper mandate.

It is important at this stage to draw the distinct, though often subtle, difference between being ultimately responsible for the maintenance of law and order and playing a supporting role. Military forces should, ideally, not be ultimately responsible for law and order regimes. However there are a wide range of activities they can conduct in support of small, under-resourced police forces and legal authorities. Such activities include :

- The sharing of intelligence - as far as security considerations allow.

- Security/monitoring of borders to deter, for example weapon smuggling and trafficking of people.

- Direct support to policing action - for example provision of additional security at the scene of an arrest, focused patrol programmes, search operations or riot control.

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- The provision of more specific capabilities to support law and order authorities more directly, perhaps the best NATO example being Multi-national Specialised Units (MSUs), a capability deployed under military auspices but comprising resources based upon the "third force" capabilities (Gendarmeries/Caribinieri/Guarda Civil) that exist within some contributing nations.

There is potentially much more that can be done in providing such support to

a police or equivalent authority lead without taking over the policing/legal function itself. However the extent to which this is possible will be dependent upon factors that include :

- Mandates.
- Rules of Engagement and associated legal considerations.
- Training levels.
- Equipment and force structure.

There is another set of reasons that can limit the use of military forces in such a role, namely domestic political sensitivity within donor countries perhaps governed by the domestic constitutional position of an army. This might point to the selective use of forces appropriate to such a role.

If military forces are to be used in support of a police or legal authority - one that may be very small in physical terms on first deployment- a number of other prerequisites need to be met. These include :

- Identifying the gap to be filled.
- Understanding fully the limitations of using the military in a public security role.
- Joint planning prior to deployment that anticipates changes in mission requirements over time and which include plans for transition of responsibilities.
- Military force generation and design.
- Training covering a wide range of activities.
- The drawing up of realistic mandates.
- Structures for co-operation on the ground, such as joint operations centres.

None of this is easy to address and less easy to follow through. Even in the Balkans today where the public security position is much improved and both international police forces as well as ones established locally are working well, a stable public security regime is not yet embedded.
In particular, organised crime on a huge scale continues to pose a major challenge to the creation of effective law and order. To combat it requires a level of capability within the mandated organisations and the local forces they are supporting and a level of inter-organisational/inter-governmental co-operation that is proving difficult to realise.

CONCLUSION

There continue to be potential gaps in the IC's ability to establish effective public security regimes in peacekeeping operations. This stems from the absence of readily deployable capabilities that can be tailored to a given situation. The problem is further enhanced by the need to address the spectrum of public security issues in an holistic, integrated manner. This can only be done under the lead of the proper, mandated civil authority. Often, in the absence of such an approach, military forces have found themselves drawn into public security roles without proper mandate and/or preparation. Both these problems can be addressed together by recognising that military forces can contribute much towards effective and lasting public security without going beyond playing a supporting role. Nonetheless, for such an approach to work there is a considerable range of issues that needs to be first addressed. These issues include examinations of :

- Potential requirements in the above field and the IC's ability to meet them from civil/police sources.
- The extent of potential military support.
- The follow-on implications for military forces of involvement in such a role.
- The potential command and control arrangements for integrating military capabilities with civil led law and order regimes.
- The legal and policy implications of the above.

The Laws of Land Warfare and Non-Conventional War

The Laws of Land Warfare (LLW) represent a relatively comprehensive set of rules governing conventional warfare between nation states with regularly constituted and identifiable military establishments. These rules are the result of a long historical tradition and effectively regulate the conduct of war when war follows the standard model of violent confrontation between established states in the form of battles and campaigns contested by conventional armies and navies. The LLW are much less effective, however, in governing non-conventional conflicts. In this short article I will attempt to describe the legal complexity of non-conventional warfare. This should allow us to understand the reasons for the failure of the LLW to effectively govern non-conventional warfare and identify the work to be done if this failure is to be corrected.

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The views expressed in this report are those of the author and do not necessarily reflect the official policy or position of the Department of the Army, the Department of Defense, or the U.S. Government.

The very fact that we label certain conflicts non-conventional hints at the legal and moral problems these conflicts will produce. Non-conventional conflicts are legally (as well as physically) messy and for good reason. They are at the intersection of the LLW, other aspects of international law and civil law. Unlike conventional conflicts where legal distinctions and categories are relatively clear, in a non-conventional war there is frequently little agreement on the legal and moral status of the different combatants and their actions. Of course, even in the most conventional armed conflict we invariably are confronted with competing and mutually contradictory legal and moral claims concerning issues of both *jus in bello*, the just conduct of war, and *jus ad bellum*, the justice of engaging in a particular war. In non-conventional warfare, however, we are frequently confronted with moral and legal claims which seem to ignore or even reject outright these traditional categories that form the foundation of the LLW. The legal problems presented by non-conventional wars are particularly urgent today because we find ourselves increasingly confronted by asymmetrical wars which almost invariably start as or evolve into non-

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conventional conflicts. To avoid confusion and get at the core of the legal problems posed by non-conventional warfare, we must clearly define what we are talking about.
At one end of the spectrum of what is sometimes considered non-conventional warfare are tactics and operations which we can assimilate to conventional war. In these cases, both combatants fight using conventionally equipped and organized forces, but one or both of them adopt non-conventional tactics, usually using specialized units. Non-conventional in this sense entails avoiding pitched battle with your opponent's main combat formations while conducting raids, ambushes and other combat operations against logistic, command and control and other "soft targets". In these cases, the LLW are effective in governing the conduct of the combatants. Although we sometimes talk about such examples as cases of non-conventional warfare, they are in fact quite conventional and we must treat them as such. British and American "Chindit" operations against the Japanese in Burma during World War II are a classic example of this sort of warfare.

At the other end of the spectrum of "non-conventional" warfare is what I would identify as true non-conventional operations. But what are "true" non-conventional operations ? These are operations where a combatant force seeks an advantage by blending in with the civilian population to escape engagement on unfavorable terms. These non-conventional operations frequently include the deliberate targeting of civilians. Further, the belligerent entities who conduct "true" non-conventional operations are routinely groups who have no clear sanction from a state and no clear legal existence within the framework of international law. They are not necessarily identifiable as military organizations either, although in most cases these groups will have some of the features of a military organization. In "true" non-conventional warfare, therefore, we must keep in mind these two important features. The first is the instrumentilisation of the civilian population as a military asset by one or both of the belligerents.
The second is the confusion over the legal status of the group or groups conducting non-conventional warfare. A group such as Hamas is a prime example of this sort of extra-state entity waging non-conventional warfare. Hamas depends on the Palestinian civilian population as a protective cover and uses the Israeli civilian population as its prime target.

Of course, in most of the conflicts which we qualify as non-conventional, there is a confusing mixture of conventional and non-conventional actors, tactics and operations used by one or more of the belligerents. The U.S. war in Vietnam is a classic example of a conflict with this type of confusing mixture of actors and tactics.

At this point we can begin to identify the often intractable legal issues associated with non-conventional warfare. Perhaps the most critical legal problem in these types of conflicts is posed by the fact that one or more of the belligerents reject the distinction between *jus in bello* and *jus ad bellum*. Belligerents in conventional wars either believe or at least seek to give the appearance that their conduct generally conforms to the LLW. Obviously in any conflict there is tremendous disagreement between belligerents concerning the legality of their opponents actions. This disagreement is particularly acute on questions of *jus ad bellum*. Yet despite fundamental disagreement on the question of *jus ad bellum,* belligerents can and often do agree on the tenets of *jus in bello,* the just conduct of war.
This distinction is fundamental if the LLW are to have any meaningful role to play at all in regulating the conduct of war. A non-conventional combatant group will almost systematically reject this distinction and will instead justify their violations of *jus in bello* constraints by appealing to the compelling justice of their cause and their relative weakness.
The formula very simply put is "We are weak but our cause is profoundly just. Because of our weakness we cannot possibly win if we respect the LLW. But given the justice of our cause, we must win and can therefore prosecute the struggle without regard to the LLW."
This extraordinary challenge to the LLW has gained wide currency and acceptance during the later half of the 20th century. This formula and overt or tacit rejection of the LLW was the standard approach of Marxist inspired wars of so-called "national liberation". These wars invariably had a very large non-conventional component with the resulting degradation in the respect of the LLW.

The justificatory discourse of the non-conventional Marxist inspired belligerents in these wars became so pervasive that we now tend to selectively accept this type of reasoning as valid. The Israeli conflict with the Palestinians is a prime example of the power of justifying a complete disregard for the *jus in bello* portion of the LLW based on the supposed overwhelmingly just nature of a belligerent's cause and the belligerent's weakness. Palestinian "combatant" groups such as Hamas violate the most basic tenets of the LLW, yet are almost never condemned as criminals except by their opponents the Israelis.
The Israelis, on the other hand, have extensive rules of engagement (ROE) designed to afford at least minimal respect for the LLW. Whether the Israelis do effectively respect the LLW is an open question of course. What is surprising is that the Israelis are frequently condemned as war criminals or even as committing crimes against humanity while the Palestinians get a free ride. It is perplexing that there is almost no inclination to hold their non-conventional opponents to the same standards of legality.

The second perhaps insoluble challenge non-conventional warfare poses for the LLW is the confusion over the legal status of non-conventional combatants.
The question is : are they combatants

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as defined by the LLW or simply criminals ? The complexity of modern non-conventional conflicts make this simple question perhaps unanswerable. Part of the problem in determining the status of non-conventional combatants comes from interpreting the LLW criteria for identifying a combatant. Were non-Afghanis fighting beside the Taliban legitimate combatants under the LLW, or " illegal combatants " as claimed by the U.S. government ? Resolving the controversy surrounding these " combatants " status is dependent on achieving a consensus on the legal nature of their activities under the LLW and other international law. Another facet of this problem comes from establishing the legal status under international law of the organizations that non-conventional combatants are members of. War in the 21st century seems destined to primarily oppose states against non-state transnational organizations. What is Al Queda's status under international law and the LLW ? Are members of Basque or Corsican separatists groups protected under the LLW ? What about the IRA ?

Many non-conventional conflicts take the form of civil war which further exacerbates the legal confusion surrounding the conflict. Will the conflict be governed by internal criminal law or the LLW ? For example, should French torturers during the Algerian war have been punished under French law or international law or both ? Did they even violate the LLW since Algeria was for the French an internal " police action " ? Perhaps the last problem for assigning or no the status of combatant is the fact, as we saw in the paragraph above, that many non-conventional combatant organizations reject the LLW. Clearly this is the case of terrorist groups such as Hamas and Al Queda. If they reject the LLW completely, to what extent do they deserve protection under the LLW ?

Non-conventional warfare poses the greatest challenge to the legal edifice represented by the LLW. This was of course true in the past but is even more so today as we enter a period of our history where non-conventional wars and actors seem to dominate warfare. This challenge points out the stark inadequacy of international law and the LLW to in some way " civilize " modern war. Of course this weakness is nothing new. During the Cold War the different nuclear powers' strategies of massive nuclear retaliation completely disregarded any consideration of the LLW. That glaring failure of the LLW was never resolved and is probably un-resolvable. We have perhaps a greater chance of resolving the legal and moral problems posed by non-conventional warfare. Solving these problems, however, will entail significant new work on defining the LLW. For the time being, that work has not even begun.

The Legal Protection
of deployed Spanish Soldiers

Throughout their history, the Spanish armed forces have served on theaters of operations under the protection of their flag. However, since 1992, the military forces have taken part in many international missions and from a legal point of view they have taken a new step - extraneous to tradition, but rich in debates.

Since Spain's integration into NATO in 1982, the "*Status of Forces Agreement*" (SOFA) has represented the reference framework that lays down the rules for the status of forces out of the home territory. Nevertheless, the operational span is broader and it is sometimes necessary to consider other structures (UN, EU...) for overseas military operations.

Debates on the legal protection of committed soldiers primarily concern the missions carried out by Spanish forces within the framework of the United Nations or NATO. Before looking further into the very specificity of these fields, it is necessary to underline some aspects of the organization of Spanish justice.

BY LIEUTENANT-COLONEL JOSÉ IZQUIERDO-NAVARETTE, SPANISH LIAISON OFFICER, CENTER FOR FORCE EMPLOYMENT DOCTRINE (CDEF)

Military Justice in Spain

The military legal status is adapted to the constitutional provisions and guarantees and it is used within the framework of a "specialized jurisdiction" because of its field of application and the specific law applied. A reform started in 1988 was at the origin of the integration of military justice into the State judicial power in order to safeguard the principle of jurisdictional unity established by the 1978 Constitution.

The Spanish military justice keeps a clear separation between commanders and jurisdiction. The judicial function is assigned to the military legal bodies, excluding the command and control bodies that had carried it out previously. It is administered by judges and magistrates from the judicial branch and as such "independent, irremovable, responsible and only subjected to the realm of law", according to the Constitution.

The Spanish military jurisdiction is not "corporative". Its attributions are related to the nature of the offense, neither to the condition of the supposed delinquent, nor to the location where the events occurred. Punishable behaviors of common nature are not included in the military legislation, but in the ordinary legislation, although a soldier is the actor.

The December 15, 1998 law on the territorial organization of the military jurisdiction brought down the number of territorial military tribunals to 18 and adjusted their competence to the boundaries of autonomous areas. They are gathered around five territorial tribunals. Two military tribunals are headquartered in Madrid, with jurisdiction on the entire territory ; a special military tribunal for field grade officers is added to this organization. Moreover, a military court is part of the Supreme Court.

The February 3, 1999 organic law on the disciplinary regulations for the armed forces has adapted the former code to the requirements of the current all-volunteer armed forces and thus feminization. It makes a distinction between misdemeanors (34) and crimes (37) ; the disciplinary actions taken can go up to thirty days in custody for the first ones and up to two months for the second ones. The jurisdictional supervision of the disciplinary power is given to military tribunals.

Status of Forces in International Missions

The legal protection of Spanish soldiers deployed out of Spain depends on the jurisdictional competence and on the system of rights and duties applied to the force.

In Spain, in peacetime, the military jurisdiction is exclusively limited to the military field. This takes into account the proceedings included in the military penal code and, by extension, its competence in all cases included in the international agreements signed by Spain for forces out of home territory (Organic law 4/1987 on the competence and the organization of the military jurisdiction : Art. 12.3). In time of war, the July 15 organic law 4/1987 includes an extension of this field ; but this decision relies on the Cortes Generales "[1] or the government if there is a preliminary authorization. As regards international jurisdictions, the evolution of the geopolitical context has raised new problems. Despite globalization, the State has been, until now, the primary body and the custodian of a range of authority linked to its concept of sovereignty. The exercise of this sovereignty is limited to a territory. Consequently, the Nation-State induces the principle of territorial sovereignty according to which an offence made inside its borders cannot evade its penal jurisdiction. Nevertheless, the presence of foreign forces on a Nation's territory poses a conflict of competence between the principle of territorial sovereignty - already evoked - and the " principle of flag "; according to this last principle, the forces of a sovereign State hold an extraterritoriality privilege according to which they are everywhere subject to the jurisdiction of their Nation of origin. The opposition between both these principles has grown from the second half of the XXth century, in parallel with the increase in the presence of soldiers outside their own borders.

The current demise of the Nation-State concept and the weakening of political structures resulting from the proliferation of civil wars impair the practice of international law. Moreover, the generalization of violence in crises goes beyond national framework, and legal ambiguity jeopardizes the legitimation of military operations. The status of forces seems to be the only valid tool

to guarantee the legal status of soldiers in overseas operational theaters. A SOFA is an international agreement that is worked out to meet a specific situation. Today, before projecting a force, it is necessary to negotiate an agreement, on the one hand between the Nation or the international organization which integrates the forces and on the other hand, the concerned Nation so that the status of forces is clearly established. This agreement is highly important because it is a guarantee for projected forces and a conciliation tool for two sovereignties in conflict : the sovereignty of the Nation of origin and that of the Nation which hosts the forces. The penal, disciplinary and administrative fields, as well as the privileges of the force and of its members are the SOFA's basis.

In the operational field, the " Rules Of Engagement " (ROEs) are closely linked to the operational mandate; they are a technical solution to reach planned goals and a legal reference to legitimate the action. ROEs are a tool for commanders that endeavor to guide the use of force in the form of allowances and denials. That is why they are specific directives for the troops ; the national authority is responsible for their enforcement whereas infringements are subject to the Spanish military jurisdiction.

• Operations Within the UN Framework

The status of a force which operates with a mandate from the United Nations derives from articles 104 and 105 of the Charter which lay down the recognition of legal competence, the privileges and immunities of the Organization and of its members. These estimates were developed in the Convention on UN privileges and immunities (1946) and in the Convention on the UN manpower's safety (1994).

This last agreement is enforced in U.N. operations decided by the competent authority and carried out under UN control and authority. The convention relies on the " judge or extradite " international law principle, which enables a national legal authority to judge the punishable behavior of its citizens or to extradite the alleged delinquent.

The convention does not govern coercion operations authorized by the Security Council within the framework of chapter VII of the United Nations Charter. This type of operation is regulated by the international law of armed conflicts. However, nothing prevents the human rights enforcement with a universal character as considered in article 20.

The signature of a SOFA is necessary between the HN (Host Nation) for the operation and UN. The first document of this kind is the 1957 " regulation for UN contingency forces ". Today, SOFAs rely on the pattern resulting from resolution 4/89 of the General Assembly. It consists of ten articles broken down into 60 sections, which settle the legal status for the operation.

This agreement establishes a difference between criminal and civil jurisdictions. As regards soldiers, immunity with respect to the penal jurisdiction of the host country is guaranteed, although a delinquent is accountable for his acts before the respective national jurisdiction.
On the other hand, all the members of an operation are subject to the civil jurisdiction of the host country, except in the case of a request based on facts in connection with operations, which follows the procedure envisaged by the SOFA.

However, in many cases these provisions are not respected by local authorities who act in an excessively independent way and out of international law in crisis or war situations.

Disciplinary measures remain a national responsibility. The span of possibilities is very large, but generally, the commanders of the Spanish force have the authority to sanction in the AOR (Area Of Operation). Misdemeanors are sanctioned in the theater, whereas criminals are repatriated and placed under the responsibility of the relevant national authority.

Eventually, the responsibility for damages linked to operations carried out by members of the force is assumed by the UN.

• Operations Within a NATO Framework

If we disregard the debate on the legal bases for the latest NATO commitments, the legal protection of Spanish soldiers varies according to the situation : peace, war or crisis.

In a peacetime situation, the legal status of NATO personnel is set by the 1951 London agreements (" *Status of Forces Agreement* " or NATO SOFA) and by the MOU (Memorandum of Understanding) and the supplementary agreements on the status of the permanent headquarters (Paris, 1952). There are other secondary provisions such as the agreements between the Atlantic organization or one of its subordinate commands and the Nations which host the forces or the NATO headquarters or the agreements between NATO members and PfP (Partnership for Peace) Nations regarding the status of forces (PfP SOFA, Brussels 1995).

In a situation of war, it is necessary to make a distinction between the status of NATO forces towards warring factions or neutral countries and the status of an Alliance Member State on the territory of another Member State. In the first case, the status of NATO forces is defined by the international law of armed conflicts. As NATO countries do not take part in additional Protocol I, this treaty will not deal with all the troops; but they will be subject to international law. In the second case, the SOFA will remain valid. Nevertheless, article 15 provides that paragraphs 2 and 5 of article 8 will not be applied to war damages. Moreover, the parties will be allowed to suspend or modify these agreement provisions.

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In a crisis, operations go beyond the framework considered in article 5. These kinds of operations which - in NATO terminology - were initially nicknamed "*Peace Support Operations*" have become "*Crisis Response Operations*" during the Kosovo conflict in order to widen the operational spectrum. The legal protection of soldiers depends on the precise definition of the kind of operation. If the label of "war" applies, the relevant legal status of forces is described in the preceding paragraph. On the other hand, if operations do not deserve this label, the status will be fixed by the status of forces agreed between the Alliance and the HN (Host Nation) for the mission. It should be stressed that urgency and a weakened political power in the host country deteriorate the reference framework. Committed forces should never remain without any legal protection. Combat operations that are likely to occur in this kind of commitment must abide by the international principles of the law of armed conflicts and of the humanitarian international law.

The participation of Spanish forces in the Balkan conflicts shows the various kinds of agreements which manage the legal status of soldiers in the theatre. In "the military appendix" of the Dayton agreements there are the major elements that guarantee the legal protection of forces : the "*mutatis mutandi*" application of UN privileges and the exclusive competence of the penal and disciplinary jurisdiction of NATO Member States towards their respective forces. In short, it is a matter of ensuring the immunity of military personnel towards local authorities and the submission of a case to the military jurisdiction in case of reserves.

• Other Operations

In addition to the previous situations, any commitment within the WEU - now EU - framework is the only one that Spain has considered. The Petersberg declaration has enabled some missions to be carried out ; the status of forces varied according to operations.

There are no major differences between the legal status of the Spanish forces within the framework of NATO and the EU. As the EU does not have a legal status, because the envisaged SOFA was not approved of, the status of forces in operation was negotiated between the Member States and the HN (Host Nation). These agreements were supplemented with other technical arrangements between the forces' commanders and the local administrative authorities.

1 In Spain, the "Cortes Generales" exert the legislative power and are made up of the "Congress of deputies" and the Senate.

Conclusion

The new geopolitical context, the progressive legitimation of the commitment principle - that is to say for chapters VI or VII of the Charter of the United Nations -, and the evolution of the strategic concepts of the Western defense organizations resulted into a significant increase in the commitment of Spanish forces in overseas operations.

The perception of legal protection has become a fundamental factor for troops' morale, in particular for the consequences that they could have for their NOKs (Next of Kin). The legal status of Spanish committed soldiers depends both on the international and national authorities.

Compared to the first one, the presence of Spanish troops in a foreign country has resulted into a conflict between sovereignties for which a solution relies on the operation's SOFA. This instrument of international law includes various parts ; but the penal and disciplinary fields are perceived as the keystone for the legal environment. SOFAs in force recognize the validity of the principles of territorial sovereignty and of the "flag".

In the problems of conflicting jurisdictions, national jurisdiction is applied preferably for offences that interfere with the members or the properties of the Spanish forces or of other forces committed in the operation, in addition to offences that are service connected. As regards disciplinary responsibility, it is always conferred on Spanish authorities. In crisis management operations carried out in areas of conflict whose official structures do not grant any political credibility, the immunity of jurisdiction is generally called upon in the status of forces.

At a national level, military justice is a guarantee for the legal protection of Spanish forces. Indeed the military jurisdiction applies generally to crimes or misdemeanors made by Spanish soldiers out of their home territory.

Stabilization and Rebuilding Operations

A radical change in the strategic context has involved deep changes in terms of capabilities, structures and military doctrines of commitment those last few years. Static missions for the defense of homeland territory - specific to the bipolar period - have evolved towards dynamic overseas commitments, from humanitarian missions to high intensity operations, to cover the whole range of conflicts.
Security has no longer a primarily military connotation and has become a larger concept, with a multidimensional and multipurpose character, within the framework of which the military tool is one of the major " actors " for action ; it operates alongside the diplomatic, economic and civil assistance components, in accordance with political guidelines.

BY GENERAL GIACOMO GUARNERA, ITALIAN DEFENSE ATTACHÉ IN PARIS

In modern scenarios, conventional symmetrical conflicts, characterized by protracted high intensity warfare, are very rare indeed. On the other hand, Crisis Response Operations (CROs) are very frequent. They can include several operational activities undertaken simultaneously and requiring diversified capabilities.
The recent lessons learned in Iraq have shown the extent to which the limit between Crisis Response Operations and conventional war operations is narrow or even non-existent, but especially the extent to which the stabilization and rebuilding phase proves to be essential, resolutive and complex at the same time.
Indeed, to ensure order and safety, thus implementing the conditions for a real democratization of the country in which the forces are committed, it is necessary to have a broad range of capabilities, enabling to carry out a heterogeneous set of activities, such as disarmament, demobilization and the rehabilitation of former-combatants and refugees, humanitarian aid, without forgetting war against guerrilla and terrorism, etc.
It is a phenomenon whose appearance renders the framework even more complex and on which we will come back later in order to better specify the implications in the military field.

To deal with the new operational requirements characterizing modern scenarios, military tools must have distinct but complementary capabilities. They must be able to cope with the very combat missions, but also with stabilization and rebuilding tasks.
The Italian Army has launched a process of structural and capability reorganization for a long time through which it has been possible for our units to take an important part in the numerous commitments carried out on the international scene.
Currently, approximately 6,500 Italian soldiers are committed overseas. The daily average for personnel committed in out-of-area operations during the last 6 years amounts to about 8,000 men.

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In addition to these soldiers, it is necessary to add the soldiers tasked with defending the homeland territory, within the general framework of anti-terrorism warfare : the protection of VPs (Vulnerable Points), nicknamed " Operation Domino ", has been carried out since 2001 with an average of 4,000 men tasked to monitor almost 150 VPs located in 88 provinces.

Last year, the Italian Army committed approximately 16,500 personnel on the various operation theaters, whereas 10,000 men were committed for " Operation Domino ", out of a total of 26,500 personnel in one year, equivalent to 33 % of the operational component.

This is only a brief presentation of an intense commitment, during which time the Italian Army has supported peace and international security on the front line for more than ten years.

These numerous operational activities have resulted into useful lessons learned not only from national experiences, but also from those nurtured by other Armies.
All international crises in the last decade (from the crisis in the Balkans until the most recent ones in Afghanistan and Iraq) have confirmed the central role and the resolutive character of the land component toward obtaining strategic objectives - in the field - as laid down by the political level.
Indeed, conflicts breaking out in populated areas during operations of this kind require the diffuse presence of the land system, an essential securing device to cope with crises.

Lessons learned revealed several other very important elements for the constant updating of the future capabilities that the Army must have. We will only present the main ones.

1) Success for a crisis management operation depends in particular on a careful planning for " after-conflict " activities. To transform a military victory into a political victory, we need in fact to conquer " the hearts and minds " of the civil population, by helping it to restore acceptable living conditions, to rebuild the main installations, and to implement medical assistance, etc.

2) Modern stabilization operations must be launched without stopping the whole of the operational cycle. Thus combat, stabilization and rebuilding activity planning have to be carried out simultaneously, as an integral part of a single and larger operation plan.

3) Within the framework of a stabilization and rebuilding operation, the commander of the force has to operate both as a major " manager " for stabilization and rebuilding activities ; simultaneously he has to be responsible for monitoring all the forces committed in the theater, and also by exercising command and control for smaller combat operations when necessary. Accordingly, it is necessary to plan to integrate the know-how shown on the table within the command structure, in particular during the initial phase of the post-conflict period, before the civil structures begin to resume operations.

- AOR security :
  - . Route security
  - . Force protection
  - . VPs' defense/control
- Counter-terrorism/guerilla warfare
- CIMIC
- EOD (Explosive Ordnance disposal)
- Crowd control
- Military Intelligence
- Humanitarian aid
- Transportation/Supplies
- Medical support
- Rebuilding
- Restoring power
- Crime control
- Police and armed forces training
- Support to NGOs and GOs

4) As the situation is stabilized, it is necessary - in the process of force generation - to carry out the lightening of combat units incrementally. Action will focus on the maintenance of long-term stability, through a closer coordination with the present international organizations.

5) It is essential to have a significant number of tactical support and logistical assets, in order to support the units of the operational component of the land force properly and to achieve stabilization and rebuilding activities to the benefit of the civil population.

6) The " *Brigade Task Force* " approach chosen by the Army to define the sets of forces to be committed individually proved to be effective. Moreover, as stabilization operations carried out in the post-conflict period last for quite a while, it is necessary to have a robust set of major unit and brigade commands to enable units to rotate and to provide sustainability.

In short, to face future challenges, lessons learned have confirmed that land forces must include a vast range of capabilities as well as complementary and especially specialized assets, necessary to carry out actions developed within the framework of a crisis management operation successfully, including stabilization and rebuilding activities - specific to the after-conflict phase.

In terms of forces, the components necessary to conduct crisis management operations can be schematically gathered in three sets.
- **The first one** composed of forces able to implement an actual and large combat capability is also essential during the stabilization and rebuilding phase to meet foreseeable risks and to graduate responses in a flexible and tailored-to-attack way ; and it is also an important element of deterrence.

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- **Second** - in theory at a level no lower than brigades - one must be able to secure large areas - and also to deny some of them. It must also be able to operate in an environment as insidious as urban terrain, in the whole range of missions including close combat in the event of anti-guerrilla and counter-terrorism operations.

- Lastly, a **third** set of forces, composed of specialized units for stabilization and rebuilding operations : Intelligence, CIMIC, PSYOPS, NBC, Engineers, Medical and Transportation.
  Within this framework, so-called gendarmerie forces can be committed ; they are tasked with missions typical of a police force with a military status, generally entrusted to ensure law and order, to carry out criminal investigations, to fight against organized crime and to train local police forces.

Each set of forces makes its contribution to achieve the required "*end state*", within a "military" security framework that must anyhow be carried out before and during a stabilization operation.

The operational concept consisting in committing - during stabilization and rebuilding operations - specialized units in a synergistic and complementary way compared to combat units is not new at all for the Italian Army.
To confirm it, it is only necessary to refer to forces deployed on the various theaters as years go by.
Still today, in the Balkans, in operation "Antica Babilonia" carried out in Iraq and in operation "ISAF" in Afghanistan, the Army commits "*combined-arms task forces*" task-organized around a combat component, tasked to protect, including the above-mentioned specialized components.

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The appearance of terrorism on the international scene makes it more difficult to task-organize and balance the units designed to carry out modern operations.
Indeed, military operations that occurred on the international scene - following the September 11 attacks - resulted from the fact that terrorism moved from an especially internal law and order problem to a problem of international security.

Today, to meet terrorism, it is not only necessary to implement a vast range of political and economic measures, but also to commit forces able to neutralize and fight this threat whose organizational and operational factors represent an increasing military connotation.
It is within this framework that NATO's NRF - NATO *Response Force* - initiative, whose planned operations for commitment can ideally be set in a kind of "overlapping zone" between peace-support and high-intensity operations.

In this "transition zone", the limit between war and Peace Support Operations (PSOs) is unspecified.
For this reason, even while stabilization scenarios progress, it is necessary to commit Army specialized forces of gendarmerie-type units or MSUs, beside a significant number of combat units, within which Special Operations Forces (SOFs) and light infantry units trained for anti-guerrilla and counter-terrorism warfare, as operations "Licorne" in Ivory Coast and in Haiti showed, where France applied these concepts in a significant way.

Among Army specialized forces operating beside SOFs and light infantry units in the repression of guerrilla and "militarily" organized terrorism, there are units tasked to carry out intelligence operations (EW - Electronic Warfare, observation, HUMINT at a tactical level), NBC units, and EOD (Explosive Ordnance Disposal) teams to neutralize, remove and destroy explosives, PSYOPS and CIMIC units.

In addition, recent terrorist attacks against civil populations and against the array of forces and military facilities in Iraq and Afghanistan, show that terrorism exploits urban installations for its own ends to cause not only devastating effects on civil

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including urban terrain.
The initiatives undertaken in this direction by the Italian Army are numerous and, to begin with, deal with training, specific cycles aiming to the acquisition of a capability to operate in asymmetrical contexts and in all the dimensions of urban terrain, including sub-surface.

population but also important effects on military, political and economic plans.

From this point of view, it is necessary to increase and improve the components that can meet and neutralize the asymmetrical and terrorist threats in any environment

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In conclusion, the evolution of operational scenarios compelled the Italian Army to reorganize almost all its operational components, implying quality. As regards manpower, we moved from almost 290,000 personnel in 1991 to 115,000 today, and we aim to reach 112,000 men and women in 2006. A decrease of 60% compared to 15 years ago.

Today, thanks to this rationalization process, the Army is able to implement almost all its (combat and specialized) units required to meet the needs associated with stabilization and rebuilding operations in a suitable way, by supplementing them with the capabilities provided with other components of the military tool, depending upon the mission to be carried out and upon the characteristics of the operational environment.

In practice, it is a unique set of forces within which synergies on the terrain - among various components - result from a balanced and functional use of their respective and specific operational capabilities, derived from an ad hoc developed training and a structural organization.

The capabilities optimization and improvement process has not yet been completed. At an organizational level, we consider to reinforce the SOF pool, to complement the ISTAR-GE reservoir, within the general framework of capabilities associated with tactical intelligence, in particular to the benefit of units earmarked to observation and intelligence gathering, including HUMINT.

We also consider to establish a set of medium forces particularly fitted to operate in sophisticated environments, thanks to their mobility, protection and firepower characteristics.
Obviously, the reinforcement process aims at a high joint- and multinational-oriented interoperability level.
Now we have to move forward in this way, in order to provide fast and effective answers adapted to all possible missions.

Does the end Justify the Means ?

"Unquestionably the bad has always persecuted the good, and the good the bad; some serve their passions, others serve charity. The murderer does not care about what he tears apart - the medical doctor is concerned about what he cuts. One seeks welfare - the other, decay ... In other words, which one acts in the name of the truth, which one is impious, which one harms, and which one cares" [1] ***Saint AUGUSTIN***

BY LIEUTENANT-COLONEL JÉRÔME CARIO, CENTER FOR FORCE EMPLOYMENT DOCTRINE (CDEF) LESSONS LEARNED DIVISION (DREX)

If the condemnation of *"violence"* is a fully legitimate principle per se, disarming the righteous allows others to perpetrate acts of violence. Therefore a justice order should be able to use force all the more as the righteous could be threatened by injustice and terror disorders.
On the question of what is just and unjust, moral references are obvious and legal steps are implicit. Warfare, a human - or inhuman - activity does not escape this phenomenon - because at war freedom and the responsibility of man are at risk. That is why the choice among the means and ways to fight is not unlimited.

Lacking any universal legislator and a law enforcement workforce, States have to develop and enforce laws. In the "jus in bello" matters, States should give priority to security imperatives - that is their principal mission, and not to draw international laws to suit their own warfare practices...So, beyond the philosophical, ideological, or religious differences, States have to allow for a minimum of obligations, simply because of charity and humanity principles, and also because of self-interest.

Gradually, ethics and law lead one to recognize that an enemy should be respected. This is the reason why, nowadays, in matter of international law a reference to "humanitarian considerations" tends to become mandatory and why it does not tolerate violence. Further, if the combatant is the one who, through his own action, inflicts suffering on the victim, let us not forget that humanitarian law was born on the battlefield to protect the combatant who becomes a victim as soon as he is disabled. This sustained trend of humanitarian law however conflicts with a certain evolution of warfare that has resulted in the depiction of the enemy as a non-human Devil. *But then, if torture is a form of violence forbidden by law, doesn't it become "a military necessity" in a lawless conflict, especially against an enemy deprived of any sense of honor ?*

Inter Arma Caritas[2]

The humanitarian principle should develop in the conscience of the human being to fight the "animus belligerandi".

- Respect for the enemy

It has not always been so, however it is now forbidden to inflict no quarter - to finish off the wounded that, on the contrary, should be receiving care. Under any circumstances, the combatant who falls at hand of his enemy is entitled to a human treatment, to the respect of his person and of his honor. These general principles protect him from any violence or intimidation, insults, public curiosity, physical or moral torture, and no constraints should force him to give out information.

The captured enemy is a prisoner of war from the moment he has a regular combatant status. Moreover, the way prisoners and populations are treated in an occupied territory is the best indication about the character of a civilization and of the nations. So, the Third Geneva Convention, concerning the protection of prisoners, states that their repatriation is to take

place as soon as the hostilities are ended.[3] This principle is most important as it precludes the encouragement of slavery when the victorious countries would be tempted to make use of this submissive and cheap workforce to participate in reconstruction on pretext of some collective responsibility.

So not everything is allowed in war. Those who, as Clausewitz, think that war *"is an act of violence, and there is no limit in the expression of this violence... In matters as dangerous as war, mistakes resulting from kindness are catastrophic... It is impossible to moderate the principles of the philosophy of war without causing some nonsense"* should be reminded that the end does not justify the means.

- The limitation of combat means and processes

This principle is taken up in the *"jus in bello"*. Confirming and building on the " Law of The Hague", the "Geneva Law" endeavors to protect individuals from war effects by restricting the combat processes and means.[4]

In spite of moral requirements and regardless of a States' commitments, we can only note a most recurrent neglect of the most elementary rules. That is why, in Manila, Alexander HAY chairman of the ICRC, addressed the States with this cry of alarm : *"the increase of indiscriminate violence, and repeated breaches to the basic humanitarian principles, are taking dreadful proportions particularly during conflicts of an ideological or racial character -in internal as well as in international conflicts - during which the struggle has now taken the form of total war. All excuses are used to justify the unjustifiable: military necessities or imperatives, security, last recourse for subjugated communities. What will become of humanity if ideology precludes from considering man in a defenseless enemy... "*[5]

Is Torture a Military Necessity ?

It is the advent of total war that has lead to the repudiation of the enemy. Ideology suddenly emerged on the battlefield. Together with the crusades against totalitarianism, wars of national liberation, and revolutionary wars for the conquest of power, *"wars"* wich pretend to justify any violence, will prevail.

- The enemy "demonizing" or "dehumanization"

In these wars, the opponent is no more an enemy to wage war against, and then to make peace with. He is regarded as a scoundrel condemned to perish. An ideological war is then prolonged in internment camps along with indoctrination and brainwashing. The atrocity of the struggle is amazing. This concept of war is " perfectly " depicted in the report of general Westerman to the Convention in 1793 : *"Vendée does not exist anymore! It has died ; it has succumbed to our redeeming sword, together with the women and children. It sunk in the swamps of Savenay.*
I have crushed the children under the hooves of my cavalry,
I have slaughtered the women, they will no more breed bandits.
I cannot reproach myself taking one single prisoner.
I wiped out everything... The roads are strewn with bodies. There are so many, that in various places they form pyramids. "

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Hatred is always ready to exploit the minds. To Che Guevara, hatred is even the core of the revolutionary military concept :

" Hatred is an element of the fight. Staunch hatred of the enemy... makes man an efficient, selective, and controlled killing machine. Our soldiers have to behave in this way ; people without hatred cannot overcome the enemy. "

In modern warfare, it is the resort to guerrilla tactics that, since 1945, has become the preferred method to force political changes ; its principle consists in blending in with the population, even though the Law of Land Warfare is founded on the discrimination principle, that is to say on the distinction between civilian and military. Suffering and terror have been turned into weapons

- In such conditions of " demonizing " or " dehumanization " of the enemy, could not torture[6] be a military need ?

The moralist will immediately answer negatively to this question. Likewise, he will declare that killing is forbidden by making reference to the Decalogue and to ethics, and he is right. As a matter of fact, in 866, Pope Nicholas I requested torture to be rejected for collecting legal evidence. Indeed, torture used as a physical mean to extract an admission or to confess a sin, deprives the victim his freedom and force him to take the blame for anything and everything in order to escape death. However, we are not moralists and we cannot ignore the conscience dilemma set upon those who had to face and to fight blind terrorism.

The torturer tries to inflict pain, not only physically, but also mentally. Torture consists in consciously causing sufferings. This is what makes it clearly different from the pure combat.[7] Often used during guerrilla and revolutionary wars to collect information, torture is inconsistent with the respect due to human beings. Though forbidden by law, there are countless occurrences of man torturing his fellow man. Let us classify them into three main categories.
Used as a combat process, torture will always threaten to arouse reprehensible cruelty by the imposing party.

- The horror atmosphere

One of the reasons that could lead a man or a group to systematically torture is the intent to inflame horror. That horror atmosphere is intended to suppress the will to fight. It is expected to remove the combat option out of any political calculations, and out of any equation dealing with advantages and disadvantages. Horror forces war to enter the domain of the inexpiable from which any peaceful and negotiated solution, and any compromise are banned. Those who initiate it in order to compel halfhearted, indifferent and cowardly people, even their enemy to fight, jeopardize any possibility for peace talks. It is the blood bath of terrorism or the atrocities of concentation camps. So, to rely on terror is to fanaticize men and to bet on individual and collective sadism. Again, torture and its aims are to be condemned.
The will to generate an inexpiable war is criminal in two ways : first because of the means used - fanaticism and sadism ; then, and more importantly, because of its purpose - it is inhumane to turn war into an inextinguishable struggle, without any political solution, without no other objective than exterminating the adversary.

War is a political matter ; it should be kept inside the limits of a political design ; it is the deliberate rupture of a peaceful order only in view of establishing a better new order. However, sadism that generates horror, focuses on the negation of any human order, away from any peaceful solution. The excuse of bolstering a " national cement " in a war for national liberation through the use of terrorism strictly speaks evil.

War is a political matter ; it should be kept inside the limits of a political design ; it is the deliberate rupture of a peaceful order only in view of establishing a better new order.

It is understandable that when facing such attempts, a society[8] that intends to remain humane and to fiercely preserves its love for peace, should keep its self-control, and overcome horror and anger feelings to resist temptation to crime. In addition, it will have to vigorously combat this terrible and barbarian enemy while rejecting to fight on this new province - that of inextinguishable hatred.

- The fear weapon

Another reason, although quite different, is the will to frighten the adversary and those who hesitate. When a party or a power does not succeed in overcoming its adversary through normal war methods, such as upheaval and repression, it may decide to use abnormal means to discourage or intimidate, in order to multiply his combat ratio.

In war, where violence prevails, the temptation is great for the one that risks everything but has lost all hope of conciliation through the political

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means to revert to the most savage means to wreck the enemy's spirit. Torture may appear when one of the belligerents, most often the aggressor, sees victory slip away. In major warfare it is replaced by other equivalent means : asphyxiating gas, napalm, bombing of civilian populations, genocide... Likewise, when the importance of control means drives the belligerents to the wall, those who want to win at all costs will not hesitate to multiply their combat ratio by the one of the effective human factor, fear. *We should condemn resorting to such inhumane practices.*

However, lacking an international agreement banning unfair aggression, it is impossible to actually restrict war means without automatically favoring the unscrupulous enemy.

If the *rebel* has decided to engage in a ruthless battle against legal authorities, isn't he responsible for the discord, and therefore, shouldn't he suffer the consequences ?

- Is the right to act in self-defense include the use of torture ?

In civilized countries, the right of self-defense is a State prerogative, and the user does it on behalf of the citizens from whom he received this particular power. Otherwise, the State would encourage individuals, and combatants to engage in atrocities such as those discussed here and that are scandalous, simply criminal.

On the other hand, doesn't the insurgent lose his right to liberty and to dignity from the very fact of his rebellion ? Underground activities, terrorism, the two components of the revolutionary war, degrade man. It is easily conceivable that the power or the authority feels helpless in view of those aggressions, however isn't it the prime duty of the State to safeguard a peaceful order for the people's life and properties ? Isn't it its strict duty and its right to make all attempts to obtain information, from those who know, in order to protect innocent lives ?

Although torture will remain illegal, but as wars can be regarded as unfounded and/or illegal by international laws, doesn't it receive some legitimacy in this particular context ? Indeed,

the aim of torture is merely to get a piece of information and to force the individual to disclose what he knows to avoid sufferings. It is some kind of deal - the life or the death of a person for the life or the death of ten, twenty, one hundred, one thousand, two thousand people ; - life or death for a secret. Some maintain that the moral value of torture depends on the value of this secret. However is it possible to know in advance about the value of a secret ?

While considering these various arguments, let us guard against giving carte blanche to legitimate powers and/or to their officials.

A society cannot act arbitrarily against the interest and the rights of any one of its members. Torture is a dangerous tool and ***must never be considered to be a normal combat asset.*** Even in a just and necessary war, effective means are not all that justifiable to those who get an exact and sound view of justice - the foundation of military honor.

1 This quotation of St. Augustin sets the issue of the end and means, it should take us to a more detailed approach of the violence phenomenon and particularly of war.

2 " Charity amongst arms " or " Humanity in the roar of armaments " is the motto of the Red Cross international organization and of the Red Crescent.

3 Article 118 of the third Geneva Convention, states " that at the end of active hostilities, the prisoners of war are to be released and repatriated as soon as possible. "

4 Protocol 1 to the Geneva Conventions includes two basic rules :
- *In any armed conflict, the right of the warring parties to choose the processes or the means of the war is not unlimited.*
- *It is forbidden to use weapons, projectiles, and materials, as well as combat processes that could cause more harm than necessary (Article 35).*

5 Manila address, 1989. International journal of the Red Cross and of the Red Crescent.

6 " Torture is a significant brutality or a series of painful, inhumane, or degrading ill-treatments, that are systemic search for pain from the one who forces it onto his victims." Convention for the abolition of torture adopted on December 10, 1984 by the General Assembly of the United Nations and ratified by 102 States.

7 TTA (FM) 173 Army regulation for the interrogation of prisoners of war. 1974

8 And consequently its armed forces.

The Military Commander and War Crimes

“ The weight of responsibility is such (at war) that not so many men are able to carry it all. That is why the highest spirit values are not enough to face it. Possibly, cleverness makes it easier and instinct could admittedly be an incentive, however the decisive impulse for decision is of a morale nature. ”

Charles de Gaulle, *le fil de l’épée.*

BY SÉBASTIEN BOTREAU-BONNETERRE,[1] OF THE FRENCH DEFENSE LEGAL SERVICES AGENCY

Human activity gets structured while growing. This build-up is bound to go through the definition of the legal rules that settle human activities. War, a several hundred years old social activity, is no exception. Therefore, because of a continuous strive for an optimal military effectiveness, the poorly organized armed gangs of the origins evolved into the highly structured modern military units. A disciplined evolution has been made possible thanks to the law that sets its modalities and its limits.

The capacity to command, the “ imperium ”, inherent to the military, simultaneously increases the commander’s duties. The notion of the commander’s responsibility is all the more acute when the core of military activities is considered, i.e. combat operations - obviously ruled by the laws of armed conflicts. And among the rules of such complex laws, some are seen as so important that, whenever infringed, they make up a special category of international crimes - war crimes.

During out-of-area operations, the commanding officer, either company grade officer, field grade officer, or general officer, could be confronted with war crime. If one of his soldiers is accused of committing such an act, his responsibility as commanding officer is to be implicated, or if he is himself suspected of such an act he could be personally liable, even if he was merely obeying seemingly sound orders. Therefore it is necessary to detail those relationships.
The war crimes category is usually perceived as a threat to the warrior, as a sword of Damocles, but this is not fully true. To correctly deal with the commander’s responsibility in matters of war crimes, it is necessary to first demythologize those crimes. Then, as a further step, it will be possible to expand on the matter of the commanders’ responsibility inside the chain of command.

The War Crime Definition

War crime, incrimination submitted to conditions

War crimes are defined as *“acts of violence against people or properties that are overstepping the limits that the war laws set as legitimate to the armed forces ”*[2] that is to say an act of violence contrary to the war laws and custom. An example could be the murder of a prisoner of war. Committing such an unlawful act is likely to render its author criminally liable.
We should be careful not to confuse war crimes and other international crimes such as crimes against humanity and genocide, both of them being characterized by a specific wrong - the negation of the human being.
War crime incrimination is complex in its implementation because of its internationalist

origins. *"The "war crime" qualification supposes infringing upon international law and ordinary military law"*[3]. *That is to say that the State should get a legal organization capable of suppressing breaches to the law of armed conflicts. The States themselves should carry out the suppression of war crimes. International jurisdictions*[4] *should be called upon only when States are not able to judge their own war criminals by themselves.*[5]
Article 8 of the Statute of the International Criminal Court draws an inventory of all breaches of the law of armed conflicts that can be described as war crimes and over which the Court will exercise jurisdiction. They will soon receive an equivalent in the French law.[6]

For a war crime to be committed, the practical act (hitting, killing, bombing...) should take place during an armed conflict[7]. The notion of armed conflict depends on a reality assessment ; it is not linked to the situation assessment made by the political authorities. The mandate or the mission of the operation does not matter ; so the fact that the Security Council of the United Nations could have authorized the operation or that it has been carried out for humanitarian purposes is not relevant.
The judge will consider the real situation, he will have to determine whether the actual violence in the said area was at a such a level as to consider that it was not a peace time situation[8]. According to French law, war crime is established from the moment that it is an act condemned by the International Criminal Court, and that it takes place in the framework of armed conflict.

The Intentional Nature of War Crime

A war crime is an intentional one. It is the consequence of an act considered to have been consciously committed. There is no war crime unintentionally committed. That is why in case of a genuine mistake, its author's responsibility cannot be pursued.

That is a fundamental aspect of the law of armed conflicts. In the confusion inherent in the military activities, each fact should be carefully considered before deciding that there is a war crime.
Article 27 of the statute of the ICC points out that the official capacity (Head of State, secretary, or military) of the one indicted with war crime cannot exempt him from criminal responsibility. There is no special immunity.[9]

It is a constant fact that regarding the commander, the higher his position, the more he is supposed to know about the laws of the armed conflicts and the more he is likely to be considered as responsible. It is not possible

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to claim a lack of knowledge of sometimes very subtle measures of the law of armed conflicts. As a matter of fact, *no one can be regarded as ignorant of the law*. Moreover, it is always possible for the commander to get informed by his legal advisers[10]. In France, it could be the commanding officer's legal adviser, the legal cell of the armed forces general staff, or the legal directory of the department of defense.

Impact of War Crime on the Relationships Within the Chain of Command

The Responsibility of the Commander as the Authority Issuing Orders

The responsibility of the commander for those acts committed by his troops is the other side of his command authority. The dimension of the commander's position derives from this responsibility. In the framework of the criminal law of armed conflicts, contrary to other legal matters, this responsibility is not automatically implicated. The commander is responsible for criminal acts committed by subordinates, only when because of poor command leadership he has not attempted to prevent a criminal act, or when he has not ordered punishment if the crime has already been perpetrated.

> NO ONE CAN BE REGARDED AS IGNORANT OF THE LAW.

According to the law of armed conflicts, the higher echelon is defined as the one holding power or authority, by law or de facto, to prevent a subordinate from committing a crime or to punish him afterwards. The criterion is the effective command and control of the commander on the forces under his command. As a result, *"as long as a commander really controls his subordinates, and in so far as he has the capacity to prevent them from committing crimes or to punish them afterwards, he could be regarded as responsible for those crimes if he does not exercise such command and control properly"*[11].

In the event of a subordinate about to commit (or having committed) a war crime, the commander is responsible only if he has knowledge of it, or if he should have known what was being planned, and if he has taken no action with the available means to stop or repress the crime.[12]

Therefore, the commander's responsibility is far from utter failure. His participation in criminal acts committed by his subordinates is placed under specific conditions. It is possible to note some dilution of responsibility when escalating the chain of command. The presumption of knowledge is to be assessed higher for a platoon leader, because of the limited number of soldiers under his command, than for the higher strategic commanding officer of a multinational force several thousand men strong. Nevertheless, the knowledge condition is a matter of practical assessment, and with the modern communication means, the commander could be more easily seen responsible if he does not order an inquiry into the committed crimes[13].

Defense Resources of the Subordinates - the Superior order

In international law, superior order is a harshly discussed matter, especially since the Statute of the International Criminal Court has been drafted[14]. Its position clearly departs from those previously accepted.

Criminal law as enacted at the trial of Nuremberg[15] categorically rejects superior orders to relieve responsibility. The responsibility of the author is in no way changed by superior orders, those are only considered when the sentence is pronounced. Superior order is a personalization factor of the sentence leaving full responsibility for the committed crime. This rigorous position currently is the French one, however because of the Statute of the International Criminal Court the French law will have to be adapted.

The Statute of the International Criminal Court forced this concept to evolve. Superior order could relieve responsibility under three conditions. First, it is necessary that the author of the act, either military or civilian, had a legal obligation to obey orders from the government or from the superior. Second, this person should not have known that the order was unlawful[16]. And thirdly, the received order should not have been manifestly unlawful. This solution appears to be much more adapted to military realities.The " manifestly unlawful " condition proves to be necessary to keep discipline - the foundation of the armed forces. It is worth noting that subordinate echelons rather easily perceive obvious unlawful orders. Ordering prisoners to be killed or tortured should leave no doubt to anybody about the breach of the law by such an order.

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Conclusion

The war crime notion restrains disorderly behavior of men subjected to extraordinary strain. That is why it particularly applies to officers. It is through their example only, their rejection of compromise, and their high morale values, that the combat operations they carry out in the name of their Nation get their relevance. The function of the lawyer, all in all a minor one, is to make this natural principle very clear to the majority.

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2 BASTID (S.), Law for international crises, Paris, Law courses, 1959-1960 , leaflet 1, p. 40.

3 DONNEDIEU DE VABRES (H.), " Rapport général ", in GRAVEN (J.) (dir.), International Conference of Criminal law, Proceedings V. Paris, Sirey, 1952, p. 136.

4 It is so for the international tribunals for the Former Yugoslavia and for Rwanda. The Security Council, their initiator, having considered that the concerned States were not able to judge the committed atrocities.

5 As for the International Criminal Court, it is acting only when the State Party to the Statute cannot or is not up to investigate into the crimes committed on its territory or into crimes implicating one of its nationals. It leads to think that there is not much risk seeing the International Criminal Court taking proceedings against French nationals, because of the advanced and robust legal structures of France.

6 A bill for adapting into the French law the incriminations depicted in the Statute of the International Criminal court is being drafted by the relevant services inside the various concerned departments, among which the DOD. We can sensibly expect this bill to be submitted to the national representatives before the end of the year 2005.

7 No discrimination is made between international and non-international armed conflicts. The ongoing French military operations are out of area operations, the violent phases of which will quite probably be qualified as international armed conflicts.

8 The forces concentration, equipment, tensions are as many factors for assessing the intensity of a situation.

9 As a matter of fact, Article 124 of the Statute of the ICC prevents it pursuing, for a period of seven years, possible war crimes committed by nationals of those States having required the benefit of this disposition, as France did, however it is not an immunity clause. The State should carry out an investigation, and, when necessary, to put to trial the possible war crimes committed by its nationals. In case of ill will, the State would be internationally liable.

10 That is an obligation provided for by Article 82 of the first additional protocol to the four Geneva Conventions dated 1949, ratified by France in 2001.

11 International Tribunal for the Former Yugoslavia, chamber of appeals, Prosecutor c/ Zejnil Delalic and others (Case Celibici) February 20th, 2001, §198.

12 See the exact wording at Article 28 a) of the Statute of the International Criminal Court.

13 The function of the judge advocates proves to be important to protect officers. Their investigations immediately after the facts could discharge the responsibility of the commander, excluding him from possible accusations.

14 See GARRAWAY (C.), " Superior orders and the International Criminal Court : Justice delivered or justice denied ", Revue internationale de la Croix-Rouge (IRRC), 1999, pp. 790-792, as well as DUFOUR (G.), " La défense d'ordre supérieur existe-t-elle vraiment ? ", IRRC, 2000, pp. 986-987

15 This superior order concept has been accepted for the international tribunals for the Former Yugoslavia and for Rwanda.

16 It is worth noting that Article 33 § 2 stipulates manifestly unlawful the order to commit genocide or crime against humanity.

The Legal Framework of the European Union Military Operations

Operation ARTEMIS in the Democratic Republic of Congo

The 1st of September 2003 saw the end of the mandate given to the emergency interim multinational force at Bunia in the Democratic Republic of Congo. The "Artémis" operation was brought to an end, as planned, only just three months after its beginning based on resolution N° 1484 of the United Nations Security Council dated May 30, 2003. This European Union military operation, which encompassed numerous security, humanitarian and political[1] stakes, was also to confirm the military capabilities of the European Union in the field of crisis management and, from there, to materialize the common European policy in terms of security and defense (S.D.E.P.). The "Artémis" operation wasn't indeed the first military operation of the European Union. The "Concordia" operation, conducted from March to December 2003 in the former Yugoslavia Republic of Macedonia, marked the beginning of the Union as a military player. However, it was backed up on the assets of the North Atlantic Treaty Organization (N.A.T.O.).

BY CAPTAIN FRÉDÉRIC JORAM*, LEGAL AFFFAIRS DIVISION, FRENCH AIR FORCE ADMINISTRATION

Therefore, the operation in the D.R.C. was the first autonomous military operation of the European Union, conducted with its own command and control capabilities. It was placed under the political control and strategic direction of the permanent political and military bodies created for the implementation of the S.D.E.P. The European Union Council, the Secretary General - high representative, the security and political committee (SPCo), the military committee, the European Union staff and the Council general secretary were all involved in the preparation, the monitoring and the control of the "Artémis" operation. The chain of command was, as it was concerned, made up of non-permanent structures, created for the operation. The commander of the operation had a strategic level staff called "Operation Headquarters" (O.H.Q) located in Paris, and the force commander had a force staff located at Entebbe in Uganda, the "Force Headquarters" (F.H.Q).

Besides this new and continuously evolving political and institutional framework, it is today useful to come back over the legal characteristics of the European Union military operations, which are, from now on, an additional action framework for the French armed forces.

A New Legal Framework for Peace Operations

Similarly to the majority of national or Atlantic Alliance missions, the "Artémis" operation was falling under the framework of a mandate of the United Nations Security Council. Based on chapter VII of the United Nations Charta, this framework authorized the recourse to force in order to contribute to stabilize the security conditions in Bunia and improve the humanitarian situation there, to ensure the protection of the airport and of displaced persons located in the camps of Bunia and, should the situation require it, to contribute to

ensure the security of the civilian population and of the United Nations and humanitarian organizations personnel in the town.[2] Therefore, the novelty does not lie there, but in the specific legal framework of any European Union military operation.

Unanimously adopted by the Member States[3], the legal acts of the Union Council bear a constraining political characteristic.
For the "Artémis" operation, the common action made on June 5, 2003[4] appointed the lead nation and the commanders of the operation and the force, approved the operation plan (OPLAN), authorized the rules of engagement, decided upon the launching of the operation and gave the political control and the strategic direction to the SPCo. In accordance with this common action, a Council decision launched the operation on June 12.

The European Union drafted several operational concepts, one of which, adopted in November 2002, receiving the agreement of the Member States, pertains to the recourse to force[5]. European equivalent to the NATO M.C.[6] 362 document, it contains a very similar list of rules of engagement, directly usable in the selection of the recourse to force rules that pertain to each operation. The procedure pertaining to the rules of engagement (authorization, implementation, request) is also stated therein ; it involves the legal advisor. This type of document, whose usefulness has been demonstrated during Atlantic Alliance operations, is, notably, a guarantee of interoperability between the various national contingents making up a force. In multinational operations, the rules of engagement, authorized by a political authority, make up the favored tool of the control exercised by the Member States.

Furthermore, an agreement on the status of forces (S.O.F.A[7]), resulting from the agreement of a State to deploy a force on its territory, has been finalized with Uganda, host nation welcoming the general support base intended for joint general support (joint general support base - J.G.S.B.) and the force staff (F.H.Q).
This agreement notably contained provisions concerning the free entry in the territory, the wearing of uniforms and carrying of weapons, duties and taxes on imports and re-exports, compensation for damages and jurisdiction privileges. Adopted on the basis of a France-Uganda agreement[8], this statute included an exception to article 24 of the European Union Treaty. In this latter one indeed it is stated forth that the European Union Council concludes agreements on the status of forces of the European Union, based on a recommendation from the presidency.

At the time of the "Artémis" operation the European Union did not have an agreement on the status of Member States citizens based in another Member State. The presence in France of non-French representatives from the O.H.Q, European citizens or not, has not been subject to a specific status. This deficiency will soon be settled when Member States have approved the text they have recently signed[9].
This "internal EU S.O.F.A." will then become the European equivalent of the June 19, 1951 London convention pertaining to the status of forces of NATO which is called "NATO S.O.F.A.".
The links between those two texts are indeed envisaged in the agreement concerning the European Union status of forces. This latter agreement will be applicable to HQs, forces and their personnel assigned by the European Union for the preparation and the execution of the Petersberg missions, when their status is not to be covered by any other agreement.

Lastly, some other conventional acts might have to be concluded by the European Union on the occasion of a military operation : agreement between Member States concerning the mutual renunciation to claim compensations in case of prejudice to persons and damages to properties, general agreement on the participation of third party States in the Union military operation, arrangements concerning the exchange of classified information with third party States or international organizations and, possibly, agreement between the European Union and NATO on the security of information.

Recurring Legal Issues

The legal issues faced during the "Artémis" operation are similar to the ones raised by any peace support operation involving the recourse to the armed force. A few examples demonstrate this. Adopted before or at the beginning of the operation, the rules of engagement do not prejudge the legal framework of the recourse to force. In fact, this latter one will be imposed by circumstances. The law concerning armed conflicts is the only one conceived to regulate the conduct of hostilities, but its applicability is not always obvious. Thus, in most cases, the recourse to force remains subject to the sole provisions stated forth in the national criminal law of the militaries engaged in the operation. This situation might raise some interoperability problems between national contingents that are to be taken into account by the operation and force commanders.

As other international forces under similar circumstances, the multinational emergency interim force had to arrest armed individuals threatening its members or hindering the fulfillment of the mission. Due to the lack of local judicial authorities to which these persons could be handed over, the force might be compelled to detain them a few hours. Then, the question of the applicable legal regulations is raised. The P.O.W. regulations stated forth in the third Geneva Convention being only applicable in an international armed conflict situation, one should try to organize the detention conditions in accordance with the human rights international law.

The presence and the intense activity of the contingents deployed in Uganda and in the Democratic Republic of Congo have inevitably generated extra-agreement contentious. The policy concerning damage compensation falls under the responsibility of national authorities and each contingent is consequently responsible for it on the theater. As far as France is concerned, the amicable compensation for damages has been carried out by the Theater Administration Direction, in cooperation with the direction of legal affairs.

Last, the deployment of forces in a geographical area marked by genocides, crimes against humanity and war crimes raises the question of the cooperation with the international criminal jurisdictions. In the near future, the International Criminal Court (I.C.C.) could open its first investigation and its prosecutor has publicly stated his concern as far as the events that occurred in the D.R.C. are concerned. It is normal for the prosecutor of the Court to wish to rely on the presence of an international force or, at the end of the operation, on the information gathered by it. This question will now have to be taken into consideration for any future crisis management operation, as it implies the drafting of a cooperation procedure with the I.C.C. and notably, an allocation of roles between the States participating in the operation and the European Union itself.

* *Assigned to the office of armed conflicts legal affairs of the direction of legal affairs of the defense ministry, the Air Force Administration captain Joram dealt with the responsibilities of legal advisor to the "Artémis" operation commander.*

1 Cf. notably the institutional press of the defense ministry (Armées d'aujourd'hui n°282, July-August 2003, pp. 17-18 ; Air actualités n°563 July 2003, pp. 4-7 ; Terre Info Magazine, n°147, September 2003, pp. 16-23 ; Air actualités n°564 August-September 2003, pp. 4-7 ; Armées d'aujourd'hui n°284, October 2003, p. 32-52 ; Terre Info Magazine, n°148, October 2003, pp. 18-21 ; Air actualités n°656 October 2003, pp. 9-29). About the situation in the Democratic Republic of Congo before the "Artémis" operation please refer notably to the recent book of Colette Braeckman, The new predators. Policy of powers in Central Africa, Fayard, 2003, 310 pages.

2 Resolution n°1484 of the United Nations Security Council dated May 30, 2003, paragraphs 1 and 4.

3 Cf. article 23 of the European Union Treaty. However paragraph 1 of article 23 still renders it possible for certain Member States, based on the principle of constructive abstention, for not participating in the vote without all the same jeopardizing the adoption of the common action.

4 Official journal of the European Union n°L143 dated 11.06.2003, p. 50.

5 "Use of Force Concept for EU-led Military Crisis Management Operations" (ESDP/PESD COSDP 342 dated November 20, 2002).

6 Military Committee.

7 Status of forces agreement.

8 Cf. Journal officiel dated 29.08.2003 (p. 14 736).

9 On November 17, 2003.

The legal advisor to the commander cannot deal with all these questions alone. Therefore, it must be possible for him to rely on several institutional players, from the lead-nation as well as from the European Union. In this respect, the existence of a legal service within the Council Secretary must enable the implementation of a functional legal chain with several levels - strategic and operational, European Union -, from the European authorities down to the theater of operation.

The pending relief of NATO by a European force in Bosnia-Herzegovina will give another opportunity to test the smooth running of the politico-military structures of the S.D.E.P. Furthermore, the future European Union military operations will have to confirm the pertinence of the legal framework concerning the military management of crises and the importance of legal counseling during planning and conduct of operations.

The Law in Occupied Territories

On January 1st, 2004, the US armed forces reached the end of the eighth month of occupation of the Iraqi territory ... After invoking some false excuses to attack Iraq (in particular the possession of WMD), Washington finally presented its military intervention as a war of liberation. This objective was not the only one, and it was certainly not the main one. Consequent to "jus ad bellum" (law for war declaration) comes "jus in bello" (war law). The later will be emphasized here. In this regard, Iraq has been an occupied territory for about one year and, the longer the occupation, the more difficult is it to comply with the 4th Convention because the occupying forces do slow down the normal development of the country, would it be only for being in there. This occupation has yet been agreed by though agreed by the Security Council through resolutions number 1483 dated May 22, 2003, ratifying the coalition provisional Authority and number 1511 dated October 16, 2003, awarding significant esteem and representational support to the interim government Council set up by the occupying forces.

However we can only note the misunderstanding between the Iraqi population, persuaded to be under American or Western supervision with their forces confined in the vacation spots of the former government, and the occupying forces, relying on a co-opted and totally under control elite, persuaded that the most important part of their mission has been achieved. This situation is partially understandable because the law to be applied in Iraq by now (the 4th Geneva Convention ratified by both the opposing parties) is far from being enforced.

BY MICHEF DEYRA, HEAD OF THE IAG IN THE AUVERGNE UNIVERSITY, SENIOR LECTURER AT THE LAW UNIVERSITY OF CLERMONT-FERRAND

US ARMY

After the minimum humanity standards of the 1907 4th The Hague Convention proved to be totally inefficient during both World Wars, in 1949 the Geneva law worked out much more accurate rules, intending to prevent the resurgence of WW II acts of barbarism.

A territory is occupied from the time when it is de facto placed under an enemy's authority, even without recourse to force. The actual territorial control of the area where civilian people are living is the criterion. When control is ineffective because of the opposing combatants, it will then be considered as an invaded territory where the rules to be applied are those of the battlefield. A war occupation is a provisional situation that doesn't lead to the disappearance of the occupied Nation, the sovereignty of which, even affected, remains, and the government of which, even in exile, has got a right to continue hostilities. After all is said, the rules set by the international humanitarian laws are in line with the logic of the UN Charter according to which acquiring territories through occupation is

unlawful. Thus, war occupation does not necessarily translate into sovereignty (Art 47 C IV). Therefore, it is necessary to sort out the issue of power sharing between the occupying and the occupied Nations. The matter will be, in priority, to take the necessary steps to maintain order and to protect the public life, and second, to protect its population against possible arbitrary decisions of the occupying forces.

Maintenance of Public Order

The occupying Power should maintain the laws of the occupied State, and more particularly its criminal laws, and the courts responsible to enforce them, unless security is at risk. If there are militias or groups of resistance and hostility from the civilian population toward the invader, security is quite likely to be jeopardized. In this case, the occupying Power will decree a criminal legislation to maintain order in the ruling of the territory, to protect property and the lines of communication of the occupying armed forces and administration. That legislation will be published and will offer all conventional guarantees, in particular the rules of non-retroactivity, of proportional sentencing, of petition for reprieve, of deduction of preventive detention, and of restrictions of the death penalty (only in case of espionage and sabotage having caused death and only if the criminal law of the occupied territory was making provision for such a sentence (Art. 68.2 C IV). Moreover, the detention of civilians is addressed as well. It should take place in the occupied territory, with good conditions of hygiene, food, religious support, and medical care. It should also keep the prisoners in good health, with specific guarantees for women and children (art. 50 and 76 G IV), and should allow visits from the ICRC delegates limiting neither their frequency nor their duration (art. 143 G IV). The detaining of civilians, for pressing security reasons, obeys the very strict rules set by the 4th Convention (art. 79 to 141).

As for militias and organized resistance movements that are operating inside an occupied territory, they are to be considered as prisoners of war when captured, on condition that they are hierarchically organized, that they wear some distinguishing feature recognizable from a distance, that they carry weapons openly in combat actions and that they comply to the war laws and custom (art. 4.2 G III). The prisoners of war (including the most famous of them, Sadam Hussein) do not benefit immunity of proceedings for crimes that they possibly committed, they can undergo cross-examination within the strict limits set by article 17 of the 3rd Geneva convention. In case of proceedings by the holder power, any prisoner of war should be put to trial in the same courts and along with the same procedures as for members of the armed forces of the holder power. Thus, a prisoner of war detained by the US forces can be court-marshaled along with the US criminal military law with the inherent basic freedom and impartiality guarantees.

To Protect the Population against Possible Arbitrary Decisions of the Occupying Forces

The protection of the civilian population, more particularly vulnerable to the actions of the occupying forces, is provided through three different mechanisms.

First, respect for the basic guarantees of humane treatment. To ensure respect for the rights of an individual detained by one of the warring parties, murder, torture, corporal punishment, mutilation, pillage, and any other brutalities are forbidden. On the same line, foreign nationals are authorized leaving an occupied territory unless national interests of the occupying power make absolutely necessary for them to stay. In such an event, there could be internment or placement under house arrest.

Second, the right to live as normal as possible. Actual administrator of the territory, the occupying forces have three obligations. Firstly, they have to facilitate a smooth running of the establishments in charge with children care and education or, if the local institutions are faulty, to provide the support or the education of those children (art. 50.1 C IV). Then, the occupying forces should maintain the medical and hospital establishments as well as public health and hygiene. The occupying forces can decide requisitioning on a temporary basis only and only if the needs of the civilian population are satisfied (art. 56 and 57 C IV). Finally, they should allow the ministers of religions to spiritually support their fellow believers, and the rescue organizations to hand over individual and collective assistance at times when the population does not get sufficient supplies (art. 55, and 58 to 63 C IV). The occupying power has to authorize neutral and impartial NGOs to check the level of supplies of the population and to let a free access to humanitarian aid. However it is in no way an excuse for the occupying forces not to feed the population.

Third, respect of the allegiance of the population to the occupied Nation of which they are citizens. It is forbidden to transfer, to deport, or to establish outside the occupied territory the protected people, either in large numbers or individually (art. 49 C IV), and to establish nationals of the occupying Power in the occupied territory. Further, hostage taking and moral and physical coercion of civilians, in particular in view of getting pieces of information, are prohibited. Lastly it is also forbidden to recruit children in any organization or formation coming under control of the occupying forces, to force people having a job to join the occupying armed forces, to compel them to works that would force them into military operations (art. 50 §2 and 51 C IV).

Therefore, the occupying Power has to take the necessary steps to maintain order, and the occupied Power has to protect its population against possible arbitrary decisions from the occupying forces. If many measures, in particular those relating to human treatment and respect of the allegiance of the Iraqi people to Iraq, are properly applied by the occupying forces, the current situation in this country gives rise to two series of questions.

On one hand, those relating to the respect for individual rights, of civilians or of prisoners of war. The measures adopted by the provisional Authority of the coalition and by the interim government Council are giving cause for concern, more particularly in regard of the freedom of the judiciary power, freedom of speech and of association, freedom of movement, access to information in the proper language and patrimonial disputes. In this matter the adoption of a provisional constitution on March 8 is not of a reassuring nature, and certainly not for ... Iraqi women. Will 25,000,000 Iraqi citizens approve what the 25 members of the interim council ? Further, the access of the ICRC to some prisoners of war is not made easier when delegates must visit all prisoners and confined people, in any detention place, and benefiting discussions without witness. And this, as often as the ICRC judges it necessary. Further, if prisoners of war can be transferred outside the country where they have been captured imply that they also could be detained in their own country. Following this hypothesis, even if nothing specific has been set by law, it would be logic to grant them the same right to family visits as the one granted to civilians protected under the 4th convention.

US ARMY

On the other hand, there are questions about public order. If the tyranny of the Baas party has come to an end, is it possible to view the interim government as legitimate ? Should we ignore the problems of food, gas, electricity, and gasoline supply ? Public heath and security problems ? Unity of Iraq in a democratic regime with the Kurds divided in rival groups, Sunnits and Chiites divided in several schools of thought is wishful thinking. The balkanization that divides communities, tribes, clans, not to say the families themselves has lead to the death of hundred of civilians that are now deliberately targeted.

The United States declared in February that they would leave Iraq on June 30, 2004 and for lack of being able to organize free elections before hand, they will leave this country with a provisional constitution and a non-elected government that is not to be " the internationally recognized and representative government requested " by Resolution 1511. And it is this very resolution that establishes the multinational force under an American unified command to which the UN State members are called on to provide some support, to include military forces.

Strange paradoxes that can be solved neither through " jus ad bellum " nor through " jus in bello " !

Operation ARTEMIS :

" To Provide the Commander with the Necessary Legal Framework to Carry out his Mission "

The ARTEMIS operation begins on June 3, 2003, as a (French) national operation under the name of " MAMBA " ; it will become a European mission on June 16.

An operation designed to preserving area and population security in the depth of Africa in an area devastated by bloody confrontations among militias with a background of ethnic conflicts, ARTEMIS has confirmed the pressing need to provide the military commander with the necessary means for freedom of action from the outset.

BY BRIGADIER GENERAL THONIER COMMANDING THE 9TH BLBMA[1]

The Army exercises and operations feedback and assessment Center (CEREX - US equivalent is Center for Army Lessons Learned), a CDES department (Army Doctrine and Higher Military Education Command - US equivalent is TRADOC), has qualified this operation as " complex because of its environment, perilous because of the force projection and of the open theater, difficult in implementing and dangerous to carry out " adding that " the sole simplicity of the principles used ensured success ". As a matter of fact, the lack of previous planning, the remoteness of Bunia, and the lack of understanding of the forces involved lead to spontaneous decisions and recourse to a simple system of reference - mainly relying on action. The opacity, the seriousness and the volatility of the situation in the ITURI province demanded the force to acquire an adapted legal framework. Indeed, this had been done in the form of ROEs. But, on the other hand, there was nothing concerning procedures for the treatment of prisoners, suspects, or proven criminals.

Indisputably, my freedom of action was facilitated to a great extent, thanks to clear-cut ROEs - those of a force committed to take the decision with the use of fire as necessary. They allowed me to take the initiative, to deliberately select offensive courses of action that proved dissuasive. Our capacity to use our weapons advisedly, applying a strict fire discipline when the ratio of forces was not always favorable, seriously restrained the aggressiveness and the self-confidence of the militias. Today, I am certain that giving the commanders, down to the lowest level (team leaders), the possibility to make a controlled use of their weapons has been a key factor of force credibility and efficiency. The authorized and legal use of force, beyond self-defense, resulted during the operations in implementing some lessons learned and rehearse them in training. Those ROEs embodied a real determination to react - not to undergo hostile actions but rather to impose our will onto the " adversary ". This state of mind made up of vigilance, of initiative, and of reactivity has certainly contributed in deterring the militias from directly attacking the force. In that kind of engagement, right from the start of the mission, the COMANFOR[2] should receive ROEs that provide him with a legal framework adapted to a possible use of the full spectrum of available military means. This was the case for ARTEMIS. This capacity to use all weapons, to include offensive air, without having to request prior permission from the Operation Commander, was most likely decisive in this operation. An operation in which the approach of the reality and the understanding of the current situation demanded swift and adapted responses that only the forward commander can properly assess. Additionally, it is the high quality of the men selected for this operation. Experience of the African theaters, total professionalism in execution, and full collective motivation enabled me to make risky tactical and logistical decisions that only united and cohesive units could carry out. It is of no use indeed to have robust ROEs, if the commanding officer cannot or does not dare delegating because of lack of experience, or simply because he is not familiar enough with the commanded troops. If a legal framework is absolutely necessary indeed, as long as it does not add constraints that reduce the commander's initiative, with the associated risk of making him vulnerable,

it is as much necessary, not to say essential, to be in a position to provide each command level with the proper initiative. This capability is only possible if commanders know each other as well as they are familiar with their subordinates. In my view, it is certain that cohesion of the basic tactical units, mutual respect and confidence, and of course expertise of junior leaders are elements, even though not quantifiable, that allow one to face with less stress "non-conventional" situations.

So, the lack of administrative structures in ITURI, in particular no police and no legal system, obliged us to develop detailed standard operating procedures concerning proven criminals, looters, and others arrested on the scene or concerning simply militiamen captured during contacts - as the committed force had been given no mandate to carry out police actions. That legal vacuum could render a force less credible. It turned to be quite a handicap from the first contacts, as well as during the Bunia security stabilization phase. However, the accepted principles were to systematically arrest, by force, and by the use of our weapons, when necessary, anyone committing criminal offense or showing any hostile intent towards anybody... in accordance with the ROEs. Weapons were seized and destroyed. The accused were submitted to a very detailed interrogation, in the presence of provost marshals, then they were released without further ado... This attitude demonstrated our will not to undergo hostile actions, and we contributed in lowering the interethnic violence level or the mere delinquency level. On the other hand, we have to admit that with regard to repeated offenders, it was not that dissuasive - and more so with regard to the militiamen. Paradoxically, the handling of the "enlisted children" issue was rewarding because it was possible to hand over those arrested and disarmed children to UN bodies or to NGOs. However, it is worth noting that the saturation limit of their capacities appeared to have been reached.

In this situation, my other concern was to provide protection to my men by reducing the visibility of legal vulnerability. I removed any doubt by issuing clear orders, and systematically calling for the provost marshals.
The men perceived their participation as a guarantee. Their legal status as law enforcement officers established the truth of evidence in face of any ill intentioned informer or of any national jurisdiction. However, provost marshals should be placed under the command of the force commander who should be the only one to settle priorities for their use according to the current operational situation, and by giving them the necessary means to carry out their mission. Bunia was a case in point. They took part in the planning process and they were used, on my request, in all firing incidents or any arrest of militiamen, criminals, and delinquents. Their presence, together with their "gendarme" status, has significantly increased the effectiveness of the warnings given to local potentates, i.e. the threat of bringing them before the International Criminal Court. Nevertheless, the presence of a provost marshal detachment is no excuse for not establishing procedures concerning the treatment of prisoners, suspects, or proven criminals. Those procedures should be adapted to the legal conditions in which the committed force is. This matter has to be considered in details because out of area operations are increasingly bound to take place in a legal vacuum.

1 Translator's note : marine light armored brigade.
2 Translator's note : Force commander.

CCH J.J. CHATARD/SIRPA Terre

The Legal Environment of Land Forces in the Republic of the Ivory Coast

On 19 September 2002, rebels conducted simultaneous attacks against military and political objectives in Korhogo (in the North), Bouaké (centre) and Abidjan, the Ivory Coast economic capital. The coup attempt failed in Abidjan. But, as a result, the north of the country fell under the rebels' control. Since that day, the Ivory Coast is, de facto, divided into two areas : the northern area under the rebels' full control, and the southern area under the regular armed forces' control.

The French land forces legal environment in the Ivory Coast is very complex since two types of forces coexist; on the one hand, those permanent forces based in the Ivory Coast in accordance with the agreement signed by the Ivory Coast and France on 24 April 1961 ; on the other hand, the force of operation LICORNE, whose initial intervention, taking place within the framework of an operation intended to protect French citizens, found its legal basis within a customary framework before receiving new missions requested by the warring factions. It eventually fell under a United Nations Security Council Resolution legal framework. After reminding how the missions framework had evolved, it will be interesting to observe the legal basis that protect French forces during their deployment in the Ivory Coast.

By Lieutenant (A) Stéphanie NICOL*(Legal directorate representative)

Protection of French Citizens

When what was perceived to be almost a civil war, the permanent French forces in the Ivory Coast [1] were immediately activated. The priority was to generate a force capable of providing security to foreigners within the combat zones that extended up to the north of the country. This was the reason for the deployment of French forces to reinforce the 43 BIMA on the 22nd September 2002. In addition to the protection of French and other foreigners, the French soldiers had to ensure the protection of the facilities and assets that would allow the evacuation of those French and foreigners at any time and under the best possible conditions. That evacuation operation conducted over the entire Ivory Coast territory began on the 26th of September 2002 and was called operation " LICORNE ".

France's decision to reinforce its deployment in the Ivory Coast constitutes an example of what is called " humanitarian intervention ", i.e. the deployment of armed forces to a foreign country's territory in order to extract from a failing government or rebellious warring factions' control, our own citizens when they are threatened of severe human rights violations. This humanitarian intervention concept is part of customary law ; the United Nations Charter has never acknowledged it. Its legality has not been explicitly accepted by the International Court of Justice jurisprudence[2]. However, it has become a practice tolerated by the International Community. In its 23 October 1924 decision, concerning British possessions in Spanish Morocco, Max Huber, President of the ICJ states that " at a certain point it becomes unquestionable that a State's interest to protect its own citizens and their possessions must prevail over the respect of sovereignty, even if no conventional obligation exists. The right to intervene has been claimed by all states, only the limits to that right can be discussed ". Humanitarian intervention must respect certain

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principles. It must be restricted to non-combatant evacuation without any discrimination[3] and must be strictly limited in time. And last, as stated by Mr. Dominique de Villepin (French Minister of Foreign Affairs), it must not become an excuse for mingling into a sovereign state's internal affairs[4].
Besides, the Licorne forces kept their actions within a strict framework in order to avoid that the International community could question its legality.
When the conflict began to lengthen, France, at the request of the parties, became involved as a mediator, but without having to implement any of the defense agreements. The Licorne force legal environment was shaped by the events that took place during the peace process and generated several agreements amongst the parties.

France's Involvement in the Ivory Coast Crisis Settlement

The Cease Fire Agreement (17 October 2002)

Following a series of French supported negotiations, undertaken under the aegis of the Economic Community of Western African States (ECOWAS), a cease-fire agreement was signed on the 17th October of 2002 by government and rebels representatives. At the request of Laurent Gbagbo, the President of the Ivory Coast, and with the "agreement" of the other signatories (the rebels), French authorities assigned to Operation Licorne the mission of observing cease-fire compliance - in addition to ensuring foreigners security.
The observer mission was to be only temporary while waiting for the deployment of an ECOWAS force.[5] As a consequence, the Licorne force had to carry out by itself that delicate mission. Only in January 2003, when ECOWAS forces arrived, were the actions coordinated between both forces - also known as "impartial forces".
As the situation worsened and the cease-fire agreement got regularly violated, France offered to act as an intermediary and organized a meeting with all parties in order to find a solution to the crisis.

The Linas Marcoussis Agreement (24 January 2003)

On 24 January 2003, the Linas Marcoussis conference, initiated by the French government, gathered all political parties represented at the National Assembly, the Rassemblement des Républicains (the Republican party) and the political representatives of the rebels : Mouvement pour la justice et pour la paix (MJP), Mouvement populaire ivoirien du grand Ouest (MPIGO), Mouvement patriotique de Côte d'Ivoire (MPCI - Patriotic Movement of the Ivory Coast).
All parties signed the agreement, but the President didn't ratify it.
This reconciliation agreement included, inter alia, the creation of a national

reconciliation government as well as keeping President Laurent Gbagbo as the Head of State. However, the Linas-Marcoussis agreement was a purely Ivorian agreement. The resolutions involving either the French forces or the French government had been drafted as being only possibilities (§ 3f), or depending on an Ivorian request (§ 3 and §5 and § VII, points 1 and 2 of the annex). The Linas-Marcoussis text was only a formal invitation to deploy the forces necessary to ensure the security of the persons having participated in the meeting and, if necessary, the security of the members of the forthcoming national reconciliation government.

That invitation was made on behalf of the meeting and not on behalf of the Ivorian government. In spite of a very chaotic situation, the Ivory Coast remained however a sovereign country with a legally elected president whose approval was necessary to implement the agreement. It is only on the 25th January of 2003, during an African Heads of Sates summit in Paris, that President Laurent Gbagbo accepted formally the reconciliation agreement. The international community expressed its support to the Linas-Marcoussis agreement implementation. In order to extend this initiative, the UNSC adopted on the 4 February 2003 resolution 1464 giving a new dimension to the Licorne force legal environment.

UNSCR 1464

By adopting that decision, the Security Council endorsed the Linas Marcoussis agreement. It endorsed as well the presence of French and ECOWAS forces in the Ivory Coast with the mission of preventing any new confrontation on the cease-fire line and to participate in ensuring the security of the opposition ministers until the Ivorian government was able to do so and until conditions were established to implement a national program for demobilization, disarmament and reinsertion (DDR).

And, in accordance with the dispositions included in point 14 of the conclusions of the conference of African Heads of States held in Paris 25-26 January 2003, right after the Linas Marcoussis agreement, paragraph 9 of the resolution authorizes, under Chapter VII[6] of the Charter, " member states participating in ECOWAS force, in accordance with Chapter VIII[7], as well as French forces supporting them, to take all necessary measures to ensure security and freedom of circulation for their personnel and, without prejudice to the national reconciliation government's responsibilities, to ensure the protection of the civilian when they are threatened with physical violence within their zones of operations and within means and capabilities.... "[8]

In addition, UNSCR 1464 recalls some of the basic principles of international law used as a framework for carrying out the mission, among which principles, the respect of the Ivorian government's sovereignty and non-intervention into its internal affairs. Actually, this implies that the primary responsibility for restoring peace rests with the Ivorian government, " impartial forces " intervening only in support of the national reconciliation government.

UNSCR 1528 (27 February 2004)

Facing an upcoming and important presidential election in 2005, and a situation difficult to stabilize, the international community decided[9] to send a UN Operation to the Ivory Coast. For French forces, this evolution consisted in an evolution of the missions since they would be essentially carried out in support of UNCI but most of their legal environment remaining unchanged[10].

French Status of Forces Agreement (SOFA) on Ivorian territory

The SOFA states which tribunals are competent for the military units deployed on a given foreign territory. In that case, it has not been necessary to negotiate a SOFA in the Ivory Coast. Actually, an agreement already existed for technical assistance, dated 24 April 1961 (Annex 1 established the status of the French armed forces in the Ivory Coast). Articles 1 and 2 state that French jurisdictions are competent when a member of French armed forces is suspected of a violation committed within French armed forces facilities. They are competent as well if a common law infraction has been committed outside of these facilities if the perpetrator was on duty.

In any other case, Ivorian tribunals are competent[11]. Consequently, in some cases, that agreement provides for jurisdictional immunity in front of Ivorian tribunals. Of course, this doesn't mean impunity since any military perpetrator will have to answer French jurisdictions for what he/she has done[12].

Nowadays, there are many theaters of operations where French forces could intervene.These missions' legal frameworks are all different and can be very complex, as was the case during the Kosovo mission. Today, the usefulness of providing the Force commander with a legal advisor (LEGAD), just like in the Ivory Coast, is recognized. LEGAD's mission is to provide the commander with advice and not to restrict the forces' action in the field. In addition, a just and enlightened vision of the operation legal framework should enable the commander to issue clear orders and thus ensure the operation's success.

CCH J.J. CHATARD/SIRPA Terre

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1 French forces in Ivory Coast consist in : the 43rd Marine Infantry Battalion (43 BIMA), a signal detachment, a defense protection detachment, a military police detachment, an aerial military transport detachment and a ground support detachment.

2 Ref. 24 May 1980 ICJ decision about "diplomatic and consular personnel of the US Embassy in Teheran" The Court didn't think it had to decide on the legality of humanitarian interventions.

3 Ref the ICJ decision (27 June 1986) about military and paramilitary activities in Nicaragua : "according to the Court, in order to avoid being a condemnable intervention into sovereign state's affairs, humanitarian assistance must, not only be restricted to the Red Cross established goals (human suffering prevention and alleviation, life, health and human being respect and protection) but this assistance must also be delivered without any discrimination to any person needing it.... "

4 Senate press communiqué (4 October 2002) "...within that context, Mr. Dominique de Villepin has explained what are the French priorities: ensure French citizen's security (which has caused the reinforcement of our forces to reach a level of 900), maintain country's unity and regional stability, not to get into these countries' internal affairs, support to African mediation".

5 The build up an ECOWAS force for the Ivory Coast has been decided during the Accra summit on the 29th of June 2002. That interposition force's final goal was to relieve French forces currently deployed in the Ivory Coast for the Licorne operation.

6 Chapter VII of the Charter enables the SC to impose coercion measures to the various parties of a conflict. Under this chapter, it can authorize the multinational force to make use of force in order to carry out its mission. The sentence " all necessary means " frequently used by the SC includes the use of force.

7 Chapter VIII of the Charter enables regional organizations such as ECOWAS to intervene and implement coercion measures with the SC authorization.

8 French forces and ECOWAS mandate has been renewed by UNSCRs 1498 (4 August 2003) and 1527 (4 February 2004)

9 UNSCR 1528 (27 February 2004) "acting under Chapter VII of the UN Charter, decides to create the UN Operation in Côte d'Ivoire for a period of 12 months, starting on the 4th of April 2004 ".

10 Paragraph 16 of the UNSCR " authorizes French forces for a period of 12 months, starting 4th of April 2004, to make use of all necessary means to support UNOCI, in accordance with the agreement that must be signed by UNOCI and French authorities and, in particular to :

- contribute to the overall security of the international forces in the zone of activities,
- intervene, at the UNOCI request, to support UNOCI elements whose security might be threatened,
- intervene in case of belligerent activities, should the security conditions require, outside of the areas that are under UNOCI direct control,
- assist and protect the civilians in their units deployment areas.

11 However, French government can ask Ivorian authorities to renounce to their rights, they can of course refuse.

12 In that case, the Military Court in Paris.

The Meanders of the International Criminal Justice

The present article has no other ambition to draw some lessons learned from a judicial-operational experience in a multinational environment. It must be placed back in the cooperation context of that period between the International Criminal Tribunal for the formerYugoslavia (ICTY) and the Stabilization Force (SFOR). As it is known, this context has considerably evolved in the following years in order to enable the indictment and the conviction of a larger number of persons indicted for war crimes. Straight off, it is acceptable to say that the strict respect of the legal framework of the SFOR-ICTY cooperation is a guarantee of success.

To plead the case, following the description of the general framework of that mission, some lessons learned will be proposed regarding a six-month experience in the theater.

By Lieutenant-colonel Philippe PETREL, From the CDES/CSEM[1] studies department

The General Framework

Understanding the ICTY In order to Understand the Mission Framework

The general framework was created by resolution 827 of the Security Council on May 25 1993 to judge the persons presumed to be responsible of serious violations of the international humanitarian law committed on the territory of the former Yugoslavia between January 1 1991, and a date to be determined when peace is restored. It has not been fixed yet, which explains that the Tribunal is still competent for crimes committed in Kosovo.

After a difficult or even chaotic start, due on one part to the procedural system it chose, and on another part, to the unwillingness to cooperate of the states, the ICTY asserted itself as an essential element of the settlement of conflicts in the former Yugoslavia.

Another strong characteristic must be noted - its Anglo-Saxon procedure. At that time, the ICTY is suffering from the difficulty in adjusting its procedure strongly inspired by the Anglo-Saxon law (the common law). Indeed, the latter leads to endless questioning and cross-examination of the witnesses. Thus, the duration of some criminal trials can reach up to eighteen months such as in the Croatian General Tihomir Blaskic's case.

Generally speaking, the aim of the ICTY investigations in Bosnia-Herzegovina is to collect the maximum of informations and evidences on the sites likely to contain open graves ; to hold the inquiries and to perform the exhumations of these open graves to gather evidence

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about these war crimes ; to study and to copy any available document linked to these matters ; to hear witnesses and victims ; finally to audition the persons indicted for war crimes.

How is the NATO SFOR action in keeping with this framework ? Exclusively in a regular and legal framework derived from the resolutions of the Security Council and from the Dayton agreements[2] (General Framework Agreement for Peace - GFAP). The agreement signed by the ICTY and SHAPE - The Memorandum of Understanding - in March 96, constitutes the reference document for everything pertaining to the support that SFOR can provide to the Hague Tribunal. It is then translated in very detailled standing operation procedures (SOPs) for the Force (units deployed in the field; liaison officers...) : 3 407 for the investigations as a general rule and 3 409 for the persons indicted for war crimes.
Concretely, as early as January 1996, this is expressed by the provision of additionnal informations about the zone in question; liaison teams and a safe environment ensured by patrols around the enquiry location; accomodation and catering possibility with SFOR units and medical evacuation in case of emergency. From April 1996 on, SFOR ensures reconnaissance flights as well as a reinforced air and ground surveillance of the sites known to be the most sensitive ones.

The Liaison Officer's Mission

Inserted within the coordination cell of the SFOR operation office, the liaison officer to the ICTY (LO-ICTY) is also an integral part of the Joint Operation Center (JOC) where he performs other functions. His mission can be resumed as follows :

- Relations with the ICTY office in Sarajevo and its chargé de mission.
- Relations within the SFOR staff : the LO-ICTY is also in touch with the legal advisor's office (LEGAD) for the legal control of the support provided by SFOR; with G2 for the assessment of the potential threat against the enquiry area...
- Relations with the subordinate units : in his domain, he is responsible for the drafting and updating of the SOPs and of the FRAGOs (fragmentary orders) to the divisions.

All the Work Actions are Impregnated with the NATO Culture

Like all the officers inserted in NATO staffs, his working framework is characterized by :

- **Numerous Computers Working in Nets.**
  The secured electronic communication system (CRONOS) is omnipresent and permits to rapidly send to SHAPE, to a division, to a staff officer in the next office prepared document or message forms. So, every Monday, the LO-ICTY sends directly to the SHAPE JOC the weekly report about the support provided to the ICTY (Weekly report of SFOR support to the ICTY). Besides, this net enables him to send FRAGOs - in real time- to different subordinate units sometimes penalized by the lack of anticipation of the ICTY.

The Scuffle For Delays or the Importance of Filters

- Any document with an external value or considered as an order passes through numerous filters : the coordination cell commander, the ops center commander, the legal or even the political advisor, the PR officer... the DCOSOPS. By the way, let us note the key place held by the LEGAD. In the Anglo-Saxon sense, he is in charge of ensuring a strong judicial basis to the operational decisions taken upstream. In other words, he will search the specific rules of the operation (rules of engagement and rules of behavior which are in the OPLAN and SUPLAN) for the justification of the action of the force. Given the political-media sensitivity of the matters this control, *a priori*, may go as far as sending the document to the SACEUR legal advisor's office to be approved.

What Can we Deduce For the ICTY ?

- As the privileged interlocutor of the ICTY, he must be able to speak in lieu of the DCOSOPS, and answer, while respecting the letter and the spirit of the legal regulations, to the numerous requests from his correspondants in the ICTY Sarajevo. He is therefore requested to mix two qualities : firmness and judgement.
- As the first drafter of the letters sent to the Tribunal in The Hague he must know how to master the language and shades of meaning indispensable to the writing of a diplomatic letter.
- Finally, he must be able to present a synthesis situation report to the SFOR G3 (COS Operations) in order to facilitate rapid decision-making on subjects that are sensitive from a political-military point of view. As a comparison, the best example that can be quoted is the presentation of synthesis slides by CPCO staff officers.

Lessons Learned

As the general framework has been described, which major lessons can we learn ? Three major groups are evident : the influence of foreign policy on this sensitive subject, the media pressure, and the strict respect of the legal framework.

- **Foreign Policy Influence :**
So, as early as the beginning of 1997, the tribunal is exerting a strong pressure to bring the peace maintaining forces to track the war criminals. The prosecutor of that time, Mme Louise Harbour, makes a statement in that direction in order to be able to convict 74 persons indicted for war crimes. It is when the case of the Croatian general Tihomir Blaskic is debated, and for whom the Croatian authorities initially refuse to provide the smallest evidence to the ICTY.
Concretely, that political-legal pressure demands that the actors in the field - LO-ICTY, LEGAD...- show perseverance and, let us say it, firmness not to give into the sound box effect.

- Media pressure. Concerning the pertinence of the informations released by the AFP (Agence France Presse). What is really this all about ? On December 26th 1996, the liaison officer receives an information from a French PR officer. Reported by the AFP, it says that soldiers would have denied to a Bosnian exhumation committee team the possibility to keep working on the Kladanj area (North-East of Bosnia-Herzegovina and sector of responsibility of

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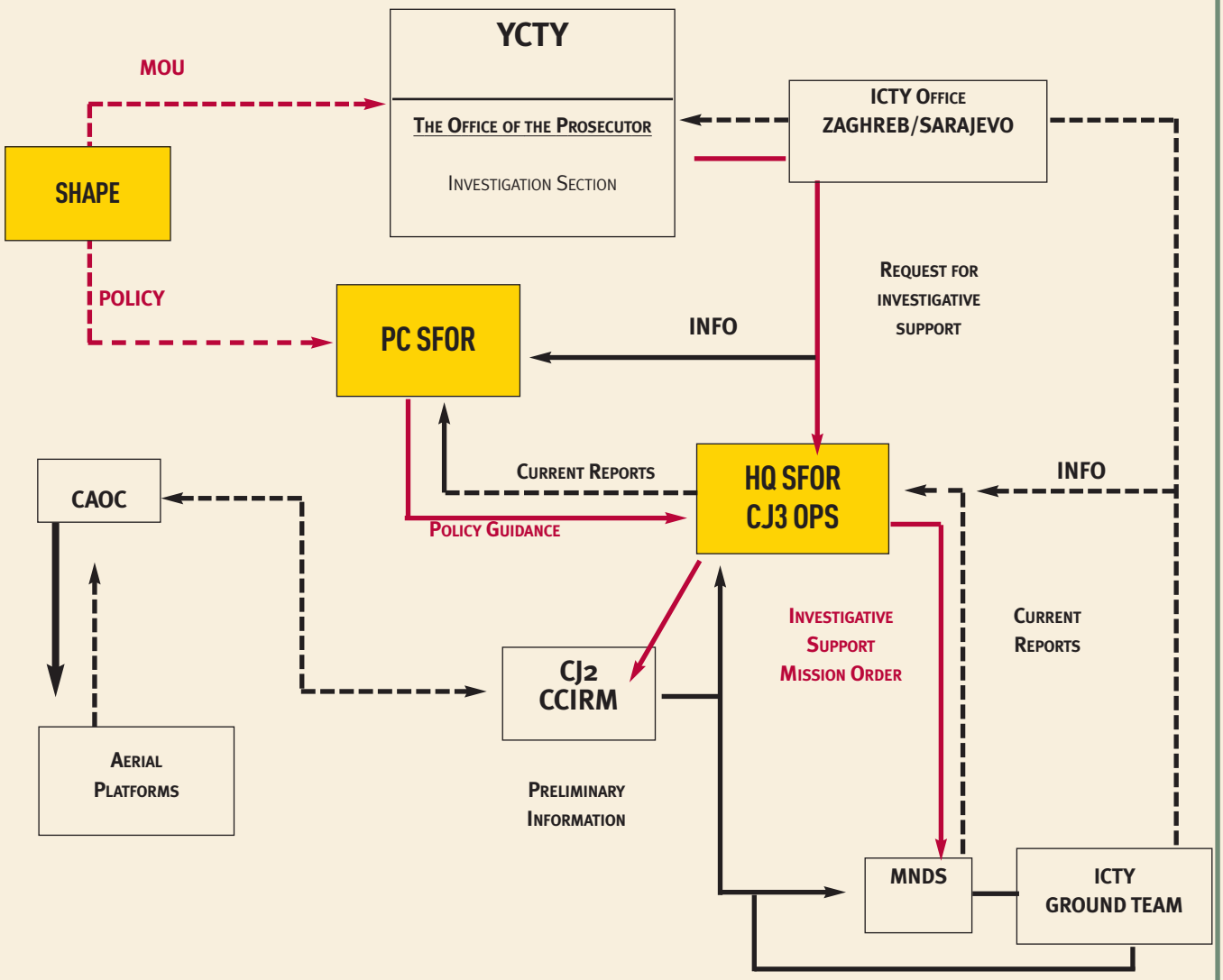
the Multinational Division North MND-N) in which 120 persons killed in July 1995 might have been buried. In the same report it is said that the president of that same committee requests the SFOR Commander in chief to withdraw his soldiers so that the committee be able to keep working. The LO-ICTY immediately reports to the G3 coordination cell commander after checking the information with the MND-N as well as with the theater intelligence sources or the national ones (the famous National Intelligence Cells). Nobody seems to be aware and no report has been forwarded up to the Division commander. Despite the reservations of the LO-ICTY and of the French PR officer it is decided to release an official denial. The next day the DMN-N duty officer reports via CRONOS that something effectively took place : an American military police team had not found necessary to report. The consequence of this mistake : the SFOR PR officer must make amends during the usual evening Press point. What lesson can we learn ? That the Anglo-Saxon reporting procedures are so strict that if nothing shows in due time it is considered that nothing happened. One must be convinced that, in this domain, there is only little room for French good sense.

Strict Respect of the Legal Framework : the mandate, the whole mandate, only but the mandate. Here lies the importance of the accuracy and of the exhaustiveness of the paragraphs - coordinating measures and legal aspects - in the Fragos given to the subordinates units. Each sentence has its importance : " The Stabilization force will provide a safe environment as well as the freedom of movement to the ICTY inquiries ". On the other hand it is emphasized that " the SFOR units are not obliged to provide direct escorts or to guard sites which are under investigation ".
A precise example will illustrate the validity of these rules. During an investigation performed in the Bosanski Samak area (North-East sector and responsibility area of the DMN-N under American command) in mid-December 1996, one of the employees of the ICTY Sarajevo calls me to indicate that the American officer in charge of accompanying the ICTY team does not provide the same level of security. After checking in the field, it actually appears that one of the female inspectors took the initiative to request to be escorted inside premises. This is beyond the legal framework of the mandate. In Sarajevo, after a thorough control of the exact wording of the Frago and SOPs by the LEGAD, it is demonstrated that the force is strictly in its rights. In parallel, a Press point is prepared, and a letter is sent that same day to M Hendrick, the chief of the investigators in The Hague, with a copy to the SHAPE LEGAD's office in order to definitely defuse the rumor. What lessons can we learn *a posteriori* ?

The importance to establish relations based on confidence with those who hold the Law, among whom the LEGAD. Directly integrated in the operational loop, his legal control a priori is a necessary and sufficient life insurance for the units which are executing these same orders and *a fortiori* for the LO-ICTY.

ICTY TASKING PROCEDURES (INVESTIGATIVE SUPPORT)



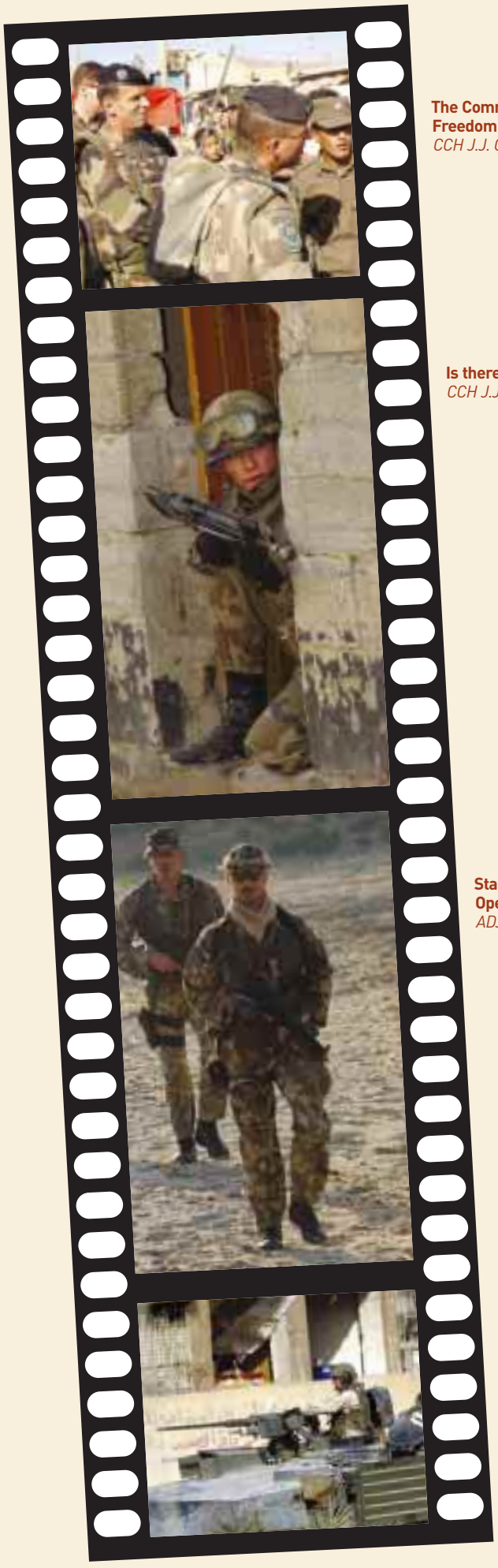
Another special case can be quoted when in March 1997, an ICTY team investigating in the Prijedor and Banja Luka area (sector West and responsibility area of the DMN-SO - under British command) wants to question persons not appearing on the poster showing the persons indicted for war crimes. A new reiteration by the LO-ICTY and the LEGAD restores things in conformity with the reality. So, it confirms the Force in its right as regards legality. How is that ? According to the agreement (Memorandum of Understanding) signed by the ICTY and SHAPE on May 9th 1996 " it is agreed that the SFOR personnel could detain persons indicted for war crimes by relying on the warrants of arrest accompanied with the corresponding bills of indictment and all additional information provided by the tribunal. These same documents must be forwarded to the SACEUR LEGAD's office by the prosecutor's office in The Hague which itself forwards them to the Force LEGAD's office. Finally, the latter is in charge of dispatching these same informations to the subordinate units through the poster of the indicted persons or any other means he judges ad hoc ". It is even emphasized further " that there is no precise clause permitting the ICTY teams to indict persons directly in the field. SFOR units must clearly specify that they do not accept orders but from military leaders and not from the tribunal ". To make it short, once again, the strict application of the legal rules accepted by the two parties allowed the force to remain *stricto sensu* in the framework of its mandate.

1 NATO SFOR Liaison Officer to the International Criminal Tribunal for the former Yugoslavia (ICTY), lieutenant-colonel PETREL carried out a LANDCENT reinforcement mission in Bosnia Herzegovina from November 1st 96 to March 27 97.

2 Signed on December 14th 1995, the Dayton agreements put an end to the war in Bosnia-Herzegovina by establishing the division of the country in two entities while planning the implementation of common institutions.

Finally, it is truly the rigourous application of the legal framework which enables a newcomer in matters of international criminal justice to fulfill his mission in the letter and spirit. It remains that the most concrete goal of this article is to learn some lessons from an assignment in an international environment in order for those who want to individually prepare themselves for similar responsibilities to have concrete examples at their disposal. Inserted in the RETEX (US equivalent is CALL) data base, they might then facilitate the understanding of seemingly complicated missions in the long-term.

The Legal Environment for Ground Forces : the Pictures



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